



An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction

Exploring Different Elements to Consider

PAPER XIII

Compliance and Verification Mechanisms*

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1. Background

At the 2012 United Nations Conference on Sustainable Development (Rio+20), States committed themselves 'to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea.'¹ This commitment was recalled and reaffirmed by the United Nations General Assembly (UNGA) in its 67th and 68th session.² In its resolution 68/70, the UNGA also requested the United Nations Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (UN Working Group) to make recommendations to the UNGA 'on the scope, parameters and feasibility of an international instrument under the Convention'.³ These recommendations shall help to prepare for the decision to be taken at the 69th session of the UNGA in 2015, whether to start the negotiation of an international instrument on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (ABNJ).

The International Union for Conservation of Nature (IUCN) in collaboration with different partners has prepared a series of policy briefs to provide technical input to the ongoing ABNJ discussions, and thereby support the UNGA decision-making process. As indicated in **Paper I**, the institutional mechanisms of a future international instrument are part of the operational measures to be discussed under 'parameters'. In this context, the following **Paper XIII** aims to analyse compliance and verification mechanisms under different multilateral environmental agreements.

2. Understanding the Issue

An appropriate institutional framework of a future international instrument could serve to bring coherence and consistency to the current fragmented governance system in ABNJ, and establish processes to make sure that States as well as existing sectoral and regional organisations cooperate and coordinate their activities.⁴ In addition, it would need to promote the overall implementation of the newly established ABNJ regime.

Based on experiences in the implementation of different multilateral environmental agreements (MEAs), it is safe to say that the effectiveness of a future international instrument will not only depend on the adoption of suitable conservation and sustainable use tools. Mechanisms for compliance and verification will be critical for the successful implementation and enforcement of such an instrument. ABNJ discussions should therefore also focus on:

¹ UNGA resolution 66/288. 'The future we want.' UN doc. A/RES/66/288, of 11 September 2012. Paragraph 162.

² UNGA resolution 67/78. 'Oceans and the law of the sea.' UN doc. A/RES/67/78, of 11 December 2012. Paragraph 181. UNGA resolution 68/70. 'Oceans and the law of the sea.' UN doc. A/RES/68/70, of 9 December 2013. Paragraph 197.

³ UNGA resolution 68/70. 'Oceans and the law of the sea.' UN doc. A/RES/68/70, of 9 December 2013. Paragraph 198.

⁴ Druel, E. and Gjerde, K.M. (2013). 'Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea.' Marine Policy. P. 5.

- Compliance which is the fulfilment by the contracting parties of their treaty obligations;⁵
- Verification which is the process of determining whether or not a party is in compliance;⁶
- Implementation which refers to relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations;⁷
- Monitoring which is the process of acquiring the information used to facilitate decision-making and implementation of an agreement, including information about behaviours that lead to non-compliance, the specific situations of non-compliance, and responses to remedy the situations;⁸ and
- Enforcement which is the suite of sanctions and incentives to entice compliance.⁹

All this can build confidence and a shared understanding between the parties to the instrument; improve prospects for future cooperation; produce information to inform future MEAs; and provide measures to address non-compliance.¹⁰

3. Commonalities and Differences of MEA Compliance Mechanisms

While it has to be acknowledged that compliance mechanisms and procedures of MEAs need to take account of their particular characteristics and environmental problems at stake, a number of common elements are normally determined and regulated, including:

- Objectives and principles of the compliance mechanism;
- Establishment of a specialized body to carry out compliance procedures;
- Functions of the specialized body and its relation to the other MEA institutions, such as the governing body and Secretariat;
- Procedures for receiving, evaluating, and making a final decision on a potential case of non-compliance;
- Due process rights of the concerned party (i.e. the party accused of non-compliance);
- Actions to promote compliance and address non-compliance; and
- Reporting of the specialized body to the governing body.

At the same time, a number of differences can be determined, such as:

- The composition and functions of the specialized body;
- Triggering mechanisms for the compliance review process;
- Procedural guarantees afforded to the concerned party; and
- What actions may be taken to promote compliance and/or address non-compliance, including what body can make the final decision.

⁵ UNEP. (2006). *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements.* UNEP Division of Environmental Conventions. P. 59.

⁶ Ausubel, J.H. and Victor, D.G. (1992). *Annual Review of Energy and Environment.* 17: 1-43.

⁷ UNEP. (2006). *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements.* UNEP Division of Environmental Conventions. P. 59.

⁸ Ausubel, J.H. and Victor, D.G. (1992). *Annual Review of Energy and Environment.* 17: 1-43.

⁹ Ibid.

¹⁰ Jabour, J. et al. (2012). *Internationally agreed environmental goals: A critical evaluation of progress.* Environmental Development 3: 5-24. P. 20.

4. Objectives and Principles of a Compliance Mechanism

The objectives of all compliance and verification mechanisms are to help parties implement the MEA provisions and address situations of non-compliance. To fulfill these objectives, mechanisms should be simple, facilitative, non-confrontational, non-adversarial, cooperative, expeditious,¹¹ preventive, predictable, flexible and cost-effective.¹² They may be legally binding or non-binding.

Mechanisms should operate by the principles of transparency, fairness, and good faith, and recognize the special needs of the concerned party, developing country parties, parties with economies in transition,¹³ and populations potentially or actually adversely affected by non-compliance.¹⁴

5. Composition and Functions of a Compliance Body

The composition and operations of compliance bodies varies with each MEA, although their functions are largely similar. Usually, the following is regulated:

- **Members**

The number of members range from 7 to 15. Members either represent contracting parties or serve in their individual and independent capacity. They are generally nominated and elected by contracting parties at a meeting of the governing body, and serve terms that range in length from one to four years, with at least half of the total number rotated out at the end of each term. Most compliance bodies only allow members to serve two consecutive terms.¹⁵

Members should be competent in matters relevant to the MEA and in related scientific, technical, socio-economic, legal or other fields; and be of high moral character.¹⁶ Member selection should also reflect an equitable geographical and experiential representation and balance of scientific, legal, and technical expertise.

- **Meetings**

Meetings are generally required once or twice between the meetings of the governing body, but can also be held only when States consider them necessary.¹⁷ Furthermore, it is usually regulated whether compliance body meetings shall be open to the public or not.

¹¹ 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; 2001 International Treaty on Plant and Genetic Resources for Food and Agriculture.

¹² 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal; 2001 International Treaty on Plant and Genetic Resources for Food and Agriculture.

¹³ 2000 Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity.

¹⁴ 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

¹⁵ Under the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer, a member that has served two consecutive terms may be eligible for re-election one year after the end of the second term.

¹⁶ The Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters requires each member to make a solemn declaration that he or she will perform his or her functions impartially and conscientiously.

¹⁷ For example, under the International Treaty on Plant and Genetic Resources for Food and Agriculture States meetings shall be held when necessary.

- **Functions**

Compliance bodies usually receive, consider and report on information, observations, or submissions of non-compliance; identify the facts and possible causes related to individual cases of non-compliance; and make recommendations to the governing body on appropriate actions to take to secure party compliance. The different tasks may be given to a single compliance body, or divided among different branches of the body.¹⁸

6. Compliance Review Procedures

With regard to the compliance review procedure the following issues are usually regulated:

- **Right to trigger the procedure**

Different options include a party self-trigger (submission regarding its own situation of non-compliance), a party-to-party trigger (submission regarding another party's actual or potential situation of non-compliance), a decision body trigger, a committee trigger, and a Secretariat trigger. Moreover, it is possible that members of the public may bring concerns about a party's compliance to the compliance body.¹⁹

- **Step-by-step process**

Usually, a compliance review process goes through different steps. First, a submission is made in writing to the Secretariat including details about the matter of concern, the particular provisions of the MEA not being complied with, and corroborating information. The Secretariat then informs the concerned party of the submission within a specified time period.²⁰ The concerned party is given a certain amount of time to respond to the submission and provide additional information which is then being used by the Secretariat to transmit an updated submission to the compliance body.

The compliance body screens the submission and may decide not to proceed if the submission is anonymous, *de minimis*, manifestly ill-founded, an abuse of a right, or incompatible with the provisions of the MEA. The compliance body determines the facts and causes of the submission and

¹⁸ For example, the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change divides its Compliance Committee into a Facilitative and Enforcement Branch, with different responsibilities: The Facilitative Branch provides Parties with advice and implementation assistance, taking into account their common but differentiated responsibilities and respective capabilities. The Enforcement Branch determines whether a Party in Annex I is not in compliance. In cases of non-compliance, the Enforcement Branch makes a declaration of non-compliance and encourages the Party to develop an action plan with a timetable to achieve compliance and deliver annual progress reports.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora has a Standing Committee that handles general and specific compliance matters, as well as Animals and Plants Committees that advise and assist the Standing Committee and Conference of the Parties by undertaking reviews, consultations, assessments, and reporting.

¹⁹ The 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention permits the Secretariat to refer a matter to the compliance body based on consideration of reports submitted by parties. The Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters permits members of the public to bring concerns about a party's compliance to the compliance body through the Secretariat. The same applies for the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, as well as its Kiev Protocol on Strategic Environmental Assessment.

²⁰ The Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal encourages Parties to try and resolve the matter first through consultations.

assists in its resolution.²¹ To do so it may gather information from all parties involved, the Secretariat, the governing body, other subsidiary bodies of the MEA, and outside expertise.²²

The compliance body finally reports to a meeting of the governing body on its activities, conclusions, and/or recommendations. MEAs may require that, prior to submitting recommendations to the governing body, the compliance body shares copies of its conclusions and recommendations with the concerned party which is given an opportunity to comment;²³ or that the report has to be adopted by consensus.²⁴

- **Governing principles of the process**

Due process: The concerned party may present responses and/or comments and participate in the compliance body's consideration of the submission, but may not take part in the elaboration and adoption of the body's conclusions or recommendations. The Kyoto Protocol permits Parties to appeal the decision of the Enforcement Branch to the COP if they feel they have been denied due process.

Fairness: The consideration and assessment of each submission shall take into account the capacity of the concerned party, comments and information, and other factors such as the cause, type, degree, and frequency of any non-compliance.²⁵

Transparency and confidentiality: Generally, no information shall be confidential. Exceptions include information provided in confidence, personal data where that person has not consented to its disclosure, interests of third parties not under a legal obligation to provide information, and the identity of the source.²⁶

Consensus: Nearly all MEAs explicitly state that compliance bodies shall endeavor to reach consensus on all findings and recommendations.

²¹ It is interesting to note that the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes recommends that its Compliance Committee prioritizes domestic remedies unless they unreasonably prolong the non-compliance or lack effective and sufficient redress.

²² The Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters also allows for hearing.

²³ 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters; 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters; 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention.

²⁴ For example under the Convention on the Protection of the Alps.

²⁵ See for example the 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters.

²⁶ For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora keeps communications between the Secretariat and individual parties on specific compliance matters confidential. 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention.

7. Measures to Promote Compliance and Address Non-Compliance

Typical reasons for non-compliance are lack of capacity, awareness, and resources; hence, non-compliance mechanisms should be non-adversarial, include procedural safeguards, and take the totality of circumstances (i.e. the state, history, nature of violation, etc.) into consideration.²⁷

The measures to promote compliance and address non-compliance are fairly consistent among the MEAs. The primary difference is whether the compliance or governing body makes the final decision on which measure to impose. Measures available may include:

- Providing advice and appropriate assistance;
- Requesting or assisting the development of a compliance action plan with an agreed upon timeline;
- Inviting the concerned party to submit progress reports;
- Making recommendations to the governing body to assist the concerned party with the implementation of the compliance body's advice;
- Requesting the concerned party to appear before the governing body to make a presentation concerning the submission;²⁸
- Upon invitation of the concerned party, conducting in-country exploratory activities, providing in-country assistance, technical assessment, and verification;²⁹
- Requesting the concerned party to submit special reports;³⁰
- Recommending financial and technical assistance, training, and specific capacity-building measures;³¹
- Issuing cautions, making a declaration of non-compliance or issuing a formal statement of concern;³²
- Suspending specific rights and privileges under the MEA and/or its Protocols;
- Taking other non-confrontational, non-judicial and consultative procedures as appropriate and necessary.

8. Conclusions

To achieve the objectives of an international instrument for ABNJ there is a need for it to be supported by a robust compliance and enforcement regime. While it is important to take account of the particular characteristics and environmental problems at stake in ABNJ, existing MEAs and their compliance and verification mechanisms provide lessons to be considered in this regard.

An issue that needs to be differentiated from the setup of an international compliance and verification mechanism (promoting compliance of State parties with their international obligations) is how to ensure effective compliance and enforcement 'on the ground' (i.e. against non-State ABNJ

²⁷ United Nations Environment Programme. (2006). *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements.* P. 145.

²⁸ 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention.

²⁹ Convention on International Trade in Endangered Species of Wild Fauna and Flora. (2007) *Guidelines for Compliance with the Convention.* Fourteenth meeting of the Conference of the Parties. Art. IV.C.

³⁰ Ibid.

³¹ Ibid. 1991 Convention on the Protection of the Alps and its Protocols.

³² 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters.

actors). Here another set of compliance and enforcement problems arise from reliance on traditional flag State jurisdiction and the lack of ability to enforce compliance by non-Parties regarding area-based and other conservation measures.

One approach to addressing these problems would give port State measures a prominent role. For example, according to Article 218.1 of the UNCLOS, port States may undertake investigations and institute proceedings in respect of any discharge from a vessel outside the internal waters, territorial sea, or exclusive economic zone of the port State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference. Furthermore, Article 218.4 foresees that the records of the investigation carried out by a port State shall be transmitted upon request to the flag State. An international instrument could expand this port State jurisdiction beyond pollution to cover all violations of the obligations contained in the instrument.

Additional approaches could be to include provisions in a future international instrument

- Devoted to the duties/obligations of flag States (including States of nationality for nationals and beneficial owners) and to compliance and enforcement, such as specific articles requiring that
 - Parties take all the necessary measures to ensure that their vessels and nationals do not undermine international conservation and management measures;
 - No authorisation is to be granted to conduct activities in ABNJ if they are likely to cause a significant adverse impact/more than a minor or transitory impact to marine biodiversity in ABNJ;
 - States adopt administrative sanctions to deter illegal activities taking place in ABNJ (penalties, fines, seizure of vessels, etc.).
- Developing a legal basis for international cooperation, exchange of information, mutual assistance regarding potentially harmful activities. With respect to commercial/extractive activities, States could be obliged upon request to provide information regarding the beneficial owners of such activities.
- Providing a legal basis to develop guidelines on the evaluation of State performance through independent experts.
- Creating incentives for compliance, such as the establishment of white lists of Parties that are deemed to be giving full effect to certain benefit-sharing, such as capacity-building or technology transfer.

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