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COMPILATION OF SUBMISSIONS BY PARTIES, GOVERNMENTS, INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITIES AND RELEVANT STAKEHOLDERS ON COMPLIANCE IN THE CONTEXT OF THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

Note by the Executive Secretary

Addendum

SUBMISSION FROM THE UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP)

1. The Secretariat is circulating herewith, as an addendum to the original compilation of submissions on compliance in the context of the international regime on access and benefit-sharing (UNEP/CBD/ABS/GTLE/2/2), a submission from the United Nations Environment Programme.

2. The contribution has been reproduced in the form and the language in which it was received by the Secretariat.

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Issues of Compliance : Consideration for the International Regime on Access and Benefit Sharing [1]

1. Introduction

The formal sources of international law are composed by the general principles of international law, international custom and, regardless of the vocabulary used, all the treaties, conventions, regional and global agreements. Multilateral agreements create rights and obligations for contracting parties as they themselves are involved in decision making with regard to development and implementation of the agreements. The fulfilment by the parties of their obligations to comply with multilateral agreements is a key element to ensure the effectiveness of international environmental law in general and the common interest of all the contracting states to a specific agreement in particular. Unfortunately, states' compliance is one of the main problems in the implementation of international law at international and national levels[2]. State sovereignty has always and continues to play a key role in how states behave toward multilateral agreements. Multilateral Environmental Agreements (MEAs) with the exception of a few like the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol and the Kyoto Protocol[3] have included primarily softer compliance measures, such as monitoring, information gathering and reporting. Implementation by the contracting parties will be promoted and encouraged by the legitimacy[4] of the agreements, consisting in a sound treaty-making process, well-defined obligations, transparent compliance mechanisms with foreseeable consequences to parties' behaviour and benefits of compliance overweighing the costs of non-compliance[5]. Nevertheless, beyond this it happens that contracting states do not fulfil their obligations, due to either lack of human, technical or financial resources and capabilities or even political will[6].

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[1] The views and opinions expressed in this draft document are those of the authors and do not represent those of the United Nations Environment Programme (UNEP). # This is a draft, unedited version of the paper prepared by Balakrishna Pisupati, Charlotte Boumal, Elizabeth Mrema and Alphonse Kambu of UNEP-Division of Environmental Law and Conventions. The final version of the paper will be available after the ABS WG 7 meeting.

[2] Alexandre Kiss, "Reporting Obligations and Assessment of Reports", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 229.

[3] See UNEP/CBD/BS/COP-MOP/3/1.

[4] Jutta Brunnee, "Enforcement Mechanisms in International Law and International Environmental Law" in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 8.

[5] Beyerlin, Stoll & Wolfrum, "Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia", 2006,

6. ibid, 2006 P. 9

[6] Ibid, 2006 p. 9 A Dialogue between Practitioners and Academia", 2006, Martinus Nijhof Publishers, p. IX.

According to the UNEP Guidelines (Guideline 9 a, UNEP 2002), compliance stands for the fulfilment by the contracting parties of their obligations under a multilateral agreement and any amendments to the agreement and decisions on implementation, thereof. Assessed at the international level, compliance is first of all ensured by implementing the international obligations at the national scale through adopting and adapting appropriate domestic measures, for instance by enacting legislation, formulating policies or allocating resources(Guidelines 18-33, UNEP 2002) States may wish to include provisions establishing a non-compliance mechanism in a treaty with a view to assisting parties having compliance problems and addressing individual cases of non-compliance (Guideline 14 d, UNEP 2002). Doing so, the parties will have to take into account the importance of tailoring compliance provisions and mechanisms to the agreement's specific obligations that need to be based on some clear criteria of success in implementation and enforcement of the agreement or their components. It is worth noting that compliance is not a binary issue and therefore non-compliance must not be defined as the total absence of fulfilment, but is mostly a question of degree of inobservance. Defining this is where contracting Parties often tend to indulge in protracted discussions on deciding such measures. A case in point is the ongoing discussions to define, more clearly, the compliance mechanism and its implementation under the Biosafety Protocol of the Convention on Biological Diversity (CBD).

2. Compliance in the context of environmental law

The global environment is confronted with transboundary issues such as climate change, biodiversity loss, pollution and the like that must be dealt with through wide cooperation[7] based on clearly defined principles and norms as well as diplomacy. The legal instrument commonly used in this respect is a multilateral environmental agreement (MEA) where several countries agree on a common set of goals, objectives and measure to deal with specific environmental issue. Compliance with MEAs is often a challenge in part due to the following reasons. Firstly, being transboundary in nature, issues of compliance are differently perceived by Parties and non-Parties. Secondly, capacities and resources to effectively implement the provisions of the MEA including its compliance often are assessed after the discussions on the agreement/regime are completed or decided making it difficult for Parties to take compliance seriously at the time the MEA is negotiated and entered into force. Lastly, in the absence of strong economic and political will to comply with MEAs, Parties often spend time in developing compliance regimes and limited energy on implementation. Exception to this might be the compliance to Montreal Protocol and CITES. In

[7] Ibid .

addition, the increasing number and complexity of the MEAs entails the inclination to non-compliance. Developing countries which have large burdens and responsibilities but weak national capacities face problems implementing some MEAs.[8] In this light, compliance mechanisms must be developed in order to facilitate compliance and address non-compliance cases. Although there is no unique model of compliance procedure and each mechanism must take the characteristics of its specific agreement into account, it turns out that these mechanisms should favour a non-confrontational and facilitational approach for them to be accepted by the contracting parties. Furthermore, confrontational mechanisms have in general proved to be relatively ineffective and unpopular[9]. An additional issue that need consideration when Parties begin to discuss compliance is that of the governance principles of the MEA itself, whereby Parties can decide on issues on consensus or voting. An economic and social dimension of the subject matter for which compliance is being sought also determines the nature of the compliance regime.

3. Developing a Compliance Mechanism

Some basic issues of relevance to compliance, especially when contracting Parties are developing compliance measures are discussed in this section.

A. INFORMATION GATHERING

The first step in a non-compliance mechanism is the identification of individual non-compliance cases. Overall, non-compliance cases can be detected and revealed by four actors: the non-compliant state itself, the compliance body, the secretariat of the agreement and a contracting state regarding another treaty party. Credibility of information provided to the compliance body or its equivalent established by the MEA, acceptability of information provided and timing of such provision is key to promoting effective compliance. This brings us to a major aspect of non-compliance procedures, namely information gathering, analysis and use. Collecting information about the implementation level and the possible treaty violations is the only way to guarantee transparency and to assess the efficiency of the treaty. Several channels can provide information concerning compliance with a MEA: the reporting obligation of the contracting states, inspections and monitoring by the compliance body and the commencement of a non-compliance procedure. All these, however, need to be accepted by Parties to the MEA in the development of the compliance

[8] Elizabeth Maruma Mrema, "Cross-cuting Issues Related to Ensuring Compliance with MEAs", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 203.
[9] Jutta Brunnee, "Enforcement Mechanisms in International Law and International Environmental Law" in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 14.

regime.

Having a well referenced, authenticated information sharing mechanism such as a Clearing House is thus one of the first calls for dealing with an effective compliance mechanism and focus on non-compliance. Such a Clearing House should be designed in response to the issue under consideration with due provisions for people to provide information, options for validation and/or authentication of such information and appropriate confidentiality and protection of information provisions, as appropriate.

B. Reporting Obligation

Reporting is the obligation for the contracting Parties to demonstrate how effectively the MEA is being implemented and enforced. The rigours with which such implementation reports (National Reports) are prepared thus form the core of ensuring assessment of compliance and non-compliance. Preparing the National Report is a bottom-up form of fact-finding[10] as it can lead to the identification of non-compliance by a party itself and/or by verification mechanism to testify to the accuracy of the data provided. The information produced concerns scientific data but also reassesses decisions made by national officials, national stakeholder and defaulters.[11] The reports should consist of accurate, up-to-date, complete, transparent and comparable information. At a later stage, the collected information must be analysed, interpreted and assessed in good time in order to correctly assess treaty compliance and to respond to deficits in an appropriate manner[12].

However, the states do not always comply with their reporting obligations, and, if they do, the quality of the information contained in these reports varies greatly[13]. Many states refuse indeed to take part in the monitoring of compliance that they consider to be intrusive upon their sovereignty[14]. Nevertheless, when states accept the reporting responsibility, there are still possible deficiencies in the information that is truly representative of national situation. Possible reasons for this could include lack of capacities to gather, assess and provide credible information, lack of resources, unclear reporting formats that may not provide opportunities for any objective assessments,

[10] Michael Bothe, "Ensuring Compliance with Multilateral Environmental Agreements – Systems of Inspections and External Monitoring", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 247..
[11] Alexandre Kiss, "Reporting Obligations and Assessment of Reports", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 230.
[12] Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach", University of Joensuu Publications in Law, 2004, p. 49.
[13] *ibid* 2004, p. 48.
[14] *ibid*.

agreement by Parties that such Reports shall not constitute basis to decide non-implementation and be not used to assess implementation levels and so on. However, it is important to understand that non-compliance with a reporting duty is a treaty violation just like a violation of any other treaty provision.

Reporting in an objective and clear manner offers many advantages to the MEA. Apart from serving as a key source of information to deal with compliance and non-compliance, it will provide a source of information and experience to learn from each other, especially on difficult and emerging issues such as Access to genetic resources and Benefit Sharing (ABS).

Although, various studies show that reporting practice related to MEAs is quite effective and efficient and has a lot of positive aspects, the weakness of self reporting is appearing increasingly clearly to the secretariats of MEAs[15]. Alternative ways for gathering information and ensuring compliance are therefore sometimes needed.

C. Observations, Inspections and Monitoring

Another way for the MEA to gather information is to perform compliance observations, verification, inspections and monitoring. In contrast with reporting, these methods are a top-down form of fact-finding[16], but they need more participation, understanding and good-will of contracting Parties.

Inspections can be conducted by MEA bodies in the case of monitoring or by designated observers or inspectors for observations or inspections. Observations, on-site inspections and monitoring are a part of the control process of an agreement. They tend to detect possible breaches, to define whether non-compliance has occurred and if so, to determine the required enforcement measures. They also help preventing future violations by putting pressure on the state's reputation. In general, on-site inspections are executed by domestic authorities, treaty compliance bodies or independent consultants. Observers and inspectors are mostly nominated by the countries willing to participate in the monitoring program, breaches are handed over to a central body and sanctions are left to the country itself. They may be routine inspections where the time of inspection is regulated, short-notice inspections conducted "when necessary" on a short notice, challenge inspections not necessarily on a short notice or inspections on invitation when states invite inspectors in order to

[15] *ibid*.
[16] Michael Bothe, "Ensuring Compliance with Multilateral Environmental Agreements – Systems of Inspections and External Monitoring", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 247.

prove no violation has occurred[17].

Since inspections interfere in their domestic affairs, states consider them as being too intrusive and remain quite reluctant to expose themselves to on-site inspections. Governments also fear a possible misuse of the information obtained. Therefore, only a few MEAs admit the practice of observations and inspections performed in situ as a means of information gathering and compliance control, e.g., International Whaling Convention, Antarctic Treaty, CITES Convention, Ramsar Convention. As a safeguard to states' sovereignty, governments may in some cases have the right to refuse or postpone the control of outside experts. Moreover, the powers of inspectors are usually limited in comparison to the powers of internal authorities[18]. Still, it has been predicted that on-site monitoring will become increasingly more usual among future MEAs[19]. It can be expensive, but may give a more detailed picture of compliance than periodic national reports.

D. Initiating a Non-Compliance Procedure

Several actors have the capacity to start or trigger this procedure depending on the specific MEA compliance regime. First of all, a state can initiate a procedure against itself, the self-trigger, or, more controversially, against another treaty party, the part-to-party trigger. The secretariat can start a procedure as well by introducing a referral. The question whether the trigger should be open to the conference of the parties, non governmental organizations or the civil society remains to be discussed within specific context of each MEA.

The trigger is an issue as it may introduce in the process a confrontational element, namely the party-to-party trigger. This is a politically sensitive subject. It is worth noting that with the party-to-party trigger, some countries are able to put pressure on other countries that do not comply with their obligations. Furthermore, the trigger by the secretariat, even if non-confrontational, raises another issue concerning the information gathering and the role of the Secretariat in enforcement of the MEA. Even if transparency of parties' performances plays a crucial role in building mutual trust and promoting compliance, information gathering remains an issue because it can be complex and confrontational in nature. More efforts will be thus needed to find ways of encouraging Parties to be more serious about their reporting obligations with provision of clear, measurable and assessable data and information.

[17] *,ibid.*
[18] *ibid.*

4. The Structure and Form of Compliance Mechanism

A. COMPLIANCE OR IMPLEMENTATION COMMITTEE

The compliance committee, responsible for the international enforcement of a given agreement and dealing with the non-compliance cases, raises an additional issue. More precisely, the composition of this committee may be problematic. Since this committee may have extensive powers including making recommendations to the conference of the parties, investigating on and judging non-compliance cases or even adopting actual response measures, its members should be independent qualified experts working objectively in their personal capacity, on behalf of the committee. An equitable geographical representation of the five United Nations' regional groups is advisable as well. Nevertheless, in some MEAs, the members are nominated by the states and elected by the conference of the parties or representatives of their country. The efficiency of this still needs to be demonstrated clearly.

B. RESPONSE MEASURES

Once the non-compliance cases have been identified, adapted response measures must be applied. Depending on the approach favoured by the agreement, these measures can be either positive or negative or even a carefully balanced mix of both. The international community has two kinds of means to respond to non-compliant behaviour by states, the diplomatic or management doctrine on the one hand, and the coercive or enforcement approach on the other. The former refers to friendly procedures in a cooperative atmosphere, with an aim to assist the breaching party getting back to compliance. In contrast, the enforcement doctrine is more accusatory in nature and is prepared to use some forceful measures only as last resort and when other enforcement measures have exhausted to have the treaty obligations fully enforced[20]. The incentives are soft instruments, mostly capacity-building measures consisting among other things in workshops, trainings, technical and financial assistance, technology transfer and international cooperation, while disincentives can take the shape of declarations of non compliance (also known as "naming and shaming"), prohibitions of trade, financial penalties or suspensions of privileges. All in all, the MEAs contain very differing measures and a several of them recognizes only facilitative measures and no or very little enforcement measures. However, this seems to change with the implementation of some international agreements such as the Kyoto Protocol and perhaps the World Trade Organisation (WTO) provisions.

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[19] *ibid*

[20] Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary

C. Approaches to Ensure Compliance

i. Facilitative Approach

The management approach privileges the conception that most treaty violations do not result from wilful misbehaviour of states since they always tend to comply with agreements they have ratified or acceded to, but non-compliance happen because of a lack of awareness, capacities, resources and national pressure[21]. In this view, softer means that promote and facilitate state compliance are more likely to be successful in ensuring the effectiveness of environmental agreements. The use of different positive incentives and continuous dialogue between treaty parties and institutions, international organisations and civil society are means to avoid non-compliance. The facilitative measures must assist countries with creating a capacity to comply with their international commitments and strengthening the confidence in the treaty regime as a whole, which will lead to a cooperative atmosphere when dealing with compliance problems[22]. It should be noted that such approach may encourage greater participation and implementation in the treaty regime. The management doctrine is an application of the general principle of peaceful settlement of disputes and the principle of caution as it clearly emphasises preventive measures to protect the environment rather than attempting afterwards to compensate or punish for environmental harm[23].

The positive measures consisting in supporting national actions with outside finance or with technical aid have become an important instrument when trying to create efficient multilateral environmental agreements. Positive measures increase the likelihood that countries ratify or accede to treaties and also comply with them. Another advantage is that incentives may also be used when, for political reasons, it could be sensitive to apply punitive sanctions. The use of economic instruments in a reasonable manner in environmental regulation can lead to significant efficient results. However, it should be noted that an excessive use of "carrots" can induce states to strategically overstate the difficulties they meet in implementing the agreement, in the hope to receive more financial means from other parties. In the same vein, the donors could underestimate their resources in order to decrease their support[24].

Approach", University of Joensuu Publications in Law, 2004, p. 43.
[21] *ibid*.
[22] Jutta Brunnee, "Enforcement Mechanisms in International Law and International Environmental Law" in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 16.
[23] *ibid*.
[24] *ibid*.

Capacity building covers the development and strengthening of a country's human, scientific, technological, administrative and institutional resources. In general, technology transfer includes material elements such as machinery and equipment and know-how elements such as skills and related organizational and institutional arrangements for the transfer process.

Financial incentives enable many states to become parties to agreements that otherwise would have been out of reach for them and to comply with their obligations. This assistance is an application of the principle of common but differentiated responsibilities related to environmental issues. Financing can be allocated to specific environmental projects but also to the training of national officials responsible for implementing an environmental treaty, to scientific research relevant to the treaty and to improving the general administrative structure of a country. As a rule, the absence of appropriate national institutions and procedures is likely to lead to non-compliance with international obligations for that country. Financial support can be channelled to states through a special fund that may be established and to which parties of a convention contribute, like the Global Environmental Facility. There are also numerous treaty-specific funds, like the Multilateral Fund of the Montreal Protocol. It should be noted that a concern for effectiveness would require a sanction for non-compliance by the donors as well[25].

ii. Enforcement Approach

Because positive measures are not always enough to bring back into compliance a country that may lack the political will to cooperate, enforcement measures can be applied as a back up that can be activated once the management measures have failed to enable a party to comply. It is clear that, once again, states are willing to protect their sovereignty rather than expose themselves to countermeasures taken by the international community[26]. Creating a binding dispute settlement system into an international agreement that has to necessarily bring together differing state interests is difficult and has to date never been involved by any party to a treaty. States are frequently reluctant, for political reasons, to take legal action against each other or to even authorize other parties to do so[27]. Enforcement measures have, however, been criticised for being bilateral, confrontational and strongly backward-looking, addressing the problem once it has already arisen[28]. However the threat of stricter enforcement mechanisms and sanctions has a proven preventive role. And as a rule, prevention of treaty non-compliance is a strongly advisable approach because

[25] *ibid*.
[26] *ibid*
[27] *ibid*
[28] Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary

repairing environmental harm afterwards will become more costly – both in economical and social terms.

The use of punitive sanctions can be the ultimate solution for states that show indifference towards their international commitments. There must be a real threat that the action in contradiction with the agreement will be detected and the penalty that follows will be far greater than any benefit the breach alone would bring. A sanction may not be sufficient to offset the advantage achieved through the treaty violation in that specific field, but a sanction may cause losses in other areas important for the non-compliant party. It should be noted that punishment involves not only a material cost, but also a public expression of the international community's moral disapproval of the breach[29]. Another interesting question is who should have the prosecutorial powers and responsibilities for taking enforcement action against non-compliant states[30]. International institutions have a limited enforcement role within multilateral environmental agreements. Non-governmental organisations have an active role in monitoring compliance at the national level, but their enforcement role at the international level remains limited. NGOs can, however, put informal pressure on parties, which forces non-compliant actors to adopt a compliant behaviour.

Suspension of treaty privileges is a traditional sanctioning method under international conventions. Its little costs make it an attractive sanction. It also seems much easier to reach a decision to stop what can be considered a benefit than to impose a punitive sanction. However, it does not appear to be a good practice since states may find it even more difficult to fulfil their treaty obligations as a result of the suspension[31]. The suspensions can consist for a non-compliant party among other things to lose its access to technology transfer, to cooperative mechanisms or to financial assistance, to undergo restrictions of the right to vote at meetings or the conferences of the parties, receive documents for the meetings or participate in other permanent committees or working groups or to be ineligible for the standing committee.

When developing non-compliance regimes, it should be taken into account that the mechanisms are mutually supportive in serving the aim of promoting compliance with international environmental commitments. The starting point should be to use different facilitative instruments to improve the effectiveness of an environmental agreement, for both individual state parties and the treaty system

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Approach", University of Joensuu Publications in Law, 2004, p. 74.
[29] ibid.
[30] ibid
[31] ibid.

as a whole. The means vary from increasing the transparency of the treaty and assisting participating countries financially and technologically, to arranging negotiations and giving participants more time to fulfil treaty obligations. Besides, there should always be a possibility to apply sanctions when treaty-violating behaviour is severe and persistent. In applying subsequent sanctions, it is important to balance the level of sanction to the level of non-compliance. In addition, it is strongly advisable to favour incentive management measures when the treaty is still in its early stages, so that the threat of serious sanctions would not deter potential signatories from the treaty or protocol regimes. The two approaches to non-compliance with international treaties are not mutually exclusive. Instead, an ideal non-compliance system combines elements of both the management and the enforcement approaches, not as alternatives but rather as a menu of possible responses to different possible types of non-compliance with particular features for each MEA[32]. The following table details some of the advantages and disadvantages of the above approaches.

Facilitative Approach		**Enforcement Approach**	
Advantages	Disadvantages	Advantages	Disadvantages
Promotes and facilitates state compliance	Needs funding	May cause losses in areas important for the non-compliant party	Limits states' sovereignty
Strengthens countries' human, scientific, technological, organizational, institutional resources	Excessive use of "carrots" can induce states to strategically overstate the difficulties they incur or underestimate their resources	Preventive role by the threat of stricter enforcement mechanisms and sanctions	Sometime onfrontational, addresses the problem once it has already arisen
Encourages greater participation (e.g. financial incentives enable many states to become parties to agreements that otherwise would have been out of reach for them)	Soft response measure	Public expression of the community's moral disapproval of the act	If the sanctions are too severe, it can discourage parties to join the treaty or the non-compliant state may decide to leave the treaty
Emphasises preventive measures		Suspension of treaty privileges: has little costs	Suspension of treaty privileges: may increase the difficulties of a state to fulfil its treaty obligations
Strengthens the confidence in the treaty regime			
Useful when, for political reasons, it could be sensitive to apply punitive sanctions			

[32] *ibid*

5. Examples of compliance mechanisms within Multilateral Environmental Agreements

THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER[33]

The Montreal Protocol on Substances that Deplete the Ozone Layer contains a reporting obligation and review procedures on the parties' production, imports and exports of controlled substances[34]. The non-compliance procedure may be initiated by any party to the protocol that suspects another party of non-compliance, by the Secretariat or through self-reporting. This protocol provides an excellent example of a treaty in which the non-compliance response system has been carefully tailored and which combines management and enforcement approaches in a balanced way. So far, this mechanism has proved to be effective. During the design of the non-compliance system it was emphasised, among other things, that the procedures should be non-confrontational in nature and that early warnings of possible non-compliance should be handled through administrative action by the secretariat or through diplomatic channels. So, the Implementation Committee always first examines the suspected violation and then, in an amicable atmosphere, seeks a solution that would satisfy the parties involved. Only after this process has come to a dead-end, is there the possibility to apply stricter sanctions. In addition, the Protocol has created a fund, the Multilateral Fund, which provides parties with financial assistance in implementing their obligations. The Multilateral Fund operates under the authority of an Executive Committee and relies upon implementing agencies (e.g. UNEP, UNDP, UNIDO and the World Bank)[35]. The enforcement sanctions to which a non-compliant party exposes itself are suspensions of privileges and trade-related sanctions. A party may lose its access to technology transfer or to the protocol's financial mechanism, as well as the right to produce, consume, or trade in the controlled ozone depleting substances[36]. The Montreal Protocol is a notable multilateral environmental agreement containing provisions on the possibility to apply trade sanctions against states violating treaty rules.

THE KYOTO PROTOCOL[37]

The Kyoto Protocol provides for a comprehensive reporting mechanism. The Kyoto Protocol

[33] Compliance under Selected Multilateral Environmental Agreements, UNEP, 2004 , p. 75-76; K. Madhava Sarma, "Compliance with the Multilateral Environmental Agreement to Protect the Ozone Layer", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 25-38.
[34] "Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements", WTO & UNEP Secretariats, 2001, p. 9.
[35] *ibid*"
[36] Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach", University of Joensuu Publications in Law, 2004, p. 94.

provides a recent illustration of the way the international community believes compliance with a multilateral environmental agreement can be ensured[38]. As a result of long negotiations, parties took the remarkable decision to adopt a two-way approach to solving compliance problems that might arise under the Protocol and created a two-branch Compliance Committee. The purpose of the facilitative branch is to assist and support parties in implementing their commitments. To this end, the Global Environmental Facility and several special funds (Climate Fund, Least Developed Countries Fund and Adaptation Fund) were established. The enforcement branch can make formal declarations of non-compliance and decisions concerning the consequences of treaty violations like the suspension of the non-compliant party's right to participate in the established cooperative mechanisms (Joint Implementation, Clean Development Mechanism and Emission Trading System etc.) can be invoked. A sanction may also be directed at a state's future emission quota that may be reduced as a result of a treaty breach. It is also worth noting that the non-compliance mechanism under the Protocol admits the party-to-party trigger.

THE CITES CONVENTION[39]

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a good example of the combination of both facilitative and enforcement approaches as well. The CITES non-compliance regime has been expressly regulated, but is largely based on provisions of the Convention dealing with reporting requirements and international measures and, over the years, measures to achieve compliance have been developed by the parties in resolutions and decisions of the conference of the parties.

Compliance monitoring under the CITES is carried out by the Animals and Plant Committee and the CITES Secretariat. In addition, TRAFFIC (Trade Records Analysis of Flora and Fauna In Commerce) is a trade monitoring programme created by NGOs and provides technical and scientific information to the Secretariat, the parties and the various CITES Committees to ensure that the Convention is being complied with[40].

A Standing Committee assesses cases of non-compliance that are reported to it by the Secretariat

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[37] ibid
[38] Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach", University of Joensuu Publications in Law, 2004, p. 119.
[39] Compliance under Selected Multilateral Environmental Agreements, UNEP, 2004 , p. 41-43; Susan Biniaz, "Remarks about the Cites Compliance Regime", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 89-96.
[40] "Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements", WTO & UNEP Secretariats, 2001, p. 6.

and makes non-binding recommendations to the parties. The COP may take decisions on consequences of convention breaches[41].

It is worth noting that there is a real need for capacity building consisting in additional training since the customs officials for instance, have difficulties in distinguishing between legal and non-legal export or import of species of wild flora and fauna. In this respect, the secretariat and a committee of experts have developed an Identification Manual and conducted capacity building workshops for Management Authority staff and enforcement officers to facilitate the identification of specimens included in the convention's appendices. Legal officers are trained under the National Legislation Project to draft appropriate laws and policies for the Implementation of the Convention[42].

Non-compliant parties to CITES expose themselves to punitive sanctions including the restriction of the right to vote at one or more meetings of the conference of the parties, their ineligibility to be members of the Standing Committee, the loss of the right to participate in other permanent committees, working groups, etc., and their ineligibility to receive documents for the meetings. Furthermore, over the years, a great number of countries have been excluded from the trade on CITES species for a certain time due ton non-compliance behaviour. All the bans have been later withdrawn. The success rate of the trade measures undertaken within the CITES is almost 100%. The mere threat of a sanction has sometimes been sufficient. Nonetheless, it is important to note that in most cases countries have not been under great pressure to resist the non-compliance procedures since no major economic interests have been involved in the trade. Each meeting of the Standing Committee generally reviews existing recommendations to suspend trade and withdraw them as soon as the compliance matter has been resolved or sufficient progress has been made.

THE CONVENTION ON BIOLOGICAL DIVERSITY'S BIOSAFETY PROTOCOL

The Convention on Biological Diversity's Cartagena protocol does not contain an established non-compliance procedure, though non-compliance response mechanisms exist. CBD's provisions emphasise the importance of the facilitative approach, in particular of technical and scientific assistance (research and training, public education and awareness, information exchange, access to technical and scientific cooperation). In order to disseminate information and knowledge to implement the Convention, a Clearing House Mechanism was established. The Convention also obliges the contracting parties to promote access to expertise in biotechnology, especially for

[41] "Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements", WTO & UNEP Secretariats, 2001, p. 6.

developing countries, in order to enable them to exploit their biological resources. This should encourage third-world countries to join the treaty, especially those resource-rich developing countries, by providing them additional economic incentives through participation in a fair and equitable way in the benefits of biotechnology.

THE ROTTERDAM CONVENTION ON PRIOR INFORMED CONSENT PROCEDURE FOR CERTAIN HAZARDOUS CHEMICALS AND PESTICIDES IN INTERNATIONAL TRADE[43]

The compliance mechanism under the Rotterdam Convention is still in preparation. So far, no consensus has been reached on several issues, namely, the decision-making process by the Compliance Committee (consensus or voting), the trigger to the non-compliance mechanism by other parties and by the Secretariat, whether the Committee may recommend to the conference of the parties to consider and undertake additional actions, and the sources of information that the Committee will be able to consider in evaluating a non-compliance case.[44]

THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL[45]

A Compliance Committee was created under the Basel convention. The Committee may receive submissions regarding non-compliance cases from a party concerning itself or another party or from the Secretariat. The party whose compliance is in question has the opportunity to give explanations and comments to the Committee that then will give advice, non-binding recommendations or information to that party in a view to assist it with resolving these difficulties. The recommendations may for instance be related to the establishment or strengthening of national regulatory regimes, the access to financial and technical assistance or the elaboration of compliance action plans. The Committee may also make recommendations to the COP. A Trust Fund for the Implementation of the Convention and a Technical Cooperation Trust Fund to Assist Developing Countries were established as well.

6. Dispute Settlement Mechanism

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[42] *ibid*
[43] Compliance under Selected Multilateral Environmental Agreements, UNEP, 2004 , p. 63-64.
[44] Summary of the fourth meeting of the conference of the parties to the Rotterdam convention, Earth Negotiation Bulletin, vol. 15 no. 168, 3rd of November 2008, p.6.
[45] Compliance under Selected Multilateral Environmental Agreements, UNEP, 2004 , p. 58-61; Akiho Shibata, "Ensuring Compliance with the Basel Convention – its Unique Features", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 69-

The non-compliance mechanisms are aimed at promoting the fulfillment by the contracting parties of their treaty obligations and addressing the actual cases of treaty violations. Despite these procedures, disputes between parties can arise concerning the interpretation or application of an agreement. Several dispute settlement mechanisms exist, consisting of progressive steps including negotiation, mediation, conciliation, arbitration and judicial settlement[46]. These different conflict resolution tools can be distinguished by the involvement of external actors and the legally binding character of the decisions.

The first step to settle a dispute is the negotiation, also referred to as the consultation. This mechanism involves only the parties concerned and favors an exchange of views between parties with the objective of finding a solution by themselves. The result of a negotiation is not legally binding.[47]

As a subsequent step or as an alternative, parties can proceed to mediation when they need an external actor to help solving the disagreement. This mechanism may facilitate cooperation between the parties concerned. The role of the mediator is usually entrusted to another party to the agreement, to the secretariat or to a specific committee of the convention. The outcome of mediation does not have any binding character.

Usually, only if the dispute could not be resolved through the former steps in a certain period of time, parties may submit to conciliation. This tool may also be used when parties have not accepted the same or any procedure leading to binding decisions and have not been able to settle their in dispute in a certain period of time. Conciliation can be voluntary or compulsory. A conciliation commission can be established in order to make proposals for the resolution of the dispute, which the parties concerned in the dispute shall consider in good faith. The decisions are thus non-legally binding.[48]

As last resorts, arbitration and judicial settlement, as they lead to legally binding decisions, require the consent of the parties. This consent can be expressed either in advance, in the treaty within which the dispute has arisen or in a general treaty on the settlement of disputes or, subsequently, in an *ad hoc* agreement once a conflict has emerged.

87.
[46] ibid
[47] ibid
[48] “ibid

Arbitration is the resolution of a dispute by a judge in principle chosen by the parties who agree to accept the judgment. Parties may also decide to settle their dispute through the judicial way. Conflicts under MEAs may be submitted to *inter alia* the International Court of Justice or the International Court of Environmental Arbitration and Conciliation. The ICJ has the advantage of being a permanent institution and free of any direct cost for the litigating states. In addition, the practice of jurisprudence participates to the predictability of the process. However, parties submitting their case to arbitration will in general remain better in control of the process and avoid the considerable delays of the ICJ.

Examples of dispute settlement mechanisms

i. *Under the World Trade Organization*[49]

Disputes in the context of the World Trade Organization (WTO) arise when a Member Government believes another Member is violating an agreement or a commitment it has made and that therefore its benefits are being threatened. The binding provisions contained in the Dispute Settlement Understanding (DSU) are a crucial element in providing security and predictability to the multilateral trading system.

The WTO dispute settlement procedure is based on clearly defined and detailed rules, with flexible timetables for completing a case. The procedure tends to be equitable, fast, effective and mutually acceptable in order to respect its guiding principles. Requests to consult and use the dispute settlement mechanism should not be considered adversarial acts according to the DSU. In this light, the WTO director-general can be appealed to at all stages to help achieve conciliation. The WTO dispute settlement system consists of consultation, the panel process, the appellate process and implementation.

Settling disputes is the responsibility of the Dispute Settlement Body (DSB) which consists of all WTO Members. The DSB is responsible for the establishment of panels of experts to settle the case. The rulings made by a panel must be endorsed by the Dispute Settlement Body. Concretely, a ruling is automatically adopted unless there is a consensus to reject it. The panelists are usually chosen in consultation with the countries in dispute. They are experts from different countries who examine

[49] www.wto.org; "Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements", WTO & UNEP Secretariats, 2001, p. 23-26.

the evidence and decide in their own capacity if there is a violation.

Both sides can appeal a panel's ruling, provided it is based on a point of law. The appeal body is not entitled to reexamine the facts. The appeal's ruling has to be endorsed by the DSB as well, or rejected only if there is a consensus.

Because prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes, the DSB monitors the implementation of the rulings and has the power to authorize retaliation in case of non-compliance.

ii. Under Multilateral Environmental Agreements

A lot of multilateral environmental agreements contain dispute settlement provisions. Generally, these provisions tend to be weak as states are often reluctant to accept the legal obligations to submit their environmental disputes to binding dispute settlement systems. Binding dispute resolution is a confrontational procedure and arbitration in particular is very costly. States prefer diplomatic and facilitative means to deal with disputes. However, the possibility that another party to a treaty could take a dispute to arbitration or court is a powerful disincentive and has a preventive role.

Under CITES parties can opt for negotiation where there is a dispute over the interpretation or application of the provisions of the Convention. They can also proceed onto arbitration with the Permanent Court of Arbitration, provided there is mutual consent.[50]

The Montreal Protocol is a prototype for the recent elaboration of dispute settlement mechanisms in MEAs. Its procedure is flexible and allows a party to select the procedural or institutional mechanisms that best meets its interests. The first step is negotiation and if no agreement can be reached, parties in dispute may request mediation by a third party. If the disagreement can still not be resolved, the parties may accept to settle through arbitration or judicial settlement at the ICJ. In the case parties have not accepted the same or any procedure, the dispute shall be submitted to the Conciliation Commission created at the request of one of the parties. This Commission delivers final and recommendatory award which parties shall consider in good faith.[51]

[50] "Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements", WTO & UNEP Secretariats, 2001, p. 8.
[51] *ibid*

In the Basel Convention, disputes concerning interpretation, application or compliance with the provisions can be settled through negotiation. If this is not successful and provided the parties agree, they can turn to the ICJ or to arbitration. Failure to reach common agreement does not absolve the parties from the responsibility of continuing to seek resolution through negotiation.[52]

iii. Dispute settlement system under the CBD

The Convention on Biological Diversity includes a dispute settlement mechanism in its Article 27. In case of disagreement regarding the application or the interpretation of the Convention, parties must try to settle trough negotiation. If the parties concerned can not reach an agreement by negotiation, they may jointly request mediation by a third party. Parties may also declare to the Secretariat that they accept a compulsory dispute resolution by arbitration and/or by the ICJ, if negotiation and mediation have failed. In the case parties have not made such declaration, they must submit their dispute to the Conciliation Committee and consider its recommendation in good faith. Parties may also agree to give a binding effect to the recommendations of this Committee.[53]

7. Compliance from an ABS perspective

The Convention on Biological Diversity recognises the sovereign rights of states over their natural resources in areas within their jurisdiction. Parties to the Convention therefore have the authority to determine physical access to genetic resources in areas within their jurisdiction. Parties also have the obligation to take appropriate measures with the aim of sharing the benefits derived from their use. This is one of the fundamental objectives of the convention. The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits arising out of their Utilization were adopted in 2002 to assist parties when establishing administrative, legislative or policy measures on access and benefit-sharing and/or when negotiating contractual arrangements for access to genetic resources and benefit-sharing.

Further to the call for action by Governments at the World Summit on Sustainable Development in 2002, the conference of the parties mandated the working group on ABS to elaborate and negotiate

[52] "Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements", WTO & UNEP Secretariats, 2001, p. 11.
[53] *ibid*

an International Regime on access to genetic resources and benefit-sharing with the aim of adopting instruments to effectively implement the provisions in Article 15 and 8(j) of the Convention. Paragraph 44 (o) of the Plan of Implementation adopted by the World Summit on Sustainable Development called for action to "negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources".

One area of compliance within the ABS discussion that have received some attention so far is that of international certification scheme. The 6th Working Group on ABS identified three areas of compliance in which there is a need for further elaboration. There include (i) development of tools to encourage compliance, (ii) development of tools to monitor compliance and (iii) development of tools to enforce compliance[54]. Within the discussions on possible tools for encouraging compliance falls the option to have international certificate of origin which would identify the country of origin/source and/or legal provenance of the resource and provides evidence of prior informed consent (PIC)[55]. But the discussion that is needed is to decide whether the compliance measure under the international regime requires an internationally recognized certificate or a globally harmonized certificate. Further discussion on the report of the Global Technical Expert Group meeting on this subject is needed in this regard[56]. Standardised Material Transfer Agreements can also be considered an option[57]

A. Considerations for developing a compliance mechanism for the International Regime

Suggested Issues for a Compliance Mechanism under the International Regime on ABS
- establish a Compliance Committee, determine its powers, composition criteria and elect its members
- reporting obligation, timeframe and model format (scientific data, efforts made in order to implement)

[54] UNEP/CBD/COP/9/6
[55] Brendan Tobin et. al. 2008, UNU-IAS.
[56] UNEP/CBD/WG-ABS/5/7
[57] B. Tobin, Monitoring Compliance under the International Regime on ABS: The Role of International Certificate Scheme. ABDR 10 (3): 95-112.

- define the trigger, information gathering, who has the power to trigger
- measures, facilitative and/or punitive, with funding (GEF?)
- detection and review non-compliance cases to assess progress made and general efficiency of the regime
- Non compliance penalties
    - warning
    - suspension of privileges
    - trade sanctions
    - liability
- Monitoring and evaluation
    - national reports
    - 3rd party verification
    - third party monitoring

Considering the already available compliance procedure set under the Cartagena Protocol on Biosafety, it is but appropriate to restate the objective of developing a compliance mechanism for the international regime on ABS to address non-compliance by Parties, and to provide advice or assistance, where appropriate. The compliance mechanism should be simple, facilitative, non-adversarial, non-confrontational and cooperative in nature. The operation of the compliance system shall be guided by the principles of transparency, fairness, expedition, predictability, and common but differentiated responsibilities.

Since many parties to the Convention on Biological Diversity are still gathering experience on how to deal with ABS and its provisions, a compliance mechanism in this context should include facilitative instruments like provisions on capacity building (trainings, workshops, strengthening of the governments structures)[58] combined with some enforcement provisions to give 'teeth' to the compliance mechanism.

Appropriate and agreed information gathering mechanism, reporting requirements that are clear, objective and serious are critical for an effective compliance mechanism for the international regime on ABS.

[58] Balakrishna Pisupati, "Access to Genetic Resources and Benefit Sharing. Key Questions for Decision Makers", 2004, IUCN Regional Biodiversity Programme, Asia.

The compliance mechanism could identify one or several of the following measures with a view to promoting compliance and addressing cases of non-compliance, taking into account the capacity of the party concerned to comply and such factors as the cause, type, degree and frequency of non-compliance:

- provide in-country assistance, technical assessment and a verification mission, upon the invitation of the party concerned
- calling for explanations when the timeframe agreed in the compliance measure is not met
- issuing a statement of concern regarding the non-compliance of the Party concerned
- issuing a warning
- issuing a declaration of non-compliance
- sending a public notification of a compliance matter through the Secretariat to all parties advising that compliance matters have been brought to the attention of a party and that, up to that time, there has been no satisfactory response or action
- suspension of specific rights and privileges, e.g. ineligibility of the party concerned to serve as a member of the Bureau or any committee set up under the treaty, loss of the right of the party concerned to receive documents for meetings
- financial penalties, e.g. ineligibility of the party concerned to receiving funding for its participation in meetings under the agreement, ineligibility of the party concerned to receive other financial assistance from the agreement/its funding body, including transfer of technology
- trade restrictions, if appropriate
- considering and undertaking any additional action that may be required for the achievement of the objective of the agreement
- considering additional measures within the mandate of the governing body of the agreement to facilitate compliance of the party concerned

Considering the complexity of issues related to ABS, it is but important to have further discussions and negotiations on the nature and scope of the international regime on ABS. In the absence of this it will be difficult to have any substantive discussion on finer details of the compliance issues. However, discussions through the expert group on compliance could also inform the future discussions of the regime based on the objectives and implementation provisions of compliance to the regime.

Given the nature of ABS discussions at national levels, different approaches are being used at

national level to deal with ABS and compliance with national provisions in different countries. Several countries are yet to enact legal and related provisions to deal with ABS. This in particular could pose a challenge to the discussions on compliance under the regime. A key requirement will be to seek objective and case based implementation experiences from countries that already have ABS regimes in terms of how they are dealing with compliance and non-compliance to ABS.

Arguments are being put forward to use disclosure requirements as a compliance measure. Though this merits further discussion, lack of clarity on issues such as its acceptance by the patent regime still haunts the discussion on disclosure. The nature of genetic resources and their use by various stakeholders might also pose challenge to using the disclosure requirements in patent applications as the key option to deal with non-compliance (ten Kate and Laird, 1997[59]). As detailed in the submission made by India and Brazil to the TRIPS Council (IP/C/W/443) argue that disclosure requirements will not suffice on their own to ensure benefit sharing arising from the use of genetic resources.

As discussed during the 6th Working Group on ABS, national certificates of compliance could form a possible measure for compliance but this would need further discussion as to providing certain minimum standards of requirements. Additionally, as suggested in the Canada's submission to the expert group meeting on compliance (UNEP/CBD/ABS/GTLE/2/2) this should be in tune with other existing provisions such as the Standard Material Transfer Agreement of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

It is, however, important to mention that compliance measures are in themselves not dispute settlement or adversarial measures. In the absence of this understanding compliance related discussions are bound to be tough and time consuming. Though it is important to focus on the objectives and principles of public and private international law, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), UNCITRAL Model Law on International Commercial Conciliation, the International Chamber of Commerce Rules of Arbitration, the UNDROIT Principles of International Commercial Contracts national legal systems including those related to intellectual property rights need to be assessed and understood carefully in defining the legal architecture of the international regime and its compliance mechanism.

[59] ten Kate and S. Laird, The commercial use of biodiversity, Earthscan, UK.

The compliance mechanism for the international regime on ABS shall consider access to genetic resources both for commercial and non-commercial usage along with appropriate provisions of benefit sharing. Prior Informed Consent (PIC), Mutually Agreed Terms (MATs) form the core of this issue as also described in Para 61 of the Bonn Guidelines.

Additionally, the compliance discussions under the regime should consider issues such as 'farmers' privileges' under the UPOV (International Union for the Protection of New Varieties of Plants) that need to be dealt with through appropriate national regulations/legislations. A similar provision for consideration of issues covered under the ITPGRFA is needed.

Experience from the Pacific Region on ABS and Compliance

The South Pacific Regional Environment Programme (SPREP) has developed the "Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices"1 to help countries in the region, at least on the technical side, so that they can be able to comply with their obligations under the CBD by establishing national legal frameworks on ABS. In addition, the South Pacific Community (SPC) in collaboration with other organizations including the Pacific Island Forum members and UNESCO have established a second Model Law, "The Model Law for the Protection of Traditional Knowledge and Expressions of Culture"2. These two model laws are directly related to the various provisions of the CBD primarily Article 8 (j) and those associated with prior informed consent (PIC), benefit sharing arrangements and intellectual property rights (IPR) issues.

A number of interesting developments are seen in the model laws whereby exiting practice under international law in terms of compliance requirements related to PIC and ABS have been incorporated. In addition, complex issues such as dual (ownership) sovereignty and extraterritoriality issues which international law is grappling with are being dealt with under the SPREP model law. For instance, although there is no such thing as dual sovereignty over genetic resources or traditional knowledge under international law, the SPREP model law proposes for co-ownership of the subject matter and a trusteeship mechanism to deal with traditional knowledge and associated genetic resources in the event of multiple owners or in the case of uncertainty of owners over traditional ecological knowledge. Such is a case drawn from customary laws and practices in the region and are real situations on the ground in the region.

A national ABS legislation has its limits when considering the notion of extraterritoriality, where its impact on external jurisdictions is not always possible. However, with the recognition of co-ownership and trusteeship under the SPREP model law, the countries in the region will have to work out a system based on mutual legal assistance and reciprocity so that one country's national legislation can have effect in another's jurisdiction. Such a mechanism would naturally evolve to harmonize the issue of extraterritoriality and the effect of one country's law on the other. Although this is subject to national legislation, the model laws have provided some direction on the technical aspects of issues surrounding ABS related with traditional knowledge and associated genetic resources, which can foster compliance of obligations under the CBD to a certain degree by states in the South Pacific.

1.See http://www.grain.org/brl_files/brl-model-law-pacific-en.pdf.
2. See http://www.spc.int/culture/activities_legal.htm.

8. Voluntary measures and other provisions to support compliance

All possible measures and provisions that fall under the voluntary framework are worth serious consideration bearing in mind the experiences of using/implementing the Bonn Guidelines. Education and awareness programmes, development and use of electronic databases, codes of conduct (the codes of International Plant Exchange Network, International Federation of Pharmaceutical Manufacturers and Associations, the Botanic Gardens Conservation International, Microbial Culture Collection and the like) are all worth further consideration. Experience and issues related to use and compliance to these measures should be considered during the discussions on further development of the compliance mechanism for the international regime on ABS.

9. Conclusions

Discussions on compliance to the international regime on ABS are timely and provide an opportunity to details the future of the regime discussions and the regime itself. However, care should be taken not to aspire for a perfect system that comprises such sets of compromises which will be difficult for parties to implement the regime once adopted. This paper provides the readers an overview of the compliance and related issues from legal perspective besides providing experiences from other agreements and MEAs that are worth noting in the compliance discussions by the expert group. Care is taken not to pre-empt discussions within the expert group meeting by suggesting specific options or models. However, the intention is to collate the discussions and opinions of the experts participating in the meeting to come up with an advanced version of this paper after the expert meeting on compliance and before the seventh working group meeting on ABS to be held in April 2009. In conclusion it has to be emphasised that the contents of this paper are the opinions of the authors who take full responsibility for any inaccuracies of content or interpretation and should not be read as that of UNEP.

10. Suggested reading

Beyerlin, Stoll & Wolfrum, Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia, 2006, Martinus Nijhof Publishers, Leiden/Boston, pp. 393.

Balakrishna Pisupati, Access to Genetic Resources and Benefit Sharing. Key Questions for Decision Makers, 2004, IUCN Regional Biodiversity programme, Asia, pp. 185.

Compliance Mechanisms Under Selected Multilateral Environmental Agreements, 2006, UNEP, Nairobi, pp. 142.

Balakrishna Pisupati, Access to Genetic Resources, Benefit Sharing and Bioprospecting, 2007, UNU-IAS Pocket Guide, Japan, pp. 64.

Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements, Note by the WTO and UNEP Secretariats, 2001, WT/CTE/W/191.

Tuula Kolari, Promoting Compliance with International Environmental Agreements. A Multidisciplinary Approach, 2004, University of Joensuu. Publications in Law, Finland, pp.153.

Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements,2002, UNEP, Nairobi.

Asian Biotechnology and Development Review: Special Issue on ABS. Issue : 10 (3), 2008.
