



# 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<sup>\*</sup>

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<sup>\*</sup> DISCLAIMER: The views expressed in this paper do not necessarily reflect those of the German Federal Agency for Nature Conservation or the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety.



## 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

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

All this can build confidence and shared understanding between parties to the instrument  
 improve prospects for future cooperation; produce information to inform future  
 measures to address compliance.<sup>10</sup>

3.

#### 4. Objectives and Principles of a Compliance Mechanism

The objectives of all compliance and verification mechanisms 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, preventive, predictable, flexible and cost-effective.<sup>12</sup> 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 countries, parties with economies in transition,<sup>13</sup> and populations potentially or actually adversely affected by non-compliance.<sup>14</sup>

#### 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 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.<sup>15</sup>

Members should be competent in matters relevant to the MEA and in related scientific, technical, socioeconomic, legal or other fields; and be of high moral character. 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 also be held only when states consider them necessary.<sup>17</sup> Furthermore, it is usually regulated whether compliance body meetings shall be open to the public or not.

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<sup>11</sup> 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Waters and International Watercourses

## 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.<sup>19</sup>

### 6. Compliance Review Procedures

With regard to the compliance review procedure the following

assist in its resolution. To do so may

## 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-punitive, include procedural safeguards, and take the totality of circumstances (i.e. the date, history, nature of violation, etc.) into consideration.

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 include

Providing advice and appropriate assistance

Requesting or assisting



actors). Here another set of conceptual enforcement problems arises from reliance on traditional flagState jurisdiction and the lack of ability to enforce compliance regarding area based and other conservation measures.

One approach to address 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, 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 information 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 include provisions in a future international instrument

Devoted to the duties/obligations of flag States (including States of nationality for national 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 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)

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 establishment of white lists of Parties that are deemed to be giving full effect to their obligations, such as capacity building or technology transfer.

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