

INTRODUCTION



The multilateral environmental agreements (MEAs) negotiated by the world's governments address a wide range of collective global problems, including the international trade in endangered species,¹ climate change,² the loss of biological diversity,³ and desertification.⁴ While the pace of negotiation has been rapid in recent decades, new MEAs continue to be negotiated (such as the ongoing negotiations on the regulation of persistent organic pollutants⁵) and older MEAs elaborated (for example, the Kyoto Protocol to the Framework Convention on Climate Change).⁶ This century will likely witness the continued proliferation of MEAs, but also increased attention to the actual operation and impact of existing agreements.

Despite the rapid expansion and wide range of contemporary international environmental law, relatively little is known about the practical impact of MEAs on government behaviour. Some observers suggest that the “gap between law in books and how states act may now appear wider than at any other time in history.” (Koskenniemi 1996). One means of institutionally assessing this gap, and narrowing it, is to regularly review the actions of parties to international treaties. This report analyses the institutions and processes that review state behaviour vis-à-vis MEAs. It does so in terms of four core issues:

- MEA reporting;
- The review of MEA implementation;
- The review of compliance with MEA provisions; and
- The review of the effectiveness of MEAs.

This report describes and analyses the institutions, termed “review institutions,” that are designed to address these issues. Review institutions may be formally mandated within an MEA, or may develop organically as the parties to an MEA learn more about underlying environmental problems, regulatory methods, and implementation difficulties, and, in turn, adapt the institutional structure of the MEA to new knowledge and circumstances.

A decade ago in his survey of “lessons learned in global environmental governance,” Peter Sand (1999) noted that the review institution seems “well on its way to becoming an established instrument of international environmental law — with a new obligation emerging for governments to take part in a deliberate, pre-programmed process of institutional learning.” This report examines the contemporary veracity of this claim by empirically analysing the state of the review institution

¹ The Convention on Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973. www.wcmc.org.uk/cites

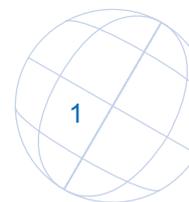
² The Framework Convention on Climate Change, New York, 9 May 1992. www.unfccc.de

³ The Convention on Biological Diversity, Nairobi, 22 May 1992. www.biodiv.org

⁴ The Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 17 June 1994. www.unccd.de

⁵ Unofficial but comprehensive summaries of the Intergovernmental Negotiating Committee meetings 1-3 by the Earth Negotiations Bulletin can be found at www.iisd.ca/linkages

⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11 1997 (not yet in force). www.unfccc.de





today in the set of 10 major MEAs covered in the UNEP GEO-2000 Report. These 10 MEAs address major global problems; nearly all of these agreements have over 100 parties, and many have over 150. The report also explains the linkages between the underlying concepts of implementation, compliance, enforcement, and effectiveness, describes the animating theories behind contemporary practice in international environmental governance with regard to their review, and surveys models of review drawn from other international regimes. Finally, in evaluating the state of the review institution today, and its likely trajectory, the report suggests some lessons learned and policy recommendations.

Scope of the Report

The MEAs addressed in this report are the following, in chronological order, the:

- 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar).
- 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage).
- 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).
- 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS)
- 1982 United Nations Convention on the Law of the Sea (UNCLOS).
- 1987 Montreal Protocol on Substances That Deplete the Ozone Layer (to the Vienna Convention for the Protection of the Ozone Layer) (Montreal Protocol).
- 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).
- 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol (not yet in force).
- 1992 Convention on Biological Diversity (CBD).
- 1994 Convention to Combat Desertification in Countries Experiencing Serious Drought And/Or Desertification, Particularly in Africa (CCD).

Organization of the Report

Chapter 1 briefly presents and defines the central concepts of compliance, implementation, and effectiveness. Chapter 2 introduces the essential characteristics of review institutions and their variations, as well as the underlying theories and expectations that motivate their creation. Chapter 3 then presents and analyses the existing and proposed review institutions in each of the 10 MEAs systematically. This survey is divided into five parts for each MEA examined: basic structure; reporting; implementation review; compliance review; and effectiveness review. These categories are empty sets for some MEAs. Chapter 4 evaluates the existing and proposed review institutions described in the survey and briefly outlines some alternatives drawn from other fields of international cooperation, such as international trade and human rights. Chapter 5 concludes with summary observations concerning the state of review institutions in existing MEAs; key lessons learned; and policy recommendations.



CHAPTER 1: KEY CONCEPTS AND DEFINITIONS



REVIEW INSTITUTIONS

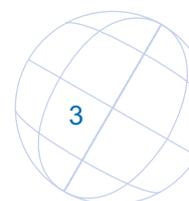
Review institutions are defined in this report as specific institutions, formal or informal, that gather, assess, and take decisions based on information relevant to the implementation of, compliance with, adjustment of, and effectiveness of international obligations, as well in subsidiary agreements and authoritative decisions of the parties. While the terms “mechanism” and “procedure” are often used by analysts of review, institution is used here because it emphasizes the elements of iteration, complexity, and evolution that are so often present in actual reviews.⁷ Institution in this sense does not connote a formal organization, such as the United Nations. Rather institutions are “persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activities, and shape expectations” (Keohane 1989).

Several points should be noted with regard to the definition of review institutions:

- Review institutions are sometimes informal or contain informal elements. That is to say, the legal structure of review as reflected in treaty text or in the authoritative decisions of MEA parties often does not fully reflect actual practice. Only by empirically studying the broad process of review can review institutions be adequately evaluated.
- Many contemporary MEAs contain substantive and procedural rules and commitments that are not part of the original treaty text, but are instead adopted as decisions of the Conference of Parties or of other subsidiary bodies constituted by the parties. These decisions may also be the focus of review institutions, or in some cases may alter or even create a review institution. Both of these points emphasize the need to go beyond treaty text to subsequent decisions and especially to actual practice.
- Review institutions can and sometimes do engage in more than “review.” Non-compliance procedures such as those of the Montreal Protocol not only review compliance information but also take decisions and make recommendations based upon that information. In doing so, review institutions become an important part of active treaty management (Sand 1996).
- As implied by the previous point, there are distinct functions of review institutions and frequently, distinct varieties of review institutions exist. Implementation review institutions need not examine compliance, and similarly compliance procedures need not incorporate reviews of implementation, though empirically they almost always do. In practice, implementation review is the broader, more common activity. Non-compliance procedures (or, as they are increasingly referred to, “compliance” procedures) are typically embedded within implementation review institutions. Reviews of MEA effectiveness, which are least common, in turn may or may not incorporate assessments or compliance or implementation information, though they often incorporate one or more of these categories of inquiry.⁸

⁷ “System” is an equally appropriate term but institution better connotes iteration

⁸ Depending on the definition of effectiveness used (discussed further below) implementation and compliance information may or may not be relevant. But it is likely that in practice effectiveness reviews would incorporate implementation and compliance data





While the focus of this report is the actual practice of MEA review, conceptual distinctions are critical to any analysis of review institutions. And in practice, governments have taken note of differing theories of key concepts such as compliance in deliberations over the structure and scope of review institutions. Thus as an initial matter it is important to clarify:

- what is meant by the terms compliance, enforcement, implementation, and effectiveness;
- how these terms relate to one another conceptually; and
- the significance of high or low levels of compliance, implementation, and effectiveness.

COMPLIANCE, ENFORCEMENT, IMPLEMENTATION AND EFFECTIVENESS

Compliance is defined in this report as *a state of conformity or identity between an actor's behaviour and a specified rule*. In the context of international law, compliance is typically best specified as conformity between a state's behaviour and a treaty's explicit rules.⁹ Compliance thus defined makes no implicit or explicit causal claims — compliance can result from many factors. Enforcement is defined here as *formal procedures and actions by which compliance is compelled or non-compliance deterred*.¹⁰ Thus while compliance is a state of being — an actor is in or out of compliance — enforcement connotes active efforts at the production of compliance. It also typically connotes an *ex post* approach to compliance. That is to say, enforcement presupposes some violation, and represents the response to that violation or the anticipated response which, through deterrence, causes or compels an actor to comply.¹¹

The relationship between compliance and enforcement is important, but as will be discussed further below, compliance can be caused in many ways. Enforcement of international rules is only one way to promote compliance with those rules. Enforcement may be a sufficient cause of compliance with an MEA obligation, but is not a necessary cause of compliance and indeed most compliance review systems are not enforcement-oriented in their operation. Instead, they rely on other means to promote or facilitate compliance with MEA obligations.

The measurement of compliance is itself not always straightforward. It is often claimed that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time” (Henkin 1979). Yet confirming this statement in a given case is difficult. Measuring compliance over time can be thorny in practice because the appropriate unit of analysis is rarely clear. International affairs are not typically broken up into discrete time periods that can then be measured and compared to arrive at an index of compliance¹² (Chayes and Chayes 1993). For example, it is unclear how a one-time violation of the prohibition against commercial trade in CITES Appendix I (endangered) species should be evaluated in terms of an overall assessment of compliance with CITES. Such an evaluation is particularly difficult because in that

⁹ E.g. Anonymous, Enforcement of and Compliance with Multilateral Environmental Agreements: An Example of Three MEAs: Problems, Issues, and Common Solutions, (Background Paper prepared for the UNEP Workshop on Enforcement of and Compliance with Multilateral Environmental Agreements), July 12-14 1999; see also Jacobson, H. and Weiss, E.B. (1998). A Framework for Analysis. In Jacobson, H. and Weiss, E.B., eds., *Engaging Countries: Strengthening Compliance with International Environmental Accords*. 1998, MIT Press, Cambridge, Massachusetts, United States)

¹⁰ Some analysts view enforcement as only referring to actions “which a state takes within its national territory to ensure that it is in compliance with an MEA.” Id. This report does not take this view, which runs counter to conventional usage and also obscures the conceptual differences between compliance and enforcement

¹¹ Some definitions make the concept of reaction to breach central; e.g. Koskeniemi, M. (1996). New Institutions and Procedures for Implementation Control and Reaction. In Werksman, J., ed. *Greening International Institutions*. Earthscan, London, United Kingdom, p. 237: “enforcement refers to a formal, legally circumscribed reaction to a breach of an obligation...”

¹² See also Jacobson and Weiss, 1998, at 4: “In principle, the compliance of countries with their obligations under international environmental accords can be measured, but we found precise measurement elusive”





case the non-compliant behaviour at issue is that of a private party. The often private nature of the ultimately-regulated behaviour compounds the difficulties present in the empirical assessment of compliance with MEAs. As a result of these factors, there is a large scope for differing judgments about MEA compliance rates and about the interpretation of particular instances of behaviour as compliant or non-compliant.

In some cases, however, the nature of international commitments permits non-controversial empirical measurement of compliance. For example, nearly every MEA requires regular, often annual, reporting by governments on their implementation of commitments. This reporting, which will be discussed further below, is the backbone of most review institutions. Most governments report in good faith, but not all governments comply with their MEA reporting requirements.¹³ Indeed, for some MEAs the reporting requirements, which are presumably among the easiest obligations with which to comply, exhibit very low levels of compliance. (This pattern suggests, though it does not prove, that compliance with more costly substantive commitments may also be low.) Because reporting is regularized and discrete in nature, compliance rates and trends with regard to reporting obligations can be readily assessed.

While empirical measurement of compliance can at times be problematic, the determination of why compliance occurred (or did not occur) is even more challenging. That is to say, the causality of compliance is quite complex. But a causal inquiry is critical from the perspective of designing MEAs that reliably produce compliance; only through causal analysis can compliance be systematically improved. Similarly, an understanding of the causes of compliance is central to improving and adjusting MEA commitments over time. While compliance may be the result of dedicated efforts by a state, it may also be inadvertent, coincidental, or an artifact of the legal standard chosen. Consequently, the sheer fact of compliance with a given MEA commitment, while legally and politically important, indicates little about the utility and impact of that commitment. To do more, compliance must be distinguished from two closely related concepts: implementation and effectiveness.¹⁴

Implementation is defined in this report as *the process of putting international commitments into practice: the passage of domestic legislation, promulgation of regulations, creation of institutions (both domestic and international), and enforcement of rules.*¹⁵ Implementation can thus occur at both the international and the domestic levels. The creation and operation of institutions and associated functions enumerated in MEAs, for example, are part of implementation at the international level. Implementation review institutions, however, almost always review domestic implementation — the actions taken by the parties to an MEA within their jurisdictions. For this reason, and because domestic implementation is typically the most critical aspect of MEA implementation, the focus of this report is on the review of domestic implementation.

While implementation is typically a critical step towards compliance, the two concepts are distinct. As noted above, compliance can occur without implementation; that is, without any effort or action

¹³ United States General Accounting Office, *International Environment: International Agreements Are Not Well-Monitored*, GAO/RCED-92-43 (1992)

¹⁴ In practice these conceptual distinctions are not always observed: Within the context of discussions on the “multilateral consultative process” under Article 13 of the FCCC, for example, the terms implementation and compliance were used interchangeably. E.g. [Questionnaire on the Establishment of a Multilateral Consultative Process Under Article 13, Note by the Secretariat](#), UN Doc FCCC/AG13/1996/1. Some academic analyses follow suit; e.g. Handl, G. (1997). *Compliance Control Mechanisms and International Environmental Obligations*. *Tulane Journal of International and Comparative Law*, 5, 29

¹⁵ This definition draws on that used in Victor, D.G., Raustiala, K. and Skolnikoff, E. (1998). Introduction. In Victor, D.G., Raustiala, K. and Skolnikoff, E., eds., *The Implementation and Effectiveness of International Environmental Commitments*. MIT Press, Cambridge, Massachusetts, United States





by a government or regulated entity. If an international commitment matches current practice in a given state, for instance, implementation is unnecessary and compliance is automatic. Compliance is produced in many MEAs in this manner. For example, many states party to the International Convention for the Regulation of Whaling now comply with the moratorium on whaling without having had to implement anything, simply because they are not now, nor have they ever been, whaling states.

Compliance can also occur for reasons entirely exogenous to the treaty process: economic collapse in countries with economies in transition, for example, has produced perfect, but coincidental compliance with some important international environmental commitments (Roginko 1998, Zimmerman, Nikitina and Clem 1998). Again, no causally-related implementation of MEA provisions occurred. Instead, as economic output has dropped, so has the associated pollution and waste discharges. This illustrates the danger of a “snap-shot” approach to compliance; the economies of these states will almost certainly improve in the future, and without further changes in production processes with that improvement will likely come non-compliance. This example also suggests that attention to the empirics of implementation processes can shed light on the real impact of MEAs.

These examples also illustrate the distinction between compliance with an international obligation and the effectiveness of that obligation. Effectiveness is a concept that can be defined in varying ways: as the degree to which a given rule induces changes in behaviour that further the goals of the rule; the degree to which a rule improves the state of the underlying problem; or the degree to which a rule achieves its inherent policy objectives (Young and Levy with Osherenko 1999, UNEP 1998, Victor, Raustiala and Skolnikoff 1998, Keohane, Haas and Levy 1993, Young 1994, Sand 1992). The most common-sense notions of effectiveness relate to “solving the underlying problem,” but the factors that may influence the solution of a complex problem are myriad. In many cases, disentangling them is nearly impossible.¹⁶ Hence many analysts of international law define and assess effectiveness in more modest terms: as observable, desired changes in behaviour.

This definition of effectiveness is employed here. Effectiveness is defined as *the extent to which an MEA causes changes in behaviour that further the aims of the MEA*. Even when defined in this modest manner, many international environmental rules are not effective. The early efforts to regulate intentional oil pollution from tankers, for example, were ineffective even in this minimal sense; they produced almost no observable, desired changes in behaviour (Mitchell 1994). In general, because many MEAs contain obligations that are weak or lenient, the pattern of high compliance but low effectiveness is common.

The converse situation is also possible: MEAs can be effective even if compliance with them is low. If a legal standard is quite demanding, even widespread failure to meet it may result in desired changes in behaviour. States sometimes sign non-binding instruments that contain relatively ambitious regulatory targets. (An example is the non-binding declaration on nitrous oxide (NO_x))

¹⁶ As Young and Levy (with Osherenko) write: ‘The most intuitively appealing sense of effectiveness centres on the degree to which a [treaty] eliminates or alleviates the problem that prompts its creation. Yet this definition presents practical problems that are sometimes severe. The social systems that are the focus of international [treaties] (as well as the natural systems within which they operate) are typically complex. Longitudinal data on the evolution of these systems, moreover, are frequently inconsistent or nonexistent. As a result, it is often difficult to ascribe observed changes in these systems to the operation of international (treaties). The difficulties are compounded by the fact that most problems serious enough to justify the creation of an international (treaty) motivate actors to pursue solutions through a variety of initiatives, including some that do not involve the (treaty) directly’

Young, O. and Levy, M. (with the assistance of Gail Osherenko) (1999). The Effectiveness of International Environmental Regimes. In Young, O., ed., *The Effectiveness of International Environmental Regimes*. MIT Press, Cambridge, Massachusetts, United States, at 4





emissions in the context of the Long-Range Transboundary Air Pollution regime).¹⁷ While “compliance” with these non-binding commitments is not always high, they have in some cases led to marked behavioural change (Raustiala and Victor 1998). All else being equal, from an effectiveness perspective more compliance is better, but rules with significant non-compliance still can be effective if they induce desired changes in behaviour that otherwise would not have occurred.

This relationship between compliance and effectiveness illustrates that compliance in the international legal context is qualitatively distinct from compliance in the domestic legal context. Domestic law in well-functioning polities emerges from a process that, while often viewed as legitimate, effectively imposes rules upon individuals. International rules as embodied in MEAs, by contrast, are the product of explicit bargains among sovereign and juridically equal states. Governments initiate treaty negotiations, determine their scope, and fix the content of their international commitments collectively.¹⁸ By doing so, governments also largely — though not totally — determine compliance levels with the resulting international obligations. Compliance and implementation in the international system is thus a different phenomenon than compliance and implementation in a domestic legal system. While high levels of compliance, for example, in domestic settings can often be attributed to the legitimacy of law and to effective mechanisms of enforcement, high compliance levels in MEAs are largely explained by the standard-setting process. Because compliance levels are often an artifact of the legal standard employed, the significance of high or low compliance levels in any given MEA is not self-evident. In sum, the international legal context is fundamentally different than the domestic one. Evaluating what causes implementation and compliance to occur, and MEAs to be effective, is extremely difficult.

¹⁷ The non-binding declaration was signed in conjunction with a binding protocol. On this case see Victor, D., Raustiala, K. and Skolnikoff, E. (1998). *The Implementation and Effectiveness of International Environmental Commitments*. MIT Press, Cambridge, Massachusetts, United States

¹⁸ Other actors, such as international organizations and non-governmental organizations, of course play a role and often are instrumental in setting the agenda of international negotiations. But it is undeniable that governments run negotiations and formally determine their ambit and resolution, even if they are aided in that process by non-state actors





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CHAPTER 2: REVIEW INSTITUTIONS



AN OVERVIEW

Review institutions are centrally important to the operation of MEAs because they are the means that enable governments, international organizations, and other observers to track party performance. Most review institutions are administered by specialized bodies. These bodies in turn report to the parties collectively (via the periodic Conferences or Meetings of the Parties that are the decision making institutions created by every major MEA).¹⁹ The most important of these specialized bodies typically are composed of government representatives, but sometimes representatives from international organizations and non-state actors are present as well.

Review institutions within most MEAs are based upon specific formal rules or decisions, often though not always found in the original MEA text. But these formal rules, while important, are typically elaborated and altered in practice by informal understandings and practices. The informal nature of aspects of review is important to an understanding of review institutions as they actually operate. Consequently, the evaluation of review institutions must be empirical and behavioural, and must reflect the full array of practices employed by states, secretariats, and other relevant actors.

While this report examines reporting obligations and three distinct types of review, implementation review is the conceptual and empirical core of existing MEA review institutions. Because MEAs are purposive and not merely hortatory agreements among states, domestic implementation of commitments is critically important. In most MEAs, the review of this implementation rests upon a system of regularized national reporting. Explicit review of compliance is at present rare, though growing. And in practice, existing MEAs rarely attempt to review and evaluate overall effectiveness in a coherent and regularized manner.²⁰ This focus on implementation and compliance rather than effectiveness is understandable given the relative youth of many MEAs, the tremendous methodological hurdles to the assessment of MEA effectiveness, and the resources available to MEA administrative bodies. But it is important to bear in mind the limitations, discussed in Chapter 1, of compliance and implementation as conceptual categories.

REPORTING

The first step in any review is the acquisition of data. In MEAs, data on party actions typically comes from the parties themselves. Many contemporary MEAs regulate behaviour that is ultimately private in nature, such as the trading of endangered species across international borders, though governments play a major role in the process through permitting and other measures. Because

¹⁹ On Conferences of the Parties to MEAs generally see Werksman, J. (1996). The Conference of Parties to Environmental Treaties. In Werksman, J. ed., (1996) *Greening International Institutions*, Earthscan, London, United Kingdom

²⁰ E.g. the Basel Convention, discussed in Chapter 3 below





private behaviour is implicated in many MEAs, accurate, consistent data about this behaviour is often difficult to obtain. Sometimes, as is the case with ozone depleting substances, the best data comes from non-state actors such as industrial firms. But in no case reviewed in this report are non-state actors required by the MEA to report data directly in a regularized fashion. Instead, most MEAs rely on national reporting systems, in which the parties individually report information on their own efforts, emissions, policies, or compliance levels. Reports are usually sent to the relevant MEA secretariat and often are publicly available.

The 1992 Framework Convention on Climate Change is representative. It obliges “developed country parties and other parties included in Annex 1” of the treaty (mainly the members of the Organization for Economic Cooperation and Development) to “communicate, within six months of the entry into force of the Convention ... detailed information on its policies and measures ... as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol”²¹ These communications are made to the COP at each annual meeting.

This national communications process is a common feature in MEAs and the primary means by which data about domestic-level implementation is gathered. It is rare — though as will be described further below not unknown — for other parties or central bodies such as secretariats to directly gather data about a party. Rather parties self-report and often do so in idiosyncratic ways — which can make data analysis challenging. Reporting rates across MEAs vary widely, and often are low, sometimes under 50 per cent. Reporting requirements also vary in periodicity. Some MEAs require annual reports, such as the Montreal Protocol, while others can be triennial, as in the Convention on Migratory Species. Many MEAs employ a standardized format for reports to ease the process. A common complaint from MEA secretariats is that despite these efforts, reports are often not comparable and report quality varies widely. At the same time, governments — particularly small and resource-poor governments — complain that reporting requirements are time-consuming and proliferating.

IMPLEMENTATION REVIEW

While a regularized reporting process is found in most MEAs, there is significant variety in what occurs after reports are received by the relevant secretariat. In some MEAs, such as CITES, the data reported are compiled and used to analyse patterns of behaviour (in that case, trade in listed species). In others, such as the UNFCCC, some reports (those from the major industrialized nations) are systematically analysed in detail. In still other MEAs, such as the CBD, the national reports are not individually analysed but the secretariat prepares synthesis documents that discuss the reports generally and identify general problems.

Within implementation review in particular, the formal and informal aspects of review frequently operate together as a system. A recent cross-sectoral and cross-national study of MEA implementation introduced the term “systems for implementation review” (SIRs), defined as “rules and procedures by which the parties to international agreements (as well as interest groups, administrative bodies, and the like) exchange data, share information on implementation, monitor activities, assess the adequacy of existing commitments, and handle problems of poor implementation” (Victor, Raustiala and Skolnikoff 1998). While there may be a formal mechanism

²¹ Article 4:2(b) of the FCCC, *supra*





at the heart of the SIR, other actors and institutions commonly feed into or influence it. SIRs typically are decentralized and evolve over time, incorporating institutions and actors that are not directly reflected in MEA texts.

The Montreal Protocol provides the best example of a fully-developed SIR. Implementation is regularly reviewed by a dedicated implementation committee, which also administers the non-compliance procedure of the protocol. The Montreal Protocol's SIR, discussed in greater detail in Chapter 3 below, comprises not only the dedicated, formal actors and procedures involved in implementation review, such as national reports and the work of the implementation committee, but also the interactions between the Committee, the secretariat, the Montreal Protocol Multilateral Fund, the Global Environment Facility (GEF), and the protocol's Technology and Economic Assessment Panel and its subsidiary committees and working groups (Greene 1998). Looking at the broader system of institutions involved in the review of MEA implementation presents a fuller picture of the actual practice of review.

Implementation review performs a number of important functions that theories of international institutions suggest should promote cooperation among states and the effectiveness of that cooperation.²² Review institutions increase the flow of information among states. By making national actions more transparent, review institutions often help assure reluctant participants that other parties are complying with shared obligations. Where cooperative choices are interdependent — that is, where states are likely to comply with international law conditionally based on others' behaviour — this can foster compliance by making clear other parties' compliance and building a virtuous cycle of reassurance. Nearly all of the MEAs explored in this report involve situations in which cooperative choices are interdependent, and hence the potential role for review institutions in promoting international cooperation is great.

Implementation review may also redistribute political power to domestic actors that favour full implementation and compliance. Such actors can use the international MEA process to strengthen their position in domestic policy debates, leveraging the information the review institution supplies as well as the legitimacy it may endow. By involving relevant industry and other interested actors, implementation review can also help produce more realistic, achievable rules and standards in MEAs. This may help produce “buy-in” by important stakeholders to the regulatory decisions undertaken, which by enhancing commitment may in turn enhance compliance.²³ Review can mobilize and provide assistance and capacity-building tools to non-compliant states, promoting compliance where needed. Finally, implementation review can promote “learning” by governments and private actors. Governments can learn to make better, more effective and more “implementable” environmental commitments collectively, and they can also better implement existing commitments by learning from the efforts of other states and systematically involving experts from a wide range of interested private actors. All of these functions should promote effective multilateral environmental law.

Reporting and implementation review is almost always the basis upon which other, more specialized review institutions operate. Compliance review requires an existing implementation review process to work well. Separating these processes is often easier conceptually than empirically — as will

²² On “functional” theories of international institutions see Hasenclever, A., Mayer, P. and Rittberger, V. (1997). *Theories of International Regimes*. Cambridge University Press, Cambridge, New York, United States

²³ The former is likely to be more evident than the latter; see the related discussion in the introduction to Part II of Victor, D.G., Raustiala, K. and Skolnikoff, E. (1998). *The Implementation and Effectiveness of International Environmental Commitments*. MIT Press, Cambridge, Massachusetts, United States





be shown. Implementation review feeds into compliance review in many cases and the processes and the institutions involved can be highly interlinked.

COMPLIANCE REVIEW

Compliance review is focused on the specific question of legal compliance with MEA commitments. In practice, this form of review usually requires commitments of sufficient clarity and specificity to enable a relatively non-controversial determination of compliance. Many MEAs contain obligations that are too imprecise or general to lend themselves to compliance assessment. For instance, this is arguably the case with the Convention on Biological Diversity, which has many characteristics of a framework convention though it is not formally labelled as such.²⁴

Compliance review arises from a concern with the consequences, both for other parties and for the environment, of non-compliance. Of the MEAs surveyed in this report only the Montreal Protocol has an existing formalized, dedicated non-compliance procedure, though the parties to the UNFCCC and the Basel Convention are currently considering the establishment of compliance systems.²⁵ Other MEAs, such as CITES, have institutions that are in some aspects functionally-equivalent to a non-compliance procedure. Compliance review institutions are particularly important because while nearly all MEAs contain provisions for formal, judicial dispute resolution, to date these provisions have never been used and they have effectively fallen into *desuetude*.²⁶ Thus, compliance review institutions provide a practical, non-judicial alternative to unused and seemingly unuseful international dispute resolution procedures.

Compliance review institutions are usually dedicated, formal procedures, but, as was argued above with regard to implementation review, the formal review of compliance often interacts with and is influenced by external, informal linkages to other institutions. Compliance review institutions are typically embedded within a broader implementation review process. This embeddedness is likely true for both historical and functional reasons. Because compliance review is more politically-sensitive than implementation review, governments are often hesitant to engage in compliance review in the early years of an MEA. Indeed, it is important to note that in no case where compliance review exists or is being considered was the system itself fully present in the original treaty text — though the original text often authorized the future creation of such a system. Some studies have argued that this pattern is problematic, and that it would be preferable to negotiate substantive commitments alongside the mechanisms that will review implementation of and compliance with those commitments (Victor, Raustiala and Skolnikoff 1998). While this is undoubtedly true, there are significant political obstacles to doing so: for example, there may be an inverse relationship between the stringency of review mechanisms and of substantive commitments (Szell 1995). While

²⁴ See e.g. Note by the Secretariat, Analysis of the Development and Experience of the Operations of Other Conventions and Agreements, UNEP/CBD/ISOC/2 (10 May 1999): "Perhaps more so than other multilateral environmental agreements, the objectives and provisions of the [CBD] require further elaboration and operational development. Though not formally designated as such, the convention has the characteristics of a framework convention." See also Raustiala, K. and Victor, D.G. (May 1996). Biodiversity Since Rio: the Future of the Convention on Biological Diversity. *Environment*

²⁵ Note by the co-chairs of the Joint- Working Group on Compliance, Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol/ Elements of a Compliance System and Synthesis of Submissions: FCCC/SB/1999/7/Add.1 (17 September 1999); and Decision III/11 (of the Third Conference of the Parties to the Basel Convention), Monitoring the Implementation of and Compliance with the Obligations Set Out by the Basel Convention, reprinted in the Yearbook of International Environmental Law (1995) at 786

²⁶ As Koskenniemi notes, "though environmental treaties ... do contain a standard clause on the settlement of disputes, this is more by way of ritual than any realistic belief that compliance problems should, or could, be dealt with through the doctrines of fault and attributability which characterize the [international] legal doctrine of state responsibility." Koskenniemi, M. (1996). New Institutions and Procedures for Implementation Control and Reaction. In Werksman, J., ed. *Greening International Institutions*. Earthscan, London, United Kingdom, p. 247. See also. Romano, C.P.R. (2000). *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach*. Kluwer Law International, London, United Kingdom





combining the negotiation of review institutions and of substantive commitments may help manage these trade-offs, there is little reason to expect governments as a result to be markedly less wary of review and hence markedly less prone to weaken either the commitments themselves or the accompanying review process. This issue is discussed further in the conclusion to this report.

Implementation review also precedes compliance review for functional reasons: non-compliance is often a sub-set of implementation difficulties. Review of implementation can, therefore, reveal compliance problems and inevitably raise the question of appropriate response. In sum, as one analyst notes, “an effective system of compliance control is, of course, premised on various procedural elements, especially the reporting of basic information by the parties, and its ‘operational links’ with other components of the regulatory regime involved, such as financial mechanism(s), science and technology assessment panels, etc.” (Handl 1997).

As a practical matter, the consideration and development of compliance review institutions within MEAs (including those related to climate change, hazardous waste, and long-range transboundary air pollution) have been heavily influenced by the experience of the Montreal Protocol’s Non-Compliance Procedure (NCP). Procedures modelled on the NCP are currently in place in other MEAs, most notably the 1994 Protocol to the 1979 Long-Range Transboundary Air Pollution Convention on Further Reductions of Sulphur Emissions (not discussed in this report). Yet while the NCP is an important model, the present focus in the UNFCCC and Basel contexts, at least rhetorically but likely also functionally, is on the development of what are explicitly termed “compliance systems” rather than non-compliance procedures.²⁷ In the words of one government involved in deliberations within the Kyoto Protocol, a compliance system is generally “intended to be broader than a ‘non-compliance’ system, which would only concern itself with actual treaty violations. As such, a compliance system should have as its objectives not only preventing and addressing actual violations of legal obligations under the protocol but also promoting implementation of the protocol more broadly.”²⁸

Thus conceived, a compliance review institution is facilitative, non-judgmental, and aimed at the promotion of compliance rather than the deterrence of non-compliance. Empirically, it will be shown below that the Montreal Protocol NCP, as well the CITES compliance review system, are in fact quite facilitative in their approach. But the rhetorical turn discernable in the current debates over compliance is important, both as signals of government intentions and concerns over the stakes increasingly present as MEAs move from paper to practice.

The current debate over compliance versus non-compliance systems within MEA negotiating fora reflects recent claims in academic compliance research, one strand of which (termed “managerialism”) argues strongly that a non-confrontational, facilitative and forward-looking approach to compliance is preferred to judicialized, sanctions-oriented enforcement procedures (such as is currently employed in the World Trade Organization). The latter approach is seen as embodying a largely unrealistic and often unhelpfully coercive, backward-looking, deterrence-oriented emphasis.²⁹ Because non-compliance with MEA obligations, these theorists argue, is usually the result of state incapacity,

²⁷ This is reflected in, for example, the discussions of a compliance system ongoing within the climate change regime. See Note by the co-chairs of the Joint-Working Group on Compliance, *Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol/Elements of a Compliance System and Synthesis of Submissions*; FCCC/SB/1999/7/Add.1 (17 September 1999)

²⁸ Id. (drawn from submission of the United States)

²⁹ On “managerial” theories of compliance see Chayes, A. and Chayes, A.H. (1995). *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge, Massachusetts, United States. The opposing view is succinctly presented in Downs, G., Rocke, D. and Barsoom, P. (1996). Is the Good News About Compliance Good News About Cooperation? *International Organization*, v., pp. See also Mitchell, R.B. (1997). Compliance Theory: An Overview. In Cameron, J., ed., *Improving Compliance with International Environmental Law*. Earthscan, London, United Kingdom





inadvertence, or ambiguity concerning the precise nature of commitments, economic or political sanctions are generally inappropriate and rarely available. The result is a focus on the ways that non-compliance can be prevented, identified early, and managed over time.

Existing compliance review institutions, whether labelled non-compliance or compliance procedures, have several distinguishing characteristics that embody this managerial prescription. They are typically focused on the management of performance rather than the ascertainment of legal wrongfulness.³⁰ They stress the facilitation of collective compliance rather than individualized “crime and punishment.” In this sense, they are administrative rather than judicial processes. They supplement, but do not supplant, traditional dispute resolution provision. As a legal matter, they do not displace or supersede decisions obtained via dispute resolution (though this claim has never been politically tested and would seem in practice to undermine much of the impetus behind the creation of compliance review).³¹ The recent focus on compliance systems can be seen as an extension of the defining characteristics of a non-compliance procedure. Compliance systems seek to move further away from the deterrence-oriented, dispute settlement model towards an even more facilitative, managerial approach to compliance — what might be termed compliance assurance.

EFFECTIVENESS REVIEW

Unlike reporting, implementation review, and compliance review, effectiveness review is not strictly focused on the actions of parties individually, but rather can look to the impact of these actions collectively. Effectiveness review is not generally a regularized process in MEAs. However, there are occasional, “one-off” studies of effectiveness that are formally mandated by the parties and in some cases even required by the terms of the MEA itself. For example, the Basel Convention mandates that three years after entry into force, and at least every six years thereafter, the COP must undertake an evaluation of its effectiveness.³² Despite their scarcity, effectiveness reviews are, from a policy perspective, quite significant because they may provide insight into whether the entire MEA process is in fact achieving its goals. But in practice, there are formidable methodological challenges to the evaluation of the effectiveness. Many variables may influence effectiveness, and isolating the impact of the MEA is correspondingly challenging.

ENVIRONMENTAL ASSESSMENTS

MEAs are evolutionary documents, intended to initiate a long-lasting cooperative process. This is part of the impetus behind the increasingly common framework-protocol format: the framework provides the ground rules and procedures for the creation of new, more detailed agreements. Environmental assessments play an important role in adjustment processes, and while assessments themselves are not a focus of this report, they merit mention because they may feed into review institutions.

³⁰ Ibid

³¹ On the legal questions raised by the Montreal Protocol NCP, see Koskeniemmi, M. (1993). Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol. *Yearbook of International Environmental Law*. See also Handl, 1997, supra. Most lawyers believe that non-compliance procedures and traditional dispute resolution processes are alternative forms of addressing compliance failures, and that the former do not implicate or alter the outcome of the latter. But clearly, the efficacy of non-compliance procedures would be compromised if dispute resolution processes reversed or nullified the outcome of a non-compliance procedure. In practice, although dispute resolution processes are a formal part of almost every MEA, they are never used, and thus the foregoing issues have not arisen

³² [Basel effectiveness study]





In the narrowest sense, assessments are reports on a given problem or issue.³³ More broadly, assessment has been defined as a social, communicative process by which expert knowledge, related to a specific policy process, is organised, evaluated, integrated, and presented in discrete documents meant to inform policymakers.³⁴ The paradigmatic environmental assessment process is the Intergovernmental Panel on Climate Change (IPCC).

Environmental assessments may influence the understandings that actors have of an environmental problem by providing new data and analysis, increase concern about a given issue, influencing its “placement” on the international agenda and perhaps implementation efforts, and influence the terms of debate over a problem and its resolution by framing an issue or by linking previously discrete problems. Assessments can also alter the political strategies of actors towards specific problems and prompt the development of new policies and institutions.³⁵

The primary link between environmental assessments and review institutions is in the area of effectiveness review. Assessments are important to effectiveness review because they provide data on changes in underlying environmental problems. In some cases, the integration of assessments into review works well; the Montreal Protocol system, for example, has relied on assessments of ozone depletion and of concentrations of ozone depleting substances in the stratosphere to extrapolate estimates of the effectiveness of the protocol at preventing deaths from skin cancers and cataracts.³⁶ For most MEAs, however, assessments either do not exist or are not well-integrated into review institutions.

³³ This is a modified presentation of the definitions used by the Global Environment Assessment Project at Harvard University, led by William C. Clark, et al. See www.environment.harvard.edu/gea. For an analysis of assessments and their data needs see van Woerden, J., ed., (1999). *Data Issues of Global Environmental Reporting: Experiences from GEO-2000*. United Nations Environment Programme, Nairobi, Kenya

³⁴ Id

³⁵ Id

³⁶ E.g. Ozone Secretariat, *Synthesis of the Reports of the Scientific, Environmental Effects, and Technology and Economic Assessment Panels of the Montreal Protocol: A Decade of Assessments for Decision Makers Regarding Protection of the Ozone Layer: 1989-1999* (February 1999)





Kerttu Lohua/UNEP



CHAPTER 3: EXISTING AND PROPOSED REVIEW INSTITUTIONS IN 10 MAJOR MEAs



The review institutions that exist in each of the 10 MEAs covered by the GEO-2000 report are surveyed below. The 10 MEAs are presented in chronological order. The focus of these review institutions is primarily on national actions and behaviour; in other words, on the steps that governments party to an MEA take to put their obligations into practice. In the case of effectiveness review, however, which looks to the overall performance of the regime, the focus is necessarily more systemic. Formal institutions, informal practices, current trends and proposals related to these review institutions are all discussed below. While formal, legal rules are given attention, the operation of these review institutions in practice is the central concern of this report.

THE 1971 RAMSAR CONVENTION ON WETLANDS

BASIC STRUCTURE

The Ramsar Convention, opened for signature in 1971, is the oldest MEA surveyed in this report and predates the landmark Stockholm Conference on the Human Environment. It entered into force in 1975 and has 123 parties. Ramsar developed largely out of NGO-led activities in the 1960s involving concerns with bird life and habitat, of which wetlands are centrally important. The convention is aimed at preserving waterfowl by preserving their habitats. In recent years, however, its focus has widened well beyond waterfowl to include water quality, food production, general biodiversity, and all wetland areas, including salt water coasts (Ramsar's mandate extends to coastal zones with waters less than six metres deep, which include mangrove swamps and many coral reefs). This overall expansion in the scope of Ramsar has been partly driven by the increased participation of developing countries.

Ramsar parties are obligated to list one wetlands site of importance (though they may list more), establish nature reserves, make wise use of those sites, encourage the increase of waterfowl populations on appropriate wetlands, and supply information on implementation of policies related to the sites. There are currently just over 1 000 designated Ramsar sites.³⁷ Many parties, however, only have one or two designated sites, though some, such as the United Kingdom, have over 100.³⁸ Each party must also designate a management authority for its national sites. Conferences of the parties occur every three years; the next COP is scheduled for 2002. In 1996, the parties agreed on a "strategic plan" for Ramsar that enumerates many specific objectives and provide concrete suggestions for implementation.

Institutionally, in 1987 a secretariat called the Ramsar Bureau and a standing committee were established to assist in planning meetings and in the general implementation of the Convention. Nine parties are represented on the standing committee. In 1993, a Scientific and Technical Review

³⁷ Secretariat interview

³⁸ Report of the Secretary General, Ramsar COP 7 Doc. 5, (1999)



Panel was established to provide assistance to the Bureau and the standing committee. The Ramsar Bureau is housed in the offices of the World Conservation Union (formerly International Union for the Conservation of Nature) in Gland, Switzerland, illustrating the close links between the NGO community and the agreement, much as in CITES — another wildlife-oriented treaty of the early 1970s. There are four official NGO partners within Ramsar, and NGO representatives participate directly on the Scientific and Technical Review Panel.

NATIONAL REPORTING

Ramsar sites are typically designated by parties, though the COP can recommend that a site be designated. When a site is designated for inclusion, the party must provide basic information and description. The Bureau can request that more information be given at the designation stage but cannot reject a designated site. The Bureau employs a standard format for describing site information. In perhaps 10-15 per cent of the descriptions, the data provided is insufficient. Missing data ranges from poor maps and descriptions to a failure to update information. At the most recent COP (COP 7), for the first time the COP requested and identified specific countries that had not to date provided adequate descriptions and basic information.³⁹

Ramsar parties must also submit at each COP, national reports detailing implementation activities undertaken in the three years since the last COP. Roughly two-thirds of these national reports are on time and complete. There is also a six-year cycle for site reports that is a sub-set of national reporting process. These reports contain specialized details about Ramsar sites that constitute an update of the original site description, rather than implementation reporting per se.

The Ramsar Bureau has no formal mandate to corroborate or verify the data in the national reports. But in practice, when a party appears to be glossing over information or omitting crucial data, the Bureau will ask if they want to clarify their report. Some parties then make changes in their reports. This process has become more important in recent years. Only with the inauguration of the Ramsar website have reports been effectively made public, though they had formally been available to any interested person or organization. The additional publicity generated by the website postings appears to have improved the quality of reports. In addition to the parties' reports, the Bureau accumulates relevant information from the many NGOs involved in wetlands issues and which are central to the daily operation of Ramsar. The accumulated data have been stored in a computerized database since 1990.

The Ramsar Convention is, like the CBD, CITES, World Heritage, and CMS, considering harmonization of reporting with other biodiversity-related conventions. But the reporting process is currently undergoing internal revision that may significantly alter the nature and process of Ramsar reporting. At COP 7, a resolution was passed to “invite the [parties] to consider preparing and adopting by the end of 1999 ‘national targets for the Ramsar Strategic Plan’.”⁴⁰ This resolution called for the establishment and maintenance by the parties of an ongoing record of implementation for national planning and reporting purposes. The bureau has prepared a highly innovative “national planning tool” to assist in the implementation of Ramsar obligations. The bureau's aim is to link up the national planning tool process with the reporting one and with the need to maintain a record of implementation. As the bureau has stated,

³⁹ COP7, [Resolution XII](http://www.ramsar.org) at www.ramsar.org

⁴⁰ [Resolution VII.27](#), cited in Doc. SC24-12, [Issues arising from COP7 requiring action by the Standing Committee-Format for National Reports to be submitted prior to COP8](#) (n.d.)





The approach being recommended by the bureau will signal to all [parties] *a significant shift in the purpose of the National Reports* — from the previous ‘one-off’ description of actions which is prepared every three years for primarily global consideration — to a dynamic and ongoing framework for strategic planning and action by national governments, *which also meets* the obligation to provide a national report every three years. [emphasis in original]⁴¹

The bureau thus sees this new reporting format as shifting reporting from an often burdensome and not necessarily-productive activity for parties to one that flows naturally from implementation efforts occurring under the guise of the strategic plan and the use of the national planning tool. In other words, the new reporting format in fact assists and promotes those implementation efforts. The national planning tool has questions that correspond to the current Ramsar Convention Work Plan. For example, for the general objective of reinforcing institutional capacity in each party, the national planning tool contains specific sub-objectives and a set of questions related to implementation. In this particular case, the questions include, among others:

- Does your country have a National Ramsar Committee or similar body? *Yes/No*
- If No, what has prevented the establishment of such a committee? *Please elaborate*
- Has there been an evaluation of the effectiveness of the Committee? *Yes/No*
- If Yes, did the review show the committee was proving to be effective? *Yes/No*

The Ramsar Bureau has also created an interactive electronic form for reports, with the aim of making them easier to prepare and post on the Ramsar website. The bureau distributed the tool in both printed and electronic form to all parties in early 2000, and is actively encouraging parties to use it. Its acceptance by the Ramsar parties is not yet clear. The bureau hopes that it will now be better able to use the reporting process to create priorities, identify regional or thematic issues, and target problem spots.

IMPLEMENTATION REVIEW

There is no formal implementation review body in Ramsar. The COP on occasion publishes “recommendations” about a party’s wetlands if there are indications, whether from national reports, the secretariat itself, or from NGOs, that a particular site is not adequately being preserved or protected or that there has been a potentially adverse ecological change. These recommendations must be approved by the COP, and, while not required, in practice that approval includes the party in question. Hence recommendations, while often important and effective, should not be viewed as a threat to induce better implementation or conservation. Rather they indicate a shared view that there are implementation problems or that the site in question is somehow threatened, and they marshal political pressure to address the problem.

In 1990, a monitoring procedure was adopted (renamed in 1996 the Ramsar Management Guidance Procedure and again in 1999 as the Ramsar Advisory Missions) which involves review of site problems, often with on-site inspection of sites. The advisory mission process was envisioned as a scientific, technical process for assisting and improving implementation, and not as a form of compliance review. (Lanchbery 1998). If the bureau believes that a Ramsar site has changed, will change, or is changing adversely, it can propose application of the advisory mission process.

⁴¹ Doc. SC24-12, *Issues arising from COP7 requiring action by the Standing Committee-Format for National Reports to be submitted prior to COP8*, (n.d.)





Sites that are considered particularly threatened can become part of what is known as the Montreux Record, listing on the record precedes an advisory mission. The record is similar to the Danger List in the World Heritage Convention, which is discussed in this chapter below. In 1997, for example, 62 wetlands sites were on the Montreux Record, including sites in the United States, Uganda, Costa Rica, and Austria (Hunter, Salzman, and Zaelke 1998).

Formally, only parties may propose that a site be listed on the Montreux Record, though the Ramsar Bureau and the Scientific and Technical Review Panel review the choice.⁴² In practice, the bureau sometimes obtains information about threats to sites informally and then writes to the requisite party's management authority to request that the site be proposed for the Montreux Record. This informal information may come from NGOs or even from parts of the relevant party's own government.

The incentives for parties to propose listing on the Montreux Record vary. In some cases domestic political battles between agencies, branches of government, or levels of government lead to listing as a way for one faction to gain an upper hand in domestic debate. In other cases, particularly for developing countries, parties have used Montreux Record status to bring in donor funds for troubled sites that might not otherwise be forthcoming. The Montreux Record can also provide a politically-neutral statement that can help break internal policy deadlocks. Parties also may be seeking technical and professional assistance from the Bureau from a listing on the Record.

If the party so requests, a Montreux Record site gets an on-site mission (the advisory mission), usually including Ramsar Bureau staff as well as outside experts. In practice, developing countries almost always want such an Advisory Mission, though industrialized countries often do not.⁴³ The bureau staff creates an expert team that visits the site and then drafts recommendations. The party receives, subject to its approval, a formal report which (among other possibilities) it can then use to approach donors. Thus in practice, the anticipated chain of events in the Montreux process is listing on the Montreux Record, then an advisory mission, then implementation of the mission's recommendations, and then, ideally, removal from the Record.

The Montreux Record was conceived as a mechanism for parties to advertise a problem with a particular site and then seek and obtain additional resources to help alleviate the problem. Unfortunately, the Montreux Record has problematically gained an image as a black list, which has deterred some parties from proposing sites. The Bureau is concerned about this dynamic and is now publicizing some Record success stories in an effort to encourage greater use of the process.

COMPLIANCE REVIEW

The implementation review institution described above in practice promotes compliance through its work, but there is no formal system for reviewing compliance or addressing non-compliance with Ramsar provisions.

⁴² In every case, the party's request to have a site included in the Record has been approved

⁴³ There is a small budget for such missions capable of funding approximately six per year. Personnel constraints are also an issue since the bureau has limited staff that can organise and lead missions. Because Montreux Record listing has not been overwhelming, no requests for missions have thus far been denied



EFFECTIVENESS REVIEW

Under Objective 8.1 of the Ramsar Strategic Plan (adopted in 1996), the COP, Standing Committee, and Bureau are to “establish and ensure regular implementation of processes for evaluating the effectiveness and efficiency of all Ramsar Convention institutions, mechanisms, and programmes” Evaluation processes as such have not yet been established.

THE 1972 WORLD HERITAGE CONVENTION

BASIC STRUCTURE

The World Heritage Convention was negotiated in 1972 and is administered by the UN Educational, Scientific, and Cultural Organization in Paris. It has 161 parties. The Convention’s obligations revolve around a list of approximately 600 designated World Heritage Sites, some of which are natural sites — such as forests or game preserves — while others are cultural sites such as cities or monuments or “mixed sites” that have both cultural and natural significance. These sites are nominated by the parties, assessed by designated NGO advisors (e.g., the World Conservation Union and the International Council on Monuments and Sites), and approved by the World Heritage Committee. While a state may become a party without listing a site, in practice sites from such parties are welcomed. Many parties view World Heritage sites as sources of national prestige and seek via the treaty international attention, tourism, validation and/or funding for their sites.⁴⁴ The health and condition of listed sites varies widely.⁴⁵ Because this report is centrally concerned with MEAs, the discussion of the World Heritage Convention will focus on its treatment of natural sites.

The World Heritage obligations are not elaborate or precise. The core commitment of the parties is the adoption of conservation policies regarding the sites within their respective territories. These policies should, but do not have to, include the establishment of planning programmes, administrative facilities, and personnel training. As a practical matter, World Heritage sites stay on the list indefinitely, though sites that are deemed in danger can be placed on the Danger List, which makes the host party eligible for assistance funds from the World Heritage Fund. The convention is administered by a secretariat (known as the World Heritage Centre), a General Assembly of the Parties, and the World Heritage Committee and Bureau.

NATIONAL REPORTING

Each party is obliged to submit to the World Heritage Committee an inventory and description of any site nominated to be in the World Heritage List. The World Heritage Convention also calls in Article 29 for regular reporting by the parties. Until recently, the provision was dormant. In the 1980s, some parties engaged in such reporting, but this practice was erratic, not very widespread, and not institutionalized. Article 29 was revived in the mid-1990s, in part due to a controversy over the procedures for reactive monitoring of the Manas site (a natural site known for tigers and rhinos) in India.

⁴⁴ Indeed, it is an unwritten rule of the convention that each party is granted at least one listed site. Yet once a site is placed on the list, the incentives to properly care for the site can dissipate because much of the political reward is reaped in the listing

⁴⁵ There is also a bias in listing in favour of cultural sites, which are easier to adequately manage and tend to have greater revenue potential through tourism





The World Heritage Committee was asked by the General Assembly of the World Heritage Convention in 1997 to establish rules and procedures for these Article 29 national reports, which were first due in 2000, starting with the Arab region and followed by other regions in subsequent years. Under this new reporting system, the secretariat has created a standardized format and will prepare a synthesis report based on the national reports received, but it is unclear if independent analysis of the reports will be included.⁴⁶ The committee approved in December 1998 the proposed format for the periodic reports. This format consists of two sections. Section I constitutes the Party's report on the application of relevant articles of the World Heritage Convention, including those referring to the identification of properties of cultural and/or natural value; protection, conservation and presentation of the cultural and natural heritage; international cooperation and fund raising; and education, information and awareness building. Section II refers to the state of conservation of specific World Heritage properties located on the party's territory. The reporting cycle of six years is the longest of those MEAs surveyed. Periodic reporting as required under the revived Article 29 procedure will not supplant the reactive monitoring procedure described below.

For specific sites that are deemed threatened, the Operational Guidelines for the Implementation of the World Heritage Convention also call for "reactive monitoring," which is "reporting by the World Heritage Centre, other sectors of UNESCO, and the advisory bodies to the bureau and the (World Heritage) Committee on the state of conservation of specific ... properties that are under threat."⁴⁷ Parties themselves must report to the World Heritage Committee whenever planned work or circumstances place a site at risk. Reactive monitoring is not formally necessary in the case of a site that is added to the Danger List (see below), but is expected to accompany such a listing.

The World Heritage Centre (secretariat) is, like the CBD, CITES, CMS, and Ramsar Conventions, exploring harmonization of reporting with other biodiversity-related conventions.

IMPLEMENTATION REVIEW

Several recent decisions and changes, including the decision to revive the Article 29 reporting process, may improve the state of implementation review in the World Heritage Convention. There is generally a greater focus on reporting and monitoring within the World Heritage system today. The secretariat is also increasingly involved in country-specific training programmes and technical cooperation, "with a sharp increase in projects devoted to building local capacity to comply with the treaty." (Jacobson and Weiss 1998).

While it is not explicitly focused on implementation review, in practice important aspects of implementation review occur through the "Danger List" institution. The danger list is meant to comprise sites that are "threatened by serious and specific danger,"⁴⁸ and for the conservation of which major operations are necessary and for which assistance has been requested.⁴⁹ While the primary means of adding a site to the Danger List is at the discretion of the host party, sites have been added without the formal consent of the host government. For example, Dubrovnik (in 1991), and the Everglades (in 1993), were added to the list, both without the expressed consent of

⁴⁶ The format can be found in *Operational Guidelines for the Implementation of the World Heritage Convention*, WH-99/2 (March 1999)

⁴⁷ *Id*

⁴⁸ *Operational Guidelines*, *supra*

⁴⁹ Article 11





the respective host countries (though not against the wishes of all elements within those governments). (Jacobson and Weiss 1998). When a site is added to the danger list, the committee often chooses to send a mission of qualified observers from a designated NGO. The mission visits the property, evaluates the nature and extent of the threat, and proposes corrective measures to be taken. Missions are in practice never refused by the host state but sometimes they are delayed, as has been alleged in the case of Australia's Kakadu site. The committee then reviews at regular intervals the state of the site in question and can decide any of the following:

- That additional measures are required to conserve the property;
- To delete the property from the Danger List if it is no longer under threat;
- To delete the property from World Heritage List if the property "has deteriorated to the extent that it has lost those characteristics which determined its inclusion ...".⁵⁰

The overall impact of the danger list institution is difficult to evaluate. The existence of the list may create incentives to comply with the convention's obligation to maintain sites — for fear of adverse publicity resulting from a listing. Alternatively, the existence of the list may create perverse incentives to reduce conservation expenditures, because the assistance coupled to a listing rewards parties with new and additional funds if the status of a site slips. In practice, the danger list has a mixed reputation and is seen by many actors as a black mark (a similar phenomenon is apparent within the Ramsar Convention institution and the Montreux Record). There is currently interest by some parties in obtaining a formal ruling that Committee cannot put a site on the danger list without the host party's consent. Australia, particularly, has pushed for this in the wake of a controversy over the Kakadu site, where Australia would like to permit mining in nearby areas. Such a ruling would arguably eliminate an important means of international leverage that exists within the convention system. Because the danger list is often viewed as a black mark, governments sometimes wish to avoid a listing. The committee in the past has stated that a party must do a specific set of things or, it is implied, the site in question will go on the danger list. This strategy is often effective; the Galapagos Islands are an example where this strategy reportedly was used effectively. However, the deterrent role of the danger list is complex, because sometimes parties or elements within the governments of parties want to have a site listed for domestic political reasons. Certain US officials, for example, sought inclusion in the danger list for the Everglades as a way of pressuring the US Congress for a larger budgetary allocation for conservation and restoration. (Jacobson and Weiss 1998).

COMPLIANCE REVIEW

There is no compliance review in the World Heritage Convention, though the operation of the Danger List and of reactive monitoring work in limited ways to promote compliance. (There is also provision for removal of a site from the World Heritage List if it becomes sufficiently degraded.) The convention's obligations are sufficiently general that no dedicated, formal compliance review institution is likely to emerge.

EFFECTIVENESS REVIEW

There is no effectiveness review in the World Heritage Convention.

⁵⁰ Operational Guidelines, No. 93





THE 1973 CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

BASIC STRUCTURE

CITES (opened for signature in 1973) like Ramsar and the World Heritage Convention pre-dates the Stockholm Conference in its genesis. CITES entered into force in 1975 and has 152 parties. CITES is focused not on general wildlife conservation, but strictly on the impact of international trade on endangered and threatened species. For its primary obligations, CITES employs a tripartite appendix structure, in which regulated species are listed based on their degree of “endangeredness” and the likely role that control of international trade would play in alleviating that danger. Permits are then required for international trade in listed species. Because CITES’ appendices list many species, and its trade-regulatory structure is based on import and export permits, the volume of data produced by CITES is extremely high. The permitting system is the heart of CITES’ obligations, though parties may always undertake stricter domestic measures, including complete bans on trade, than the measures that exist within CITES.⁵¹ This latter provision has over time become critical to the effectiveness of system of compliance review that has developed within CITES, and which is discussed in detail below.

Institutionally, CITES creates a COP, a secretariat and a standing committee as well as several smaller committees, such as the plants committee. The secretariat is based in Geneva. CITES COPs occur every three years.⁵² The standing committee (established in 1979) and the smaller committees all have been created through COP resolutions and the practice of the parties; none are discussed in the treaty text. The standing committee and other committees are centrally important to the practical operation of CITES; thus much of the machinery involved in the operation and assessment of the regime has developed organically (Sand 1997). In practice, CITES has evolved quite significantly from its initial textual form.

CITES is also noteworthy for the large role played by non-governmental organizations in the implementation of its provisions and in the gathering and analysis of information related to the international trade in endangered species. An example is the group, Trade Records Analysis for Flora and Fauna in International Commerce, commonly known as TRAFFIC. NGOs were a major part of the creation of CITES and they continue to exert significant power within the CITES system today.

NATIONAL REPORTING

There are two basic reporting requirements within CITES. The convention requires that parties maintain records of trade in listed species and that they report, in summary form, data on permits and trade annually to the secretariat. Parties must also report biennially on legislative, regulatory, and administrative measures taken to enforce the provisions of CITES. For most of CITES history, the focus was almost entirely on the first, trade records, report. Early reporting rates were low; in the 1981-85 period, for example, sources indicate that only about half of the parties submitted any sort of report at all (Favre 1989). Guidelines for annual reports were first developed in 1982.⁵³

⁵¹ Article 14

⁵² The 44th meeting of the standing committee took place in Nairobi in 2000; there have been 11 COPs

⁵³ “ Guideline for the Preparation of CITES Annual Reports” Notification 205 (March 22, 1982) cited in *ibid*





Parties now use a standardized reporting format and the current rate of submission of annual reports is claimed to be high, at least relative to the often low rates of reporting in many MEAs. At the 1994 COP, for instance, nearly 70 per cent of the parties submitted annual reports on time. Biennial reports on domestic measures, however, continue to exhibit much lower rates of submission (WCMC n.d.). To improve CITES reporting, COP 11 adopted a decision stating that, starting in 2001: “Parties should not authorize any trade in specimens of CITES-listed species with any party that the standing committee has determined has failed, without having provided adequate justification, to provide annual reports ... for three consecutive years ...”⁵⁴ CITES is, like the CMS, CBD, World Heritage, and Ramsar Conventions, considering harmonization of reporting with other biodiversity-related conventions.

The accumulated data on permits and international trade are compiled in an extremely large database – holding 3.3 million records – run by the World Conservation Monitoring Centre (WCMC), which is since 2000 part of UNEP. The trade data dates back to 1975 but the volume has grown markedly over time. In 1997, for example, 480 000 trade records were processed, nearly 2 000 per working day.⁵⁵ In addition to this tremendous volume of trade data, WCMC collects information on protected areas, habitats, and species.

This wealth of data in principle allows many factors relating to CITES implementation, compliance, and effectiveness to be reviewed. WCMC can through its database supply aggregated reports of import-export data for a specified year or species, as well as reports comparing data from corresponding importing and exporting countries. The latter permits comparison of the reporting from two trading parties. Because of the bilateral nature of CITES obligations, in theory this comparison identifies potentially illegal trade in wildlife. The correlation between export and import data is often rather low, however, and thus the utility of this method is limited.⁵⁶

In addition to national reports and data submissions, the CITES Secretariat relies in practice on several informal sources of information about implementation and/or compliance problems. TRAFFIC, for example, periodically contacts the secretariat about pressing cases it has uncovered. A party that believes that a trade permit granted by another state is fraudulent may also contact the Secretariat, which will investigate and act as a liaison between the parties.⁵⁷ Because CITES requires that parties in their domestic legislation render trade in regulated species outside the CITES framework illegal, the CITES Secretariat also interacts with Interpol and the World Customs Organization to investigate illegal trade and international trading rings. At the annual meetings of the standing committee, the secretariat presents a report on all these compliance and implementation issues, known as the “infractions report.” The important role of the infractions report is discussed further below.

IMPLEMENTATION REVIEW

In comparison with most MEAs, CITES has an extensive and well-functioning data gathering system. CITES also contains a number of explicit obligations whose implementation can be readily evaluated. CITES has developed several systems and projects for performance evaluation that in part build

⁵⁴ CITES Decision 11.37 at www.cites.org

⁵⁵ www.wcmc.org.uk/species/trade/projects/cites

⁵⁶ Id

⁵⁷ Personal communication, Prof. David Favre





off the wealth of trade and permit data collected. A central aspect of the implementation review institution is what is essentially a paper review of domestic implementing legislation conducted by the secretariat, known as the National Legislation Project.⁵⁸ The CITES Secretariat claims that CITES is the only MEA “for which the parties have precisely defined an approach, the National Legislation Project, for reviewing and evaluating domestic measures to implement the convention.”⁵⁹ In light of the review of other MEAs in this report, this claim is probably overbroad. But it is clear that CITES has developed a particularly extensive and effective system of implementation review.

The National Legislation Project, which began work in 1992, has thus far analysed and reviewed the national CITES-related legislation of 136 parties. It has in addition created numerous technical documents that promote implementation and compliance. There is a partly-searchable database of National Legislation Project findings.⁶⁰ The project operates by the CITES Secretariat requesting the party to send the relevant legislation to it. The legislation is then reviewed by the secretariat or by external consultants. Parties are re-analysed if they enact new laws. After this analysis, a report goes to the parties, with comments and suggestions.

Approximately 75 per cent of the parties reviewed through the national legislation project have not implemented CITES fully, in that they do not have the full range of necessary legislative and administrative measures in place in their domestic legal systems. CITES-related performance is highly variable regionally, and unsurprisingly correlates with national income and administrative capacity. As a result, the CITES Secretariat has proposed the establishment of a “legal-capacity-building” strategy to improve the overall record of implementation. In the secretariat’s words, the strategy “would have as its main purpose enhancement of the capacity of each party to implement the convention. The strategy would determine the relationship between implementation, compliance, enforcement, and effectiveness.”⁶¹ A capacity-building unit within the secretariat has been created, and the professional staff of the Secretariat’s Enforcement Assistance Unit is being increased from 1-4 to help coordinate and enhance enforcement activities with customs officials and police forces.

COMPLIANCE REVIEW

The compliance system of CITES is a mixture of treaty-text and subsequent resolutions and decisions that has grown up around the practice of the standing committee, the reporting process, the infractions report, what is called the “Significant Trade Review” process, and the national legislation project. The Significant Trade Review process was established by a resolution of the parties with the aim of identifying problems in the implementation of CITES obligations and working with exporting countries to rectify them.⁶² The infractions report noted above lists infractions of CITES rules by parties such as the acceptance of false permits or the commercial export of Appendix 1 species. CITES is also, like the Montreal Protocol and the Basel Convention, concerned with

⁵⁸ Like many CITES practices, this project grew out of a COP resolution ([Resolution 8.4](#) and subsequent decisions)

⁵⁹ CITES Secretariat, [Implementation of the Convention in Individual Countries/National Legislation Project: Progress and Future Development](#); Doc. SC.42.12.1 (n.d.)

⁶⁰ The National Legislation Project is also noteworthy because it has contracted out much of the analysis of implementation to two NGOs, both deeply linked to CITES: the World Conservation Union, through its Environmental Law Centre, and TRAFFIC. TRAFFIC also maintains other databases and monitoring systems, such as the Bad Ivory Database System (BIDS), now replaced, which has been formally linked to CITES. Through the BIDS ivory system, all parties were obliged to provide data on ivory seizures and TRAFFIC thus monitored the amount and location of “bad” or CITES-illegal ivory

⁶¹ Id

⁶² Established by Resolution 8.9; see www.cites.org, “a guide to significant trade”





compliance with MEA rules by private actors. CITES gathers extensive data on wildlife crime and trafficking, for instance, in its Trade Infraction and Global Enforcement Recording System, or TIGERS.

The focus of this report, however, is on the review of parties to MEAs, and consequently this section focuses on party compliance and the trade suspension process. CITES expressly permits parties to undertake stricter domestic measures with regard to listed species, and in practice the standing committee often recommends through the infractions report that the parties collectively undertake stricter measures against a party found to be in persistent non-compliance with CITES rules. In essence, the committee recommends a suspension of trade in CITES specimens with that party. This is a unique and potent tool in MEA management.

The evidentiary basis of the trade suspension recommendations emerges from national reports, Significant Trade Review, the Infractions Report process, and the national legislation project process. In practice, suspension recommendations have mostly emerged from the national legislation project. If the secretariat receives information that a listed species is being adversely impacted by trade, or that CITES provisions are not being implemented, CITES empowers the secretariat to communicate this information to the party. In most cases, the secretariat successfully engages in a dialogue with Parties whose compliance with CITES is found insufficient. The secretariat provides the party with advice and model legislation, and usually the party then enacts the necessary changes before any recommendation of trade suspension is made. Where this process fails, trade suspensions are sometimes recommended in the infractions report.

While there is no specific provision creating the trade suspension process, the practice is first based in several CITES articles which appear to provide the basis for the multilateral trade suspension recommendations.⁶³ Article XIV, which permits parties to undertake stricter domestic measures, creates the basis for the implementation of these recommendations by the parties. To date, no party or non-party has challenged the legality of the process of making recommendations to suspend trade, and the use of recommendations has now become a customary practice. Most CITES parties follow the standing committee recommendations to suspend trade and thus this is often an effective deterrent and remedy. An example of the process is the 1985 Resolution recommending that parties refuse to accept shipments of CITES specimens from Bolivia until the country demonstrated to the COP or the standing committee that it had adopted all possible measures to adequately implement the convention. This requirement was met in 1987, and the trade measure lifted.⁶⁴ Similar trade measures have been invoked against Thailand, Italy, the United Arab Emirates, Malaysia, and Greece, among others. Most recently, Senegal and Guyana were subjected to a recommendation. In the case of Guyana, the recommendation was lifted almost immediately in response to the government's enactment of the necessary legislation.⁶⁵ In all of the cases in which this non-compliance response system has been employed, trade bans were eventually withdrawn.

The trade suspensions process is bolstered by periodic unilateral measures taken by the US government against parties it deems to have undermined CITES, such as those against Singapore in 1986 (Sand 1997). While such measures are completely outside the CITES system, and run

⁶³ Articles VIII, XI, and XIII

⁶⁴ This example is discussed in *Communication from the Convention on International Trade in Endangered Species of Wild Fauna and Flora to the Committee on Trade and Environment of the World Trade Organization*; WT/CTE/W/119 (25 June 1999)

⁶⁵ Interviews, CITES Secretariat





counter to the spirit of multilateral cooperation, unilateral actions do have the effect of reinforcing CITES and its provisions and cannot be ignored in an evaluation of compliance and non-compliance response.⁶⁶

In its compliance review system, CITES benefits from its specialized international trade focus, which involves bilateral exchange of benefits among the parties. The reciprocity inherent in such exchange provides a powerful and effective means of enforcing and deterring compliance, much as the reciprocal nature of benefits and obligations and the potential for suspension of trade benefits within the WTO system promotes compliance with international trade law. While compliance with CITES is by no means perfect, the convention has gone the furthest of the MEAs surveyed in this report in using an enforcement approach to address non-compliance and implementation problems. There is no direct analogue in CITES to the formalized administrative proceedings that are used in the Montreal Protocol's Non-Compliance Procedure (discussed below), though the secretariat and standing committee clearly seek to employ less coercive and more facilitative measures whenever possible. Despite the success of the Infractions Report process, the challenge of controlling international trade is immense and non-compliance is still common within CITES. Many states, for example, do not have in place the domestic legislation required by CITES. Thus the secretariat and the standing committee in practice exercise some discretion in choosing their targets of focus under the infractions process.

It is important to underscore in this context that the text of CITES, as well as the practice of the parties, have built flexibility into the CITES system in a way that permits some deviation from a strict reading of the treaty text (Sand 1997). This flexibility decreases the effective scope of "non-compliance." Arguably, this flexibility in administration and interpretation of CITES provisions, as much as the informal compliance review system centred around the standing committee's trade ban recommendation, is responsible for much of the observed levels of compliance with CITES. This flexibility is manifested in several ways. First, CITES permits parties to opt-out of decisions on species listing. In other words, for certain decisions parties may chose to remain unbound by the new rule. While the opt-out system arguably undermines the treaty's reach and effectiveness, it also has the effect of keeping all the players in the cooperative process and allowing the regime to bend, rather than break. In practice, knowledgeable observers believe that opt-outs have not been over-used or abused, and that they often are used simply for temporary administrative reasons (e.g. Sand 1997). Second, under Article VIII the Parties have interpreted provisions flexibly; for example, introducing the exemption of ranching for trade in listed species. The use of this interpretive flexibility is sometimes a means to achieve a move towards stricter listing for a species; trading off a higher listing for some leeway in the application (Sand 1997). In this sense, the practice of the CITES parties can be very pragmatic.

In addition to the flexibility in CITES management and interpretation, the CITES secretariat engages in compliance-promoting and capacity-building through a host of training schemes aimed at domestic enforcement personnel. It has also negotiated memoranda of understanding with Interpol and the World Customs Organization to improve knowledge of and coordination related to the implementation and enforcement of CITES. These activities help to build-in compliance with CITES by strengthening coordination and capacity.



⁶⁶ There are also important questions of WTO compatibility raised by the use of trade measures, particularly when they are unilaterally applied



EFFECTIVENESS REVIEW

CITES is one of the few MEAs to engage in some aspects of effectiveness review. The CITES parties have created an action plan to improve effectiveness that has a number of varied components.⁶⁷ These range from suggestions aimed at better interaction with other relevant international organizations, such as the WTO, to the development of a plan to create performance indicators for CITES. In addition, the CITES parties commissioned an independent review of CITES' effectiveness, submitted in 1996.⁶⁸ The report surveyed CITES parties and noted the low levels of compliance with biennial reporting and the many difficulties parties face in implementing CITES. The report also tried to assess the convention's effectiveness with regard to 12 major CITES species, finding that CITES was effective for only two species and moderately effective for four.

While not formally within the confines of the treaty, similar assessments of CITES performance take place in CITES-focused NGOs such as TRAFFIC. For example, TRAFFIC produced a series of reports called the CITES 1997 Series. Most focused on trade in important charismatic species, such as the bear or rhino parts trade, but one report specifically looked, in the domestic context, at "lessons learned" and success stories in implementation, compliance, and effectiveness issues in various CITES parties. This report built upon an earlier and similar report for COP 8 (Allen 1997).⁶⁹

THE 1979 CONVENTION ON MIGRATORY SPECIES

BASIC STRUCTURE

The Convention on Migratory Species or CMS was negotiated and concluded in 1979. The CMS entered into force in 1983 and has 71 parties. The aim of the CMS is the conservation and sustainable use of migratory species. Like CITES, it has a specific transboundary focus. Unlike CITES, it is focused on transboundary movements undertaken by the animals themselves. The CMS defines migratory species as "the entire population of any geographically separate part of the population of any species ... a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries."⁷⁰ Migratory species are listed in two appendices, with Appendix I reserved for the more seriously endangered species. For Appendix II species, the CMS calls for special subsidiary agreements to be concluded. CMS is thus in part a framework convention, and nine subsidiary accords have been concluded under its auspices. Five of these are binding treaties (such as the Agreement on the Conservation of Bats in Europe, also known as Eurobats). Four, including the 1998 Memorandum of Understanding on the Siberian Crane, are non-binding instruments. (Shine 2000). A detailed assessment of the review mechanisms for each of these nine subsidiary agreements is, however, outside the scope of this report.

The substantive obligations of the CMS itself are quite general. States which fall within the range of species listed in Appendix I (range states) are obligated to endeavour to; conserve listed migratory species and their habitats, prevent and remove obstacles to their migration, and prohibit the taking

⁶⁷ Decisions regarding improvement of the effectiveness of the convention; Doc. SC.42.7

⁶⁸ Environmental Resources Management, *Study on How to Improve the Effectiveness of [CITES]* September 1996

⁶⁹ CITES' effectiveness is also discussed in UNEP ETEU, 1998

⁷⁰ CMS Article 1





of such species. CMS parties generally are called upon to conclude separate and more specific agreements – i.e., agreements like the nine referred to above – for migratory species listed in Appendix II. Institutionally, the CMS creates a COP, a scientific council (with working groups), a standing committee and a secretariat, based in Bonn, Germany. Conferences of the parties occur triennially.

NATIONAL REPORTING

Each party to the CMS must provide on joining an initial comprehensive report, which should be, but is not required to be, updated at each COP. In addition at each COP, parties must report on the measures undertaken to conserve listed migratory species. (There is, among the parties, some debate over the binding nature of the reporting obligation in the CMS).⁷¹ On an on-going basis, range state parties should provide the secretariat with a list of migratory species they are a range state for, and on measures taken to implement the provisions of the CMS for those species. Thus, this reporting requirement varies for each party based on the CMS listed species for which it is a range state.

In recent resolutions, the CMS parties have elaborated the reporting format. The parties must report on the CMS implementing legislation enacted; species for which it is a range state; population size and trends for Appendix I species; indication of whether species is endangered; migration routes; threats; and details of national activities such as surveys and monitoring programmes. These reports are compiled in a database by the secretariat. As is common in MEAs, the quality and style of the reports vary widely. For example, in COP 5 in 1997 reports varied from 3-30 pages in length.⁷² Submissions levels are reportedly near 50 per cent.

The CMS parties have recently tried to improve the reporting and review process. At COP 5, Resolution 5.4 called for the following:

All parties should be encouraged to submit reports on their implementation of CMS well before each meeting of the Conference of the Parties (COP). An analysis of reports submitted by parties should be prepared before each meeting. The Secretariat should engage a specialized organization on a permanent basis to review and evaluate the reports and to prepare a comprehensive report for the COP on the status and population trends for the relevant species, and conservation measures undertaken by the parties and non-party range states, using also information from other sources. A proposal should be developed ... to harmonize the various reports with a view to a) making those reports more substantial, b) providing the COP with appropriate information on the implementation of the convention, and c) making an input to the Convention on Biological Diversity with respect to the conservation of migratory species.⁷³

This call was repeated at COP 6 in 1999, where in addition an information management plan was submitted.⁷⁴ The CMS is, like the CBD, CITES, World Heritage, and Ramsar Conventions, considering harmonization of reporting with other biodiversity-related conventions. The information management plan is intended, through further elaboration, to provide a basis for harmonization.

⁷¹ CMS Secretariat interview

⁷² Review of Party Reports on Implementation of the Convention, UNEP/CMS/Conf. 6.6 (31 October 1999)

⁷³ Resolution 5.4, COP 5, at www.wcmc.org.uk/cms/

⁷⁴ Personal communication from R. Vagg, CMS Secretariat, September 2000





IMPLEMENTATION REVIEW

There is no process for implementation review in the CMS. Indeed, in preparatory documents for COP 6 in November 1999, it was noted that even syntheses of national reports have not been prepared.⁷⁵ However, the parties have recognized this lacuna and a priority in the action plan endorsed at COP 6 is a review of party reports and other sources of information related to implementation.⁷⁶

COMPLIANCE REVIEW

There is currently no formal compliance review in the CMS. However, the CMS Secretariat has on at least two occasions informally contacted parties concerning potential compliance problems that had been brought to the Secretariat's attention by another party. In addition, NGOs have contacted the secretariat regarding potential compliance problems in CMS parties.

EFFECTIVENESS REVIEW

There is currently no effectiveness review in the CMS. However, the parties created a performance working group at COP6 in 1999. It is tasked to develop, through coordination with the scientific council, a set of performance indicators which can assist in evaluating the effectiveness of the CMS.⁷⁷

THE 1982 LAW OF THE SEA CONVENTION

BASIC STRUCTURE

The United Nations Convention on Law of the Sea (UNCLOS) entered into force in 1994 and has 135 parties. It is a landmark legal undertaking that encompasses a wide range of maritime issues, of which environmental protection is only one. Consequently, this report will focus on the review mechanisms within UNCLOS related to its environmental provisions only. The environmental provisions with UNCLOS include:

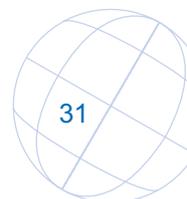
- the extension of sovereign rights over marine resources, such as fish, within the 200 mile exclusive economic zones;
- obligations to adopt measures to manage and conserve natural resources;
- a duty to cooperate regionally and globally with regard to environmental protection and research related to this protection;
- a duty to minimize marine pollution, including land-based pollution; and
- restrictions on marine dumping by ships.

In many respects, the environmental provisions of UNCLOS are general and it operates as a framework convention. UNCLOS also incorporates by reference other pre-existing marine-related environmental treaties, such as the London Dumping Convention. Any reporting or review that occurs in these contexts, or through the relevant international organizations, may be broadly considered part of the UNCLOS

⁷⁵ Review of Party Reports on Implementation of the Convention, UNEP/CMS/Conf. 6.6 (31 October 1999)

⁷⁶ Personal communication from R. Vagg, CMS Secretariat, September 2000

⁷⁷ Id





process. A truly comprehensive evaluation of review within the UNCLOS regime is as a result beyond the scope of this report. UNCLOS has thus far spawned one detailed environmental agreement, the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (not yet in force).

Institutionally, UNCLOS creates an International Seabed Authority, within which there is, *inter alia*, an Assembly and a Council (comprising 36 parties elected by the Assembly). UNCLOS also creates a Commission on the Limits of the Continental Shelf and an International Tribunal for the Law of the Sea. The secretariat functions are performed by the UN Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea (hereafter “secretariat”), based in the UN headquarters offices in New York.

NATIONAL REPORTING

There is no regular, formal reporting process under the environmental provisions of UNCLOS. However, pursuant to UN General Assembly resolutions, the secretariat reports to the parties, in alternating years, on large-scale pelagic driftnet fishing and on straddling stocks. Government submissions, which are not required but are requested, form part of the basis for these reports. In the context of straddling fish stocks, the secretariat writes to each UNCLOS party and requests information on the status and implementation of the straddling stocks agreement (mentioned above) and on developments relating to the conservation and management of such stocks, such as national legislation and enforcement measures. A parallel process takes place with regard to driftnet fishing (though there is no equivalent international driftnet agreement). Similar requests are sent to international organizations and NGOs.

It is important to underscore that this effort is not treated as nor referred to as formal reporting. Unsurprisingly, reporting rates are low: about 20-30 per cent of parties reply, and most of these are OECD members. There is no specified format given for the replies from parties. The ensuing secretariat report is largely non-analytic. The secretariat compiles the responses and summarizes them, using direct quotations at times, and provides only an introduction to the subject and legal mandate of the report.

IMPLEMENTATION REVIEW

There is no formal institution for the review of national implementation of UNCLOS environment-related provisions. However, the reports by the secretariat discussed above cover implementation and review recent events and trends in areas such as fisheries. In addition, the annual report on Oceans and the Law of the Sea, prepared by the UN Secretary-General and submitted to the General Assembly, discusses general implementation issues and events which relate in some way to UNCLOS. Environmental aspects of UNCLOS are a small but significant part of this report (e.g. a recent report noted that a UNEP Coordinating Office for the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities was created)⁷⁸. But there is no focus on national actions related to the implementation of UNCLOS environment provisions *per se* nor any institutional structure for assessing and reviewing such actions.

⁷⁸ Report of the Secretary General, *Oceans and the law of the sea*, 5 October 1998 at 49





COMPLIANCE REVIEW

There is no compliance review under UNCLOS for environmental provisions. However, while it does not constitute compliance review *per se*, the Tribunal for the Law of the Sea, by adjudicating cases that relate to environmental provisions (such as the recent Bluefin Tuna cases),⁷⁹ provides an opportunity for allegations of non-compliance by a particular party or parties to be assessed. The Tribunal is new and relatively untested and thus its activity and efficacy in this role is unclear.

EFFECTIVENESS REVIEW

There is no effectiveness review under UNCLOS.

THE 1987 MONTREAL PROTOCOL

BASIC STRUCTURE

The Montreal Protocol to the Vienna Convention on Substances That Deplete the Ozone Layer entered into force in 1989 and has 175 parties. It is widely considered one of the most successful examples of international environmental cooperation. The parties to the Montreal Protocol have created a complex array of regulations that have been regularly revised in light of new scientific and technical information. The protocol has been adjusted five times and amended four times. Regulated substances now number 96.

The core substantive commitments of the Montreal Protocol pertain to reductions or phase-outs in production and consumption of ozone-depleting substances (ODS). These are listed in often quite detailed schedules. There are obligations related to trade in ODS, trade in products containing ODS, and to trade with non-parties. Developing country parties receive a grace period to implement the control measures on ODS; there is also an “essential use” exemption for those uses of controlled ODS for which no adequate substitute chemical exists. The Montreal Protocol regime created a financial mechanism, the Multilateral Fund, to assist developing country parties in meeting the incremental costs of implementation. The success of the protocol in part has hinged upon the Multilateral Fund as an inducement to participation by developing countries.

The institutional framework of the Montreal Protocol consists of a meeting of the parties (MOP),⁸⁰ a secretariat based at UNEP headquarters in Nairobi (known as the Ozone Secretariat), an Implementation Committee, a Technology and Economic Assessment Panel (TEAP), a Scientific Assessment Panel, and an Environmental Effects Assessment Panel. The assessment panels are all composed of independent experts nominated by governments but working in their personal capacities. There are also several technical options committees under the TEAP.

⁷⁹ See http://www.un.org/Depts/los/ITLOS/Tuna_cases.htm

⁸⁰ The COP is for the Vienna Convention, of which the Protocol is part





NATIONAL REPORTING

Parties to the Montreal Protocol must annually provide to the secretariat statistical data on the production, import, and export of ODS controlled by the protocol for the relevant baseline year and for each year since becoming a party. They must also report the amounts used for chemical feedstocks, amounts destroyed, and imports and exports of recycled substances. Parties permitted special use of controlled ODS under the essential-use exemption (discussed below) also must report on this use. Reporting requirements vary somewhat based on the extent to which a party has ratified the amendments. In addition, developing country parties whose country programmes have been approved by the Executive Committee of the Multilateral Fund, meaning they will receive funds from the fund, must report annually to the Fund on all controlled substances and on administrative and supportive action in the implementation of the country programmes. The Multilateral Fund, in turn, has allocated funds to each developing country party to create an “ozone focal point,” and arranges for experts to advise the focal points on data reporting.

National reports are the primary form of data gathering within the Montreal Protocol and form the basis of implementation review. Reporting rates are quite high; more than 85 per cent of the parties report their data, and assistance and polite encouragement is given by the Secretariat to those that do not.⁸¹ UNEP has also developed a manual on reporting that explains the process in detail and assists the parties in the preparation of reports.⁸² Reporting rates are helped by the fact that developing country parties are not eligible for the grace period in implementing ODS control measures unless they report their data within certain time limits, and in some cases, will not be eligible for Multilateral Fund assistance if reporting is not satisfactory. The secretariat has developed five formats for reporting necessary data. These formats are progressively linked; parties with little usage or production of ODS use one or perhaps two of the formats, while major producers and users use all five. The secretariat then collates and re-organises the received data and forwards it to the MOP and the implementation committee.

The secretariat is not formally empowered to verify or question the data supplied by the Parties. But in practice if the secretariat becomes aware of contrary data, perhaps through a report of the TEAP or another assessment panel, or if there are anomalies in the data, it will often inquire about it with the party. This process is always non-confrontational and is known as a “request for clarification.” These requests for clarification are now a regular and accepted part of the reporting practice, and parties generally honour them.

IMPLEMENTATION REVIEW

Once clarified (if necessary), the national reports are analysed by the secretariat and used as the basis of the formal implementation review institution. The secretariat first prepares a synthesis report summarizing the data for the MOP. The data completeness of the national reports, but not the data quality, are reflected in the secretariat’s report. The overall focus is on collective trends among the parties rather than individual cases, and discussions of implementation within the MOP are general rather than party-specific. Issues pertaining to the performance of particular parties are referred to the implementation committee.

⁸¹ K. M. Sarma, *Non-Compliance Procedures of the Montreal Protocol*, (n.d.). Mr. Sarma was Executive Secretary of the Ozone Secretariat

⁸² UNEP *OzonAction Programme, Handbook on Data Reporting under the Montreal Protocol* (1999)





The committee, which has ten members, meets twice a year whether a specific issue or problem is posed or not. Members, who are government representatives, may serve up to four years. It has met 25 times in its decade of existence. Its meetings are closed, but proceedings are available afterwards. The meetings are attended by representatives of the Ozone Secretariat; the Multilateral Fund; the Technology and Economic Assistance Panel; the Global Environment Facility (GEF); the UN Development Programme; UNEP; UNIDO; and the World Bank. Until 1994, the Committee's work was focused on data reporting issues. Since that time, its work has expanded, most notably in terms of the non-compliance procedure (discussed below under compliance review).

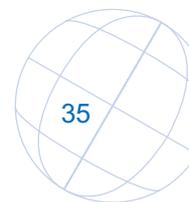
Data gathering and implementation review within in the Montreal Protocol system also occurs outside this formal institution by a wide range of directly and indirectly related bodies, such as the Executive Committee of the Multilateral Fund, the GEF, and the TEAP. The Secretariat of the Multilateral Fund gets sector-wise consumption data from all developing country parties. The implementing agencies of the Fund — UNEP, UNDP, and the World Bank — also make on-site visits to parties and gather implementation-relevant data as part of their work. The TEAP has a number of components, including technical options committees, the essential-use procedure, and *ad hoc* working groups on issues such as implementation in countries with economies in transition, each of which, in its work, addresses aspects of implementation (Greene 1998). The TEAP is quite large — with several hundred members — and consequently has access to considerable expertise. Collectively, all these institutions and committees engage in informal implementation review.

A brief examination of two components of the TEAP illustrates the richness of the informal implementation review process within the Montreal Protocol. Technical options committees examine alternatives for the use of ozone-depleting substances in different industries. As one analyst notes, “in practice ... [technical options committees] have become actively involved in informal implementation review as an inherent part of their adopted role of promoting the introduction of relatively ozone-friendly substitutes or alternative practices within their (industry) sector” (Greene 1998). Similarly, the essential-use exemption procedure provides a safety-valve for parties that have concerns about implementing the required phase-out of certain ozone-depleting substances for which no adequate substitute exists. The MOP in 1992 created rules and procedures governing the granting of such exemptions, which the TEAP employs. The MOP ultimately decides based on the recommendations that emerge from the TEAP process, and the TEAP reviews the granted-exemption every two years. The essential-use process, like the work of the Technical Options Committees, involves implementation review *de facto* if not *de jure*. Because parties involved identify and discuss areas in which full implementation and compliance are likely to be problematic, and the TEAP reviews any granted exemptions over time, implementation is reviewed over time. While these institutions are not formally designated “implementation review,” they are functionally congruent.

COMPLIANCE REVIEW

The parties to the Montreal Protocol created a specific Non-Compliance Procedure (NCP) operated by the Implementation Committee (Szell 1996, Victor, Raustiala and Skolnikoff 1998, Koskenneimi 1996, Barratt-Brown 1991). The NCP was adopted provisionally in 1990; the final version of the NCP was adopted in 1992 and amended in 1998.⁸³ The main objective of the NCP is to create a

⁸³ See Note by the Secretariat, Review of the Non-Compliance Procedure of the Montreal Protocol Pursuant to Decision IX/35 Of the Ninth Meeting of the Parties, (UNEP/OzL.Pro/WG.4/1/1, 14 April 1998)





multilateral, non-confrontational, and discursive process to further implementation. The implementation committee has no direct levers over non-compliant states and in using the NCP, relies upon facilitation and whatever political pressure emerges from open, transparent discussion of compliance difficulties. The NCP is fundamentally pragmatic in approach.

The implementation committee procedures with regard to the NCP are simple. The Secretariat prepares a report noting all cases of deviation by parties from the Montreal Protocol control measures. Parties mentioned in the secretariat's report are informed that their cases will be considered by the implementation committee at the next meeting and they are requested to attend and explain their situation. The NCP gives the committee permission to review reported government data, but not to verify that data unless at the invitation of the party. (A strengthening of this process was considered and rejected in the 1998 review of the NCP). The party(ies) in question may prepare a submission "explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance."⁸⁴ Representatives of the Multilateral Fund, UNEP, UNDP, UNIDO, the World Bank, and the TEAP attend the implementation committee meetings to discuss the case and their role in the implementation process within the party in question. The implementation committee can also gather information in the territory of the party concerned at the request of that party.

The discussion that ensues is reportedly friendly and non-confrontational but frank. The meetings are pragmatic and rarely focused on legal arguments or argumentation. In part, this reflects the distinction, at least in formal terms, between the judicial quality of the formal dispute resolution procedures under the Vienna Convention and the administrative quality of the NCP. The parties collectively have explicitly resolved that the NCP and the Vienna Convention's dispute resolution provisions are distinct procedures and thus the outcomes of the NCP process are not to be treated as binding should parties want to pursue dispute resolution.

Parties that are believed to be in non-compliance are asked to formulate a plan of action, including performance targets, which are then reviewed by the committee in subsequent meetings. The committee reports to the MOP on its meetings and includes recommendations for the specific cases. The committee's final report, which is public, does not contain information received in confidence. In practice, a party found to be in non-compliance reports to the MOP on remedial actions undertaken pursuant to the NCP process, though this is not formally part of the NCP. The MOP can take many possible actions. These include "appropriate assistance," including technical training and financial assistance; "issuing cautions;" and "suspension ... of specific rights and privileges under the protocol"⁸⁵

The NCP can be invoked in three ways:

- by a party concerned about non-compliance by another party;
- by the secretariat;
- and by a non-complying party about itself.

Interestingly, in the first set of cases relating to non-compliance, the involved parties came forward to "accuse" themselves of non-compliance and invoke the NCP. In 1995 Belarus, Bulgaria, Poland,

⁸⁴ Non-Compliance Procedure Paragraph 4, reprinted in Note by the Secretariat, Review of the Non-Compliance Procedure of the Montreal Protocol Pursuant to Decision IX/35 Of the Ninth Meeting of the Parties, (UNEP/OzL.Pro/WG.4/1/1, 14 April 1998)

⁸⁵ Indicative List of Measures that Might be Taken by a [MOP] in Respect of Non-Compliance with the Protocol





Russia, and Ukraine all made what were treated by the secretariat as formal submissions of non-compliance.⁸⁶ The implementation committee responded by initiating a process of development of compliance plans and reviews of those plans by the committee. Because complex technical issues were involved, the Committee also sought the advice of experts from the assessment panels described above.

Part of the power of the implementation committee to foster and elicit compliance in the cases of Belarus, Bulgaria, et al stemmed from a decision by the GEF, an organization formally external to the Montreal Protocol but important for its operations because of the GEF's mandate to fund projects related to ozone depletion. The GEF was providing funds for the incremental costs of compliance to Belarus and the other parties involved in the NCP process. The GEF decided to withhold additional funds for new ozone-related projects in those parties until their compliance plans were approved by the implementation committee. It worked out individual programmes with the parties involved and the GEF funds were then distributed in tranches. The GEF played no formal role in the content of the agreed programmes, but the continued disbursement of GEF funds is in practice predicated on a positive "report card" from the committee.

The committee's handling of the Belarus, et al, submissions and its review of subsequent country-specific plans has reportedly worked well, (Victor, Raustiala and Skolnikoff 1998, Romano 2000, Lang 1995) and all of the original five parties were, as of 1998, moving toward compliance with the Montreal Protocol, though some problems with full compliance are likely to persist.⁸⁷ A special additional fund for Russia administered by the GEF was set up to help reduce ODS production and help this process along. In general, the implementation committee has operated the NCP with some finesse. It has avoided highly contentious issues, such as whether or not contributions to the Multilateral Fund are legally obligatory and thus whether failure to contribute constitutes non-compliance.

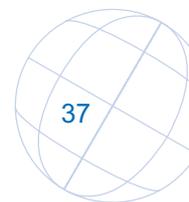
Since the first cluster of cases within the NCP there have been seven similar cases, all former planned economies undergoing some form of transition to a market economy: Azerbaijan; Czech Republic; Estonia; Latvia; Lithuania; Moldova; and Uzbekistan. Each of these cases was placed before the implementation committee by the secretariat.⁸⁸ Each has been treated in a similar manner. Other cases have come to the attention of the committee but have been "settled" through explanations by the parties involved. As developing country party obligations to phase-out ODS accelerate, there may be new cases of non-compliance that deviate from this prior pattern and which may be more difficult for the NCP system to handle. How the NCP and the implementation committee will handle such cases — and how the Committee's actions will intersect with those of the Multilateral Fund — will be an important test of the effectiveness of the broader non-compliance system of the Montreal Protocol.

In 1997, an *ad hoc* Working Group of Legal and Technical Experts on Non-Compliance was created, with members from 14 parties, to review the performance of the NCP. A motivating concern was the experience with the first wave of submissions from parties with economies in transition. The working group requested submissions of proposals on revamping the NCP. Most submissions indicated general satisfaction with the *status quo*, and the proposed changes were generally mild

⁸⁶ UNEP/OzI.Pro/ImpCom/11/1, 14 September 1995. The parties involved may not have intended to invoke the Non-compliance Procedure. See Yoshida, O. (1999). Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions. *Colorado Journal of International Environmental Law & Policy*, 10, 95

⁸⁷ Id. at 159; interviews, Secretariat

⁸⁸ Sarma, n.d. *supra*





– ranging from expanding the number of members of the implementation committee to considering granting the committee greater powers to explore potential cases of non-compliance on its own initiative and to declare a formerly non-compliant party to have returned to compliance. While more severe changes were proposed, such as Canada’s proposal to empower the MOP to declare a party to be a “non-party” in cases of persistent non-compliance, these were ultimately rejected. The majority of Montreal Protocol parties appeared concerned that any radical strengthening of the coercive or punitive powers of the NCP process could drive non-compliant states out of the Montreal Protocol system altogether, consequently undermining any gains that might be made through a stronger compliance system.⁸⁹

EFFECTIVENESS REVIEW

Review of the effectiveness of the Montreal Protocol was mandated in Article 6 of the protocol, which stipulates that “beginning in 1990, and at least every four years thereafter, the parties shall assess the control measures ... on the basis of available scientific, environmental, technical, and economic information.”⁹⁰ On the basis of these assessments, the regulatory controls have been tightened and expanded significantly, through the 1990 London Amendments and 1992 Copenhagen Amendments, for example, as well as through MOP decisions. The effectiveness review institution led in 1989 to the creation of the assessment panels. In addition, at MOP 2 the 1990 review of the protocol resulted in the establishment of the Multilateral Fund.⁹¹ Every four years the scientific and environmental effects panels produce an assessment report for the MOP; a synthesis report is also prepared. The TEAP produces its assessment reports annually. These reports, while important, are primarily scientific and technical in nature. Consequently, they do not emphasize the review of institutional effectiveness.

THE 1989 BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

BASIC STRUCTURE

The Basel Convention entered into force in 1992 and has 142 parties. It has three key objectives to: reduce transboundary movements of hazardous wastes; minimize the creation of such wastes; and prohibit their shipment to countries lacking the capacity to dispose of hazardous wastes in an environmentally-sound manner. The animating concern which led to the negotiation of the Basel Convention was shipments of waste from industrialized states to developing states. As in CITES, exports to non-parties are prohibited unless policies or agreements are in place that are functionally-equivalent to those in the Basel Convention.

For its core mission of controlling transboundary waste movements, Basel employs a scheme of prior notification and consent for import granted by a “competent authority” in the importing country. The parties have strengthened Basel’s provisions over time, most notably through a decision

⁸⁹ See Note by the Secretariat, [Review of the Non-Compliance Procedure of the Montreal Protocol Pursuant to Decision IX/35 Of the Ninth Meeting of the Parties](#), (UNEP/OzL.Pro/WG.4/1/1, 14 April 1998); Interviews, Ozone Secretariat

⁹⁰ See also UNEP ETEU, 1998 for a review of the effectiveness of the Montreal Protocol

⁹¹ Sand, 1990; citing [Report of the Second Meeting of the Parties to the Montreal Protocol](#), U.N. Doc. UNEP/OzL.Pro/2/3, Annex IV: Terms of Reference for the Multilateral Fund (June 1990)





banning export from OECD to non-OECD parties for final disposal (later extended to export for recovery and recycling) and through the negotiation of a Liability and Compensation Protocol.⁹² (Because the protocol was negotiated after research on this report commenced, it is not analysed further here). While the ban and the protocol have consumed significant political and institutional attention throughout its first decade, as Basel entered its second decade in 1999, it is increasingly focused on implementation, compliance and assessment.

Institutionally, the Basel regime includes a COP, a secretariat based in Geneva, the Bureau (a sub-set of parties) and several smaller groups, such as the Working Group for the Implementation of the Basel Convention.

NATIONAL REPORTING

Basel parties must report annually to the COP via the secretariat. These reports must contain:

- Information regarding transboundary movements of hazardous wastes in which the party has been involved;
- Data on the hazardous waste exported, such as amount and destination;
- Information on the measures adopted to implement the convention;
- Information gathered on the effects upon human health and the environment of the generation, transportation, and disposal of hazardous waste.

In addition, parties must ensure that notifications concerning any transboundary movement of hazardous waste are sent to the Basel Secretariat “when a party that considers that its environment may be affected by that transboundary movement has requested that this should be done.”⁹³ This is usually done simply by fax, but it is unclear how high a percentage of real movements are represented by the notifications received by the secretariat. Less than 100 a year on average are received. The secretariat then prepares a synthesis report based on the above information received from Parties as well as from other sources, such as the Basel Convention subsidiary bodies. Parties exercising their right to prohibit the import of hazardous wastes must inform others. Parties that enter in other bi- or multilateral agreements regarding the hazardous waste trade also must notify the secretariat.

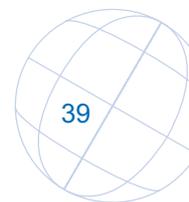
Reporting rates for the annual reports of the Basel Convention are not high, but appear to exhibit an upward trend. Currently, less than 50 per cent of the parties report at all, and the reports that are submitted are, as is true in many MEAs, of variable quality and not always comparable. Standardized reporting formats are provided to parties by the secretariat, which also will accept electronic reports. Informally, the Basel Secretariat, like the CITES Secretariat, receives information on hazardous waste movements from NGOs, the World Customs Organization, Interpol, and other international organizations.

IMPLEMENTATION REVIEW

There is no formal implementation review mechanism in the Basel Convention. But the Basel parties have created a Working Group for the Implementation of the Basel Convention. The working

⁹² This decision was of questionable legal authority and the parties later adopted Decision III/1, which proposes formally incorporating the ban into the convention. This amendment has not yet come into force

⁹³ Article 13.4





group does not review domestic implementation on a party-by-party basis but instead looks broadly at implementation-related issues. At recent meetings, the working group has, for example, discussed the status of the export ban; proposals to develop an implementation and compliance mechanism (see below); party reporting practices; and the role of regional centres.

COMPLIANCE REVIEW

In 1994, what was then called the Open-ended Ad Hoc Committee for Implementation (A committee of the Basel parties) requested the secretariat to arrange for a study on the monitoring of implementation and compliance.⁹⁴ The report reviewed the structure of the Basel Convention and, relying heavily on the Montreal Protocol NCP as a model, described possible variations of a “non-implementation/non-compliance procedure” run by a “compliance committee.”⁹⁵ The report noted, however, some salient differences between the underlying structure of obligations and harms at stake in the Montreal Protocol and Basel. While the fundamentally multilateral character of the Montreal Protocol led to the creation of a flexible response system within the NCP aimed at restoring the party to compliance, Basel is more bilateral in character. Hence the work of any compliance committee may dovetail with claims brought under the Protocol on Liability and Compensation, should that protocol be approved and come into force.

The Basel parties have more recently begun the exploration of a compliance review institution through the Consultative Sub-Group of Legal and Technical Experts, now called the Legal Working Group. At COP 4 in 1998, the parties requested that the group continue its examination of “the relevant issues related to the establishment of a mechanism or procedure for monitoring implementation of and compliance with the Basel Convention with a view to recommending, as soon as practicable, the best way to promote full implementation of the provisions of the Basel Convention”⁹⁶ This process has continued through COP 5.⁹⁷

In 1999, the Basel parties submitted relevant proposals on a compliance mechanism to the Secretariat.⁹⁸ There was general agreement among the parties that a new mechanism would promote and improve compliance and implementation. The parties also largely concurred that the following elements were desirable; transparency, cost-effectiveness, a preventative focus, flexibility and non-bindingness, and a facilitative approach.

A consolidated proposal was forwarded for consideration at COP 5 in December 1999, and negotiations on the topic are continuing. The COP 5 proposal reflected the general elements listed above.⁹⁹ In addition, the following elements were included:

- The body should be small (14-20 members) and geographically-representative.
- It may be composed of independent experts and/or government representatives, with fixed terms.

⁹⁴ [Report of the Open-Ended Ad Hoc Committee for Implementation](#), UNEP/CHW/W.1/2/14 (December 23 1994)

⁹⁵ UNEP/CHW.3/Inf.5 (June 14 1995)

⁹⁶ [Report of the Consultative Sub-Group of Legal and Technical Experts](#), 3rd Session, 22-23 June 1998

⁹⁷ See e.g. Note by the secretariat, [Monitoring the Implementation of and Compliance with the Obligations Set Out by the Basel Convention](#), UNEP/CHW/LWG/1/3 (April 6-7 2000)

⁹⁸ UNEP/CHW/WG.4/LSG/2/2 1 March 1999

⁹⁹ UNEP/CHW/C.1/4/1





- It should provide the Parties with advice and information relating, *inter alia*, to domestic regulation and enforcement, training of personnel, and waste management techniques.
- The body may address individual cases.
- Such cases may be invoked by a Party with regard to its own activity or with regard to the activities of other Parties with which it is directly involved.
- The COP itself or subsidiary bodies may also be able to invoke the procedure

These desiderata are strikingly similar to those reflected in the UNFCCC work on a compliance system, and also reflect many elements present in the Montreal Protocol Non-Compliance Procedure.

EFFECTIVENESS REVIEW

The Basel Convention mandates that three years after the convention's entry into force, and at least every six years thereafter, the COP must undertake an evaluation of its effectiveness. The first evaluation was prepared by an external consultant in 1995, and noted, in a 21-page report, that while it was premature to evaluate the convention in terms of its core goals, it could be evaluated in terms of whether implementation was on the right track and "conditions ... [were] created for the attainment of long-term goals."¹⁰⁰ The report examined the ratification history, institutional developments, work of the secretariat, and financial state of the convention. It also explored the parties' implementation of the main provisions, finding that while industrialized parties have largely enacted the necessary legislation, very few developing parties have done so. The overall message was guardedly positive. The report did not rigorously examine the actual impact of the convention but, in light of the limited history, mainly focused on the state of domestic and international implementation and the identification of apparently positive and negative developments and decisions.¹⁰¹

THE 1992 UN FRAMEWORK CONVENTION ON CLIMATE CHANGE AND THE 1997 KYOTO PROTOCOL

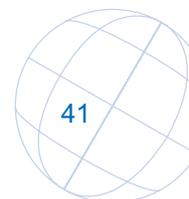
BASIC STRUCTURE

The UNFCCC was a centrepiece of the 1992 UNCED summit. The UNFCCC entered into force in 1994 and has 178 parties. Its aim is the stabilisation of greenhouse gas emissions at a level that would prevent dangerous anthropogenic interference with the climate system. The convention enshrines the principle of "common but differentiated responsibilities," reflecting the fact that while climate change is a truly global issue, the vast majority of historical emissions of greenhouse gases are from industrialized states.

The primary substantive obligation in the UNFCCC for developed country parties is an aspirational goal to return their emissions levels of greenhouse gases (excluding greenhouse gases controlled by the Montreal Protocol) to 1990 levels by the end of 2000. Few if any developed country parties will reach this goal through conscious action; some will do so coincidentally, mostly because of

¹⁰⁰ Evaluation of the Effectiveness of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP/CHW.3/Inf.7 (June 1995) at 3

¹⁰¹ E.g. "the activities of the secretariat ... have provided and will continue to provide states and relevant international bodies with the necessary information base, as well as suitable legal and institutional mechanisms for dealing with the problem" *Id.* pg 21





economic recession resulting from the transition to a market economy. Developed country parties also have an obligation to provide new and additional resources to developing country parties. Developing country parties share with their developed counterparts a series of quite general obligations such as formulating national programmes, cooperating in the development and transfer of useful technology, and promoting research related to climate change.

Institutionally, the UNFCCC created a Conference of the Parties, a Subsidiary Body on Implementation (SBI), a Subsidiary Body for Scientific and Technological Advice (SBSTA), and a Secretariat, based in Bonn, Germany. Though not formally part of the UNFCCC, the Intergovernmental Panel on Climate Change is the leading source of climate science and assessment for the UNFCCC and, in practice, an important input into the climate policy process.

The Kyoto Protocol to the UNFCCC, opened for signature in 1997 but not yet in force, creates a much more detailed and complex regulatory structure for greenhouse gas emissions, reflecting both a greater sense of urgency and dissatisfaction with provisions and implementation of the UNFCCC (Grubb, Vrolik, and Brack 1999). The Kyoto Protocol gives developed country parties “assigned amounts” of greenhouse gases that they may not exceed in a specified period, running from 2008-2012. The protocol’s target is an overall reduction of emissions by at least 5 per cent below 1990 levels, but each developed party has a discrete reduction commitment (and in some cases, such as Australia, a permitted increase). By 2005, these parties must have made “demonstrable progress” in achieving their commitments under the protocol. Most notably, the Kyoto Protocol creates three related “flexibility mechanisms” to enhance implementation and lower the costs of greenhouse gas emissions reductions: emissions trading among developed parties; joint implementation among developed parties; and a “clean development mechanism,” by which developing and developed parties may jointly achieve emissions reductions. Both UNFCCC and Kyoto Protocol obligations are discussed here.

NATIONAL REPORTING

The UNFCCC and Kyoto Protocol contain a comparatively well developed system of national reporting. UNFCCC Annex I Parties (the set of industrialized country parties) must annually submit a “national communication” to the COP containing a general description of steps taken or planned to implement the UNFCCC. These communications must contain a specific estimate of the effects that the policies and measures undertaken will have on emissions and removals. Annex I parties must also develop, periodically update, and submit to the COP national inventories of anthropogenic greenhouse gas emissions by sources and removals by sinks. In addition, the UNFCCC commits all parties to cooperate in the exchange of relevant scientific, legal, and other information related to climate change and to response strategies.

Non-Annex I parties also must submit national communications, but have a longer time period in which to do so. Least developed parties may delay indefinitely at their discretion. While the Annex I reporting process has been underway for several years, the secretariat has just begun receiving initial communications from non-Annex I parties. As of December 2000, 40 such communications had been submitted.¹⁰²

¹⁰² For an update see www.unfccc.de/resource/natcom/index.html. In a compilation/synthesis of the earliest non-Annex I communications, the secretariat stated that “a dominant theme of this compilation and synthesis is the need for better quality of data, improved information flows and scientific research, financial resources and technical expertise, improved methodologies, and institutional development.” Note by the secretariat, *First Compilation and Synthesis of Initial Communications from Parties Not Included in Annex I to the Convention*; FCCC/SBI/1999/11 (14 September 1999)





The Kyoto Protocol reporting system essentially piggybacks on the UNFCCC system by mandating that the developed country Parties include, in the inventories and national communications submitted pursuant to the UNFCCC reporting process, information related to the more precise and complex Kyoto substantive obligations.

IMPLEMENTATION REVIEW

National communications and inventories have been and, should the Kyoto Protocol enter in force, will continue to be funnelled through and reviewed by the UNFCCC secretariat. Reviews of national communications have been conducted on the basis of general guidance issued by the parties at COP 1.¹⁰³ As reiterated at COP 2, this guidance states that:

Review should provide a thorough and comprehensive technical assessment of the implementation of the convention commitments by individual Annex I Parties and Annex I parties as a whole. Its purpose is to review, in a facilitative, non-confrontational, open and transparent manner, the information contained in the communications from Annex I parties to ensure that the [COP] has accurate, consistent, and relevant information at its disposal to assist in carrying out its responsibilities.¹⁰⁴

The current practice is that a compilation and synthesis of national communications is prepared by the secretariat, and in this process errors, omissions, and inconsistencies are sometimes identified. The information provided by the parties is not challenged. However, the in-depth review institution discussed below serves to clarify and “improve” data reporting in many cases. Similarly, the quality of inventory information and the reliability of emission and removal estimates are not assessed.¹⁰⁵ Compliance with these reporting requirements is moderate, for example, as of June 1999 only 25 Annex I parties out of 36 had submitted emissions inventory data for 1990-96 to the secretariat.¹⁰⁶ These data were due in April 1998 but only four parties complied with that deadline.¹⁰⁷ Less than half had submitted their national greenhouse gas inventories as of June 1999 which were due in April 1999. Ultimately, data submitted are made available on the UNFCCC website.¹⁰⁸

To supplement national reports, the UNFCCC also employs what are termed “in-depth reviews,” which are central to the current implementation review institution. As of late 1999, about 40 in-depth reviews had been conducted by the secretariat. Each results in a country report, averaging 25 pages in length.¹⁰⁹ The reviewers are outside experts drawn from a pre-approved roster. Each review team consists of 3-4 individuals, drawn from Annex I, developing country, and countries with economies in transition parties, plus a coordinator from the secretariat. The review team visits the country for approximately one week. The draft country report is sent to the party for

¹⁰³ Note by the secretariat, National Communications From Parties Included in Annex I to the Convention: Future Review Process, Including That Under Article 7 and 8 of the Kyoto Protocol; FCCC/SBI/1999/6 (5 May 1999)

¹⁰⁴ Decision 2/CP.1, quoted in id

¹⁰⁵ Note by the secretariat, National Communications From Parties Included in Annex I to the Convention: Elements of a Review Process; FCCC/SBSTA/1999/3 (21 April 1999)

¹⁰⁶ Subsidiary Body on Implementation, Draft Conclusions by the Chairman, Annual Inventories of National Greenhouse Gas Data for 1996; FCCC/SBI/1999/L.5 (8 June 1999)

¹⁰⁷ Note by the secretariat, Report on National Greenhouse Gas Emissions Inventory Submissions from Annex I Parties for 1990-1996; FCCC/SBI/1999/5 (22 April 1999)

¹⁰⁸ www.unfccc.de

¹⁰⁹ The review process for inventories is now separate and discussed further below





comments (a process that in practice can take up to six months) and those comments are then incorporated. If the party ultimately disagrees with the report it can insert its own addendum of comments. To date this has never happened. The country reports are public and posted on the UNFCCC website. The Kyoto Protocol strengthens the in-depth review process marginally by requiring that the secretariat list, “questions of implementation” indicated in the reports for further consideration by the COP. Earlier drafts of the protocol, however, had given the secretariat much greater fact-finding powers.

The in-depth reviews are mainly a check on the reporting process and are intended to be informative without being aggressive in highlighting implementation problems. As a result, information about implementation or its lack is provided in the country reports, often without explicitly drawing out its implications. The secretariat’s own view is that the process should be confidence-building rather than inquisitorial, and should have as its primary goal the enhancement and development of the reporting process and the acquisition and dissemination of relevant data.¹¹⁰ One useful outcome of the current UNFCCC review process is greater comparability of data across countries and hence greater clarity about overall trends and comparative performance among parties. The reviews “clean” and standardize the reported data, increasing transparency and filling information gaps. The degree to which the full potential of the in-depth reviews is realized is unclear, however. Although the reviews are distributed at meetings, parties appear not to pay close attention to reports on other parties and NGOs generally pay only limited attention.¹¹¹

How the entry into force of the Kyoto Protocol, should it occur, will influence the development of this review institution is an important but unresolved question. The Kyoto Protocol goes further than the UNFCCC by requiring in Article 8 that national communications and inventories be reviewed by “expert review teams.” These Article 8 expert review teams are to prepare reports for the COP:

assessing the implementation of the commitments by [each industrialized country party] and identifying any potential problems in, and factors influencing, the fulfilment of commitments. Such reports shall be circulated by the secretariat to all parties to the convention. The secretariat shall list those questions of implementation indicated in such reports for further consideration by the [COP] ...¹¹²

At COP 4, the parties requested that the UNFCCC subsidiary bodies consider the scope, modalities, and options for the review institution. The consensus among the parties was that the review institution be configured to comprise two related but distinct parts: a technical review of inventory information; and review of non-inventory information contained in national communications.¹¹³ In addition, two sets of guidelines need to be created – for the UNFCCC review institution and for the review of implementation by expert teams as required by the Kyoto Protocol. A web-based system for inventory data and methodologies is also under consideration.

The secretariat, SBI and SBSTA have begun analysis of the reporting and review process for greenhouse gas inventories. Inventory submissions have had a number of problems thus far, in

¹¹⁰ FCCC Secretariat interviews

¹¹¹ Some private actors have shown greater interest and a small secondary market in the content of the reports has developed in certain major industrialized states

¹¹² Article 8

¹¹³ Note by the Secretariat, National Communications From Parties Included in Annex I to the Convention: Future Review Process, Including That Under Article 7 and 8 of the Kyoto Protocol; FCCC/SBI/1999/6 (5 May 1999)





addition to delays in reporting them: insufficient transparency; inconsistency in methodologies across the parties and hence in comparability; insufficient completeness; and frequent recalculations.¹¹⁴ The secretariat has proposed a more intensive “technical review” of inventories that would include:

- initial review at the domestic level, by the submitting party itself;
- a first stage of review by the secretariat, in which it would check the scope, completeness, consistency, timeliness, and adherence to reporting guidelines of submissions. Inventory information would also be “compared with previous submissions to detect anomalies;” and
- A synthesis and assessment report by the secretariat and a set of inventory experts nominated by the parties. The report would note inconsistencies identified in party submissions.

Individual party reviews might also include on-site visits by teams of experts, or further paper reviews. These expert reports could be posted on the UNFCCC website and, as the secretariat notes, “could serve as forerunners of important components of reports to assess the implementation of parties under Article 7.3 of the Kyoto Protocol.”¹¹⁵

The development of quantitative emissions limitations in the Kyoto Protocol has made greater attention to the details of the implementation review institution imperative. In this context, implementation review begins to merge with compliance review. As the secretariat itself has noted, “under the Kyoto Protocol the review of information becomes one of the crucial elements of establishing compliance with legally binding commitments.”¹¹⁶

COMPLIANCE REVIEW

Article 18 of the Kyoto Protocol calls for the creation of “appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance”¹¹⁷ Work on this has occurred largely through the Joint Working Group on Compliance. The call within Article 13 of the UNFCCC for a “multilateral consultative process ... for the resolution of questions regarding the implementation of the Convention,” which could have evolved into a form of compliance/implementation review, was not fully heeded. This provision is currently moribund but there are some indications it may be revived.

In June 1999, the Working Group on Compliance invited UNFCCC parties to make submissions to the secretariat in response to a questionnaire about a compliance system under the Kyoto Protocol.¹¹⁸ The question topics included the principles that should guide the development of procedures and mechanisms, the triggering of binding consequences in the event of non-compliance; the role of review teams, and the relationship between a compliance system and

¹¹⁴ Technical Paper, [Report on Data Comparisons](#); FCCC/TP/1999/2 (2 May 1999)

¹¹⁵ Note by the Secretariat, [National Communications From Parties Included in Annex I to the Convention: Elements of a Review Process](#); FCCC/SBSTA/1999/3 (21 April 1999)

¹¹⁶ Note by the Secretariat, [National Communications From Parties Included in Annex I to the Convention: Future Review Process, Including That Under Article 7 and 8 of the Kyoto Protocol](#); FCCC/SBI/1999/6 (5 May 1999)

¹¹⁷ Article 18

¹¹⁸ [Report of the Joint Working Group on Compliance on its Work During the 10th Sessions of the Subsidiary Bodies](#). FCCC/SB/1999/CRP.3 (9 June 1999)





the UNFCCC Multilateral Consultative Process.¹¹⁹ The submissions included the following themes:

- The compliance system should promote implementation, facilitate compliance by providing advice and assistance, and deter non-compliance by imposing consequences on non-compliant parties.
- The system should apply to the provisions of the protocol as a whole.
- Expert review teams established by the protocol will undertake technical assessment, but it remains unresolved how this process formally should feed into the compliance system.

The submissions questioned:

- whether the facilitative and enforcement functions implied by the foregoing also imply separate institutions
- whether the body(ies) should be standing or *ad hoc*
- what the nature and scope of any penalties that may ensue should be.

The process of developing a compliance review system has continued, with further meetings and more submissions made for consideration at the 12th meeting of the SBI and SBSTA (June 2000) and at COP 6 in December 2000.

The flexibility mechanisms famously introduced in the Kyoto Protocol both complicate and aid the work of creating a compliance system. The flexibility mechanisms, by endorsing many sorts of actions and deals, create greater opportunity for non-compliance and difficulties in assessing non-compliance, but also provide many ways for states that would otherwise find compliance impossible to move into compliance. The flexibility mechanisms also provide some useful attributes of a system of punishments and rewards, and indeed many of the proposed models for a compliance system incorporate denial of access to the flexibility mechanisms as a means of enforcement.

Throughout the deliberations over a compliance system, the model of the Montreal Protocol Implementation Committee and its NCP clearly has been important. But the Montreal Protocol system has only been a partial model, because of the more complicated regulatory structure envisaged in the Kyoto Protocol, the learning that has occurred among governments, and the higher economic stakes involved in climate change. At COP 5 in 1999, several more concrete proposals were made for a compliance system. These were broadly reflective of the consensus views elaborated through the Compliance Working Group. The European Union's proposal, for example, contained a compliance committee with two branches – a facilitative and enforcement – each administering a distinct procedure. The Samoan proposal included a compliance body concerned with all commitments, an “eligibility committee” concerned mainly with the flexibility mechanisms, and an “ad hoc appeal body” that would engage in “quasi-judicial appeal of imposition of binding penalties.”

In almost all proposed models, however, only the parties, and not the secretariat, can initiate the compliance review process.¹²⁰ Most Parties also appear to favour a body composed of experts

¹¹⁹ Note by the Co-Chairs of the Joint Working Group on Compliance, *Elements of a Compliance System and Synthesis of Submissions*. FCCC/SB/1999/7 (17 September 1999)

¹²⁰ The EU model, at least in its schematic form, implies that the secretariat could initiate the process based on information drawn from the parties' national communications and the reports of the Article 8 expert review teams





acting in their personal capacities. But many details remain to be decided. One significant legal issue is over the power of the compliance body to dictate binding consequences for parties in the event of non-compliance. The Kyoto Protocol bars the creation of any procedures entailing binding consequences for non-compliance without an amendment to it. The solution will likely be that the ultimately-agreed upon compliance procedure and body will only make recommendations of consequences to be decided upon by the COP – a solution that is appealing not only because it adheres to the legal text but because it keeps the power over the non-compliance procedure's impact politically controlled.

A perhaps more thorny but related issue is the degree of “automaticity” the compliance system should entail. Automaticity refers to the level of discretion the compliance body has given a particular set of facts pertaining to non-compliance. Some parties prefer a compliance review system with a clear set of consequences mapped onto particular behaviours that is signalled to the parties in advance: essentially a judicial model. Such a system would permit parties to anticipate consequences of non-compliance based on an agreed indicative list of consequences and reduce the role of politics in the system. It might also increase the deterrent power of the compliance system. Other parties prefer more room for case-by-case adjudication based on special circumstances and facts: a more diplomatic model. The argument of those opposing automaticity is that in practice, particular fact situations will vary in idiosyncratic ways that will demand individualized treatment rather than the formalistic application of rules. This debate is reminiscent of the debates over the evolution of the GATT/WTO dispute resolution system (see Chapter 4), a debate that was ultimately resolved, in the 1994 Dispute Settlement Understanding, in favour of a judicial model.¹²¹

EFFECTIVENESS REVIEW

There currently is no effectiveness review institution in the UNFCCC. The work of the Intergovernmental Panel on Climate Change, though an integral part of any likely effectiveness review, is primarily focused on ascertaining the veracity, scope, and likely impacts of anthropogenic climate change, and does not explicitly investigate the role of the UNFCCC in alleviating it, in part because the extent of meaningful anthropogenic climate change is itself still contested.

THE 1992 CONVENTION ON BIOLOGICAL DIVERSITY

BASIC STRUCTURE

The Convention on Biological Diversity (CBD) was, like the UNFCCC, part of the UNCED process. It entered into force in 1993 and has 180 parties. While the original proposal by the US envisioned an umbrella agreement linking all the extant wildlife treaties, the CBD grew significantly in scope during its negotiation (McConnell 1996, Raustiala and Victor 1996). The CBD addresses a wide range of biodiversity-related issues, including habitat preservation, intellectual property rights, biosafety, and indigenous peoples' rights. The CBD is a landmark in international environmental law for its comprehensive, ecosystems approach to biodiversity protection. It has three main goals: the conservation of biodiversity, the promotion of its sustainable use, and the equitable sharing of the benefits of genetic resources.

¹²¹ For a description of the early, diplomatic GATT system for dispute resolution see Hudec, R. (1970). The GATT Legal System: A Diplomat's Jurisprudence. *Journal of World Trade* 4, 3





Substantively, the CBD is oriented around national actions. The primary obligations of the parties are to develop national programmes for biodiversity protection, monitor biodiversity and biodiversity threats, establish protected areas, and generally seek to preserve biodiverse habitats. Both *in situ* and *ex situ* conservation is encouraged, though *in situ* is preferred. Genetic resources are declared by the CBD to be under sovereign control, but parties must facilitate access to those resources, as well as promote the transfer of technologies and exchange information relevant to the protection of biodiversity. Developed country parties are required to provide new and additional financial resources to help less developed parties meet the agreed full incremental costs of implementing the CBD. In 2000, the Cartagena Protocol on Biosafety was opened for signature. It has 2 parties and 91 signatures, but is not yet in force. (Because the protocol was negotiated after research on this report commenced, it is not analysed further here).

Institutionally, the CBD creates a COP, a secretariat, based in Montreal, a Subsidiary Body on Scientific, Technical, and Technological Advice (SBSTTA), and a financial mechanism. COPs have occurred in recent years on a two-year cycle. A clearinghouse mechanism has also been created to help facilitate information exchange among the parties.

NATIONAL REPORTING

The CBD only briefly and generally mentions reporting: A Party to the CBD must “at intervals to be determined by the [COP], present to the [COP], reports on measures which it has taken for the implementation of the provisions of this convention and their effectiveness in meeting the objectives of this Convention.”¹²² At COP 2, the parties decided that the first national reports would be due at COP 4 (1997), with the subsequent periodicity decided then.¹²³ The parties also decided that the first reports would focus on the implementation of general measures for conservation and sustainable use, and developed brief guidelines. A total of 93 developing country parties had “enabling activity” projects approved under the GEF that included the preparation of national reports.¹²⁴ At COP 4, the first reports were gathered and assessed. Compliance with reporting requirements was not high; only five parties met the formal deadline for reports, but by COP 4 itself, approximately 80 national reports were gathered, with an additional 21 added during the COP.¹²⁵ Most were posted on the CBD website.

For the first reports, the secretariat prepared a synthesis document noting that the format, length, and content of the reports varied very widely.¹²⁶ At COP 4, the parties noted “the difficulty experienced ... in preparing national reports” and called for further guidelines to be created.¹²⁷ The parties requested the SBSTTA to provide further advice on the intervals and form of future reports. Developed country parties were urged to include in their reports information on their financial support for the objectives of the CBD, and the GEF was requested to continue to provide financial assistance for the preparation of reports. The secretariat has developed as a pilot project a matrix

¹²² CBD Article 26

¹²³ Decision II/17, [Form and intervals of national reports by parties](#)

¹²⁴ See www.biodiv.org/natrep/index

¹²⁵ The formal deadline in fact was pushed back several times; the low number might have been even lower had it not. However, GEF enabling funds were reportedly quite late and many parties relied on those funds to prepare their reports

¹²⁶ Revised note by the Executive Secretary, [Synthesis of Information Contained in National Reports of the Implementation of the Convention](#); UNEP/CBD/COP/4/11/Rev. 1, 30 April 1998

¹²⁷ Decision IV/14 [National reports by Parties](#)





of questions for revamping the reporting process. This will in part help explore the possibility of improving the reporting process and making it a useful tool for Parties in their national implementation of the CBD. The CBD is, like the CMS, CITES, World Heritage, and Ramsar, considering harmonization of reporting with other biodiversity-related conventions.

In other, separate decisions not formally related to regular national reporting, parties have been encouraged to submit information on:

- the implementation of measures related to access to genetic resources and national authorities responsible for controlling access rights;¹²⁸
- their financial support for the objectives of the CBD;¹²⁹
- the development of national legislation and strategies to implement the CBD provisions relating to indigenous peoples;¹³⁰
- studies undertaken on the impact of intellectual property rights on the CBD's objectives;¹³¹ and
- studies related to the incorporation of market and non-market values of biodiversity into national biodiversity plans;¹³²

Though not formally an institution of reporting and review, the work of the innovative clearinghouse mechanism is worth noting because it can, in practice, provide certain limited functions of review through its exchange of information among the CBD parties. The clearinghouse mechanism is a decentralized and open network among the parties, with the secretariat acting as a platform or gateway for exchanges. There are approximately 140 nodes (representing, essentially, parties) in the clearinghouse mechanism, out of the total number of parties. While the information exchanged or sought can be on any topic related to the CBD, some is related to implementation. If the clearinghouse mechanism works well, the parties will be able to learn about and from one another's implementation of CBD commitments.

IMPLEMENTATION REVIEW

The CBD has begun formal consideration of an implementation review mechanism.¹³³ In a 1999 note, the secretariat discussed three potential approaches to implementation review. The first suggested approach was the creation of a new, dedicated body to review implementation, which would meet intersessionally. The body could take different forms, such as open-ended or limited in composition (e.g. like the Montreal Protocol Implementation Committee). The second suggested approach was to adapt existing working groups under the COP to review implementation. The third approach was to use regional and sub-regional meetings to review implementation. Some Parties have indicated that they want to create a new body for implementation modelled on the SBI in the climate change regime. Developed country parties, concerned about institutional proliferation, largely oppose the creation of an implementation body. Despite the controversy, governments accepted in principle the need for review of the implementation of the CBD at the intersessional meeting in 1999. At that meeting, the

¹²⁸ Decision III/15

¹²⁹ Decision III/6

¹³⁰ Decision III/14

¹³¹ Decision III/17

¹³² Decision III/18

¹³³ Note by the Executive Secretary, *Analysis of the Development and Experience of the Operations of Other Conventions and Agreements*, UNEP/CBD/ISOC/2 (10 May 1999)





parties noted the need to enhance the review of the CBD and proposed various options, including the creation of a working group on implementation.¹³⁴

COMPLIANCE REVIEW

The CBD has no compliance review institution. There is currently no consideration of creating one, largely because the provisions of the CBD are quite general and heavily qualified, making any examination and determination of compliance extremely difficult and controversial. A compliance institution has only been anticipated in the context of the Biosafety Protocol, where there is a provision to develop a non-compliance procedure at a future date.¹³⁵

EFFECTIVENESS REVIEW

There is no general effectiveness review institution in the CBD. However, effectiveness review partially crops up in two ways. First, the CBD's national reporting requirements dictate attention to the effectiveness of the measures undertaken to implement the CBD.¹³⁶ Second, because the negotiation of the CBD's financial mechanism was so contentious, Article 21 of the CBD called for a review of its effectiveness. The parties then developed guidelines for the review, which took place at COP 4.¹³⁷ The focus of the review was the effectiveness of the financial mechanism in providing resources and in assisting implementation and the appropriateness of the GEF as the financial mechanism. COP 4 called for improvement and requested the GEF to report back at COP 5, where a second review of effectiveness will take place.

THE 1994 CONVENTION TO COMBAT DESERTIFICATION

BASIC STRUCTURE

Though completed in 1994, the UN Convention to Combat Desertification (CCD) developed out of the process associated with the 1992 UNCED and has a history extending to the 1970s. The CCD is noteworthy because the initiative and concern with the underlying environmental issue is concentrated among developing rather than industrializing countries (a characteristic shared by the Basel Convention). The CCD is also distinctive for two other reasons. First, it endorses and employs a “bottom-up” approach to international environmental cooperation. Under the terms of the CCD, activities related to the control and alleviation of desertification and its effects are to be closely linked to the needs and participation of local land-users and non-governmental organizations¹³⁸. Second, the CCD employs detailed regional annexes, sometimes more detailed than the core treaty itself, that address the particularities of the desertification problem in specific regions such as Africa, Latin America and the Caribbean, and the Northern Mediterranean. These two elements are related; both reflect the fundamentally local and regional character of dryland

¹³⁴ Report of the Inter-Sessional Meeting on the Operations of the Convention, UNEP/CBD/COP/5/4 (9 July 1999)

¹³⁵ See Article X...

¹³⁶ CBD Article 26

¹³⁷ UNEP/CBD/COP/4/16

¹³⁸ In part, this focus is reaction to failed past international efforts at addressing desertification, which were criticised for paying insufficient attention to local concerns. Corel, E. (1999). *The Negotiable Desert: Expert Knowledge in the Convention to Combat Desertification*





degradation. Like the Convention on Biological Diversity, the CCD addresses diffuse land use issues that have intrinsically local qualities. The CCD came into force in 1996 and has 174 parties.

The central substantive commitment in the CCD is the obligation to develop “national action programmes,” in conjunction with local stakeholders. These programmes delineate the tasks that the parties will undertake to implement the CCD. For example, parties must make the prevention of desertification a priority in national policies and must promote awareness of desertification among their citizens. Developed country obligations pertain mainly to the provision of resources to affected developing parties and the promotion of the transfer of appropriate technology, knowledge, and know-how. Institutionally the CCD creates a Conference of the Parties, a secretariat (based in Bonn, Germany), a Committee on Science and Technology and a somewhat amorphous global mechanism, whose main function is to improve the flow of resources necessary to combat desertification.

NATIONAL REPORTING

The CCD contains standard self-reporting commitments. Parties are obliged to “communicate to the (COP) ... reports on the measures which have been taken for the implementation of the Convention.”¹³⁹ These reports were first due at COP 3 in November 1999, though this timetable only applied to African states (other regional groupings were to be addressed at COP 4 in December, 2000). The basic framework for reports was developed at COP 1. Affected parties must provide a description of strategies established and their implementation. Developed parties must report on measures taken to assist in the preparation and implementation of action programmes, including information on financial resources provided. The secretariat compiles the reports and prepares a synthesis document “setting out the trends emerging in the implementation of the convention.”¹⁴⁰

IMPLEMENTATION REVIEW

There is no formal implementation review in the CCD aside from the receipt of national reports by the COP. At COP 2 in 1998, the parties invited submissions to the Secretariat on the “consideration of additional procedures or institutional mechanisms to assist the parties in regularly reviewing the implementation of the convention.”¹⁴¹ The interest in the development of a review body was spurred by parallel developments in other MEAs and by interest on the part of specific parties. The Group of 77 and China had previously proposed a draft decision for the COP in which a committee on implementation review is established as a subsidiary body to the COP, but is open to all parties.¹⁴² The proposed committee would report to the COP on issues of assessment and review of implementation, primarily through the consideration of national reports, reports from the Global Mechanism, and with the assistance of the secretariat. This issue is yet to be resolved; at COP 3 in 1999, the COP invited parties and other interested organizations to submit further proposals and suggestions on the need for the establishment of a formal implementation review committee.¹⁴³

There is currently no compliance and effectiveness review measures in the CCD.

¹³⁹ Article 26. In addition Article 16 obligates parties, *inter alia*, “To integrate and coordinate the collection, analysis and exchange of relevant short- and long-term data and information to ensure systematic observation of land degradation in affected areas and to understand better and assess the processes and effects of drought and desertification”

¹⁴⁰ [Decision 11/Cop.1](#). Paragraph 17

¹⁴¹ Article 27 of the CCD refers to the possible creation of a “multilateral consultative process for the resolution of questions regarding implementation”

¹⁴² Note by the Secretariat, ICCD/COP(3)/17 (19 July 1999)

¹⁴³ [Decision 6/COP.3](#), November 26 1999

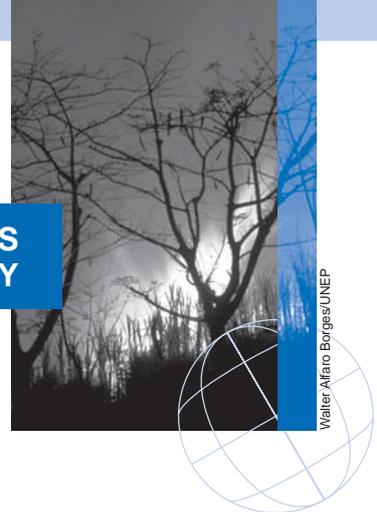




Soo Wee Ming/UNEP



CHAPTER 4: NON-MEA REVIEW INSTITUTIONS - A COMPARATIVE SURVEY



Walter Alfaro Borges/UNEP

The need for and functions of reporting and review institutions are not limited to MEAs. Many other international agreements and organizations employ forms of review that have a similar aim: the ongoing assessment of party practice and performance; the improvement of that performance, and the performance of the overall agreement. However, the methods of review employed in other arenas of international law are often quite distinct and form a useful counterpoint to the common themes and approaches found in MEAs. Several review institutions are described in this Chapter: those of the International Labour Organization; the World Trade Organization; the North American Agreement on Environmental Cooperation; the World Bank Inspection Panel; and various human rights and arms control accords.

THE INTERNATIONAL LABOUR ORGANIZATION

The International Labour Organization (ILO), founded in 1919, administers roughly 180 labour-related agreements. The ILO consists of a yearly plenary assembly, a governing body and a secretariat. The ILO has an unusual tri-partite structure incorporating representatives from government, management, and labour organizations in each member state. The ILO review institution is centralized (it applies to all the relevant ILO treaties) and organised around state reporting.¹⁴⁴ Reporting cycles vary from 2-4 years depending on the convention. The ILO places great emphasis on the importance of reporting. Overall reporting rates appear to approach 80 per cent – higher than most MEA reporting rates, in some cases by a wide margin (Chayes and Chayes 1995).¹⁴⁵ Reports, which come from governments, are circulated to the non-government representatives within the ILO who in turn make “observations.” This process likely enhances the accuracy and completeness of the reports.

There are two types of procedures in the ILO for implementation and compliance review: a regularized process and an *ad hoc*, adversarial process. The first, regular ILO process in turn employs two institutional bodies working in two stages. First, the committee of experts, composed of 20 individuals nominated by the ILO director-general and selected by the governing body. Sitting in their personal capacities, committee members review national reports and meet with parties experiencing implementation problems. The committee is largely viewed as technically adept and apolitical.¹⁴⁶ (However, the Committee has reportedly become more pointed and active in its discussions with parties exhibiting implementation difficulties.) The committee often requests further information, makes suggestions, and takes issue with claims made by parties. It then submits its findings on implementation to a larger “Conference Committee on the Application of Conventions and Recommendations,” made up of ILO delegates. This body is more representative and more political than the committee of experts whose report is advisory and not binding on the conference committee.

¹⁴⁴ This part draws heavily on the comprehensive overview in Cesare P.R. Romano, *The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements* (IIASA Executive Report ER-96-1, 1996). See also www.ilo.org

¹⁴⁵ Romano cites lower figures. Compare the MEA reporting rates reported in GAO, 1992, and in this Report

¹⁴⁶ Romano, *supra* at 5





The conference committee holds extensive discussions with representatives from those states found to have poorly implemented, or failed to comply with, ILO treaties. The conference committee is best viewed as a forum for political discussion and debate rather than a quasi-judicial body. If it is ultimately dissatisfied with the party's performance or with its justifications pertaining to specified categories of violations (most of which concern participation in the review institution itself), it can mention the party in its annual report to the general ILO conference. This is termed a "special paragraph." In addition, or alternatively, it may make an on-site visit if invited by the party. If neither of these approaches produce the desired changes, the party can be blacklisted in the committee's annual report. The use of these measures is frequent but not extensive. During the 1980s, for example, 23 states received special paragraphs and three were placed on the blacklist (Chayes and Chayes 1995). In 1977, the US withdrew from the ILO in part because it felt that the use of these measures was inconsistent and frequently improper.¹⁴⁷

The second branch of review in the ILO, the *ad hoc* review process, comprises four distinct methods. These methods do not rely on regular national reports but instead are triggered by a specific party or NGO. These operate as follows:

- Labour or employers' groups can make "representations" to the ILO Secretariat that a member state has failed to effectively observe an ILO convention obligation. The governing body then may decide to create a committee to investigate and prepare a report, with the ultimate outcome the publication of the report and any response to it by the government concerned.
- Any ILO member state may file a complaint with the secretariat against another member state concerning non-compliance. The complaining party need not show direct harm from the alleged action. As in the representation procedure, the ILO Governing Body may choose to create an investigatory committee – though it often does not. Typically the parties involved are asked to submit statements, and often so are other parties or non-governmental groups. Witnesses are interviewed and a court-like proceeding ensues. An on-site visit by the investigatory committee may take place. A final report is published, and the parties involved must affirmatively accept or reject the conclusions, which typically include the repeal of legislation and halting of practices contrary to the ILO conventions at issue.¹⁴⁸ Most often reports are accepted. The governing body can also make recommendations to the larger ILO plenary meeting regarding compliance. Thus the complaint procedure is fairly judicialized, though the outcomes (reports) are not legally binding.
- A third *ad hoc* review institution is the freedom of association procedure, which is specially focused on this critical area of labour rights. This procedure was created by the parties in the 1950s. There is a specially-established tripartite committee that handles these submissions. The procedure can be initiated by either a member state or NGO. Typically, labour groups submit complaints which are evaluated by the committee and forwarded to the ILO Governing Body which can then refer the case to a special commission. Referral has occurred only six times, with the first in 1965.¹⁴⁹ The commission then makes recommendations to the governing body concerning what measures or changes are necessary.
- The fourth procedure addresses claims of employment discrimination. This procedure, established in 1973, can be triggered by a party or an NGO, but the government in question must consent to the investigation. It has never been used.

¹⁴⁷ Romano, *supra* at 8

¹⁴⁸ If the report conclusions are rejected by a party, the case can be referred to the International Court of Justice, though this has never happened. *Id.* at 14

¹⁴⁹ www.ilo.org





THE WORLD TRADE ORGANIZATION

The WTO is widely considered one of the most dynamic and powerful international organizations. Its predecessor, the General Agreement on Tariffs and Trade (GATT) expanded its substantive obligations enormously over the last 50 years, and the WTO has continued this process. The WTO contains the most elaborate and active dispute settlement system in international law today, which in practice functions as a decentralized form of compliance review. The WTO also engages in explicit, centralized performance review through its Trade Policy Review Mechanism (TPRM).

The TPRM is modelled on similar processes used by the Organization for Economic Cooperation and Development (OECD) and the International Monetary Fund (IMF), and is now quite highly developed. Rather than rely on a regularized self-reporting process, the TPRM creates a formal review body that reviews a sub-set of parties at each meeting. Reviewed parties self-report on their implementation of the WTO Agreements, but this report is only one of the bases of the review process. The official purpose of the TRPM is to “contribute to improved adherence by all (WTO) members to rules, disciplines and commitments made under the Multilateral Trade Agreements ... and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of members.”¹⁵⁰ The TPRM began on a provisional basis in 1989. Focused only on goods until 1995, it now addresses newer areas of international trade cooperation, such as trade in services and intellectual property protection (Keesing 1998).

The TPRM uses a set schedule for review: each WTO party is to be reviewed at least every six years, and major trading states are reviewed on a two- or four-year cycle.¹⁵¹ Review begins with submission of a comprehensive report from the party on its economic situation and trade policies. A similar report is simultaneously prepared by the WTO secretariat and is based on a general analysis of the trade practices of the party plus an in-depth country visit of 7-10 days which includes meetings with government and NGOs. The two reports guide a meeting of the Trade Policy Review Body at which a representative of the reviewed party is present as well as any other interested party. While the focus of the process is on the general trade impact of national policies rather than implementation or compliance with WTO rules and norms *per se*, as other observers note, “inevitably ... much of the interchange has revolved around the applicability of GATT norms to current practices.” (Chayes and Chayes 1995). Thus implementation and compliance review occurs in practice as the TPRM operates. The final report contains the secretariat and party reports, the minutes of the meeting, and the chairman of the TPRM's concluding remarks. This report is then published and disseminated to the trade policy community. Similar, though more focused, review processes occur with regard to subsidiary agreements such as the Trade-Related Intellectual Property Rights Agreement (TRIPs).

While the work of the TPRM is central to the WTO review institution, a form of implementation and compliance review also occurs through the more widely-known WTO dispute settlement process. The WTO Agreements, as did the original GATT before it, empower individual parties to bring complaints of non-compliance or non-implementation (what is technically known as “non-violation nullification or impairment”) before its dispute settlement procedure.¹⁵² Complaints are heard by a

¹⁵⁰ Annex 3 of the Marrakesh Agreements

¹⁵¹ *Id.* at 245. Major states are reviewed on either a two- or four-year cycle

¹⁵² Interestingly, this process of dispute resolution is itself subject to review and was scheduled to occur in 1999. See Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Ministerial Decisions adopted by the Trade Negotiations Committee of the Uruguay Round of Multilateral Trade Negotiations, 33 ILM 1125, 1259 (April 15 1994)





three-person appointed panel and argued by the parties in a judicial manner. The original GATT dispute settlement institution was significantly expanded and elaborated in the WTO Agreements. Most notably, panel decisions now enter into force automatically unless voted on by all the parties otherwise (and thus cannot be readily blocked by the losing party), and a new appellate body has been created to review panel decisions. The WTO dispute settlement institution is, aside from the European Court of Justice, the most active example of an international adjudicatory body in international law today. Since 1995, when the WTO was created, approximately 150 cases have been brought, a rate of use which is in stark contrast to the International Court of Justice, which has only seen about 100 cases since 1945 (Jackson 1999).

As the influential international trade law analyst John H. Jackson (1999) has noted, the GATT/WTO dispute settlement institution has evolved considerably, often in ways that were not guided by legal text:

Towards the end of the 1950s, for example, the Director General [of the GATT] actually nudged the contracting parties to change the dispute settlement procedure from that of a “working party,” which was basically a diplomatic process, to a “panel” of usually three independent experts who did not take instruction from their governments and were supposed to make a finding independently. This was an enormously significant step, but it was not based on treaty language as such. It was trial and error and practice; it caught on and kept going that way.¹⁵³

The WTO Agreements formalize and codify many of the practices that developed organically in the GATT. Overall, the trend has been toward ever greater legalism in dispute settlement. For example, parties often hire outside counsel that argue as if in a domestic court of law, and the panels and appellate body receive *amicus curiae* (“friend of the court”) briefs from third parties, just as many domestic courts do.

While such a judicialized process of dispute settlement does not constitute review of implementation or compliance *per se*, and certainly does not produce effectiveness review, it has in practice the effect of reviewing aspects of party implementation and compliance. The process of bringing complaints operates as a functional substitute for review. It publicizes failures to implement or comply with international legal provisions to the light of day and subjects them to organised and legitimated international scrutiny. This process can result in the imposition of tangible sanctions, and in doing all of the above likely deters some measure of undesirable (from the perspective of the treaty’s goals and obligations) practices. By permitting parties to bring complaints, the WTO dispute settlement institution empowers parties to act as reviewers themselves, scrutinizing behaviour that they believe to be contrary to WTO obligations. The panels and appellate body then further engage in review in the process of making a decision in a given case. For compliance, this aspect of their work is quite clear since rulings typically declare a challenged measure or action to be or not compliant with WTO rules. In sum, unlike the TPRM which is a centralized institution of review, the dispute settlement approach constitutes a decentralized process in which review is a by-product of dispute resolution.

This approach can be termed a “fire alarm” rather than a “police patrol” model of review.¹⁵⁴ Police patrols are efforts by centralized authorities to actively and systematically look

¹⁵³ Id. at 827

¹⁵⁴ I borrow these concepts from analyses of the US Congress. See McCubbins, M. and Schwartz, T. (1984). Congressional Oversight Overlooked: Police Patrols v. Fire Alarms. *American Journal of Political Science*, 2, 1



for violations. While review institutions like that of the Montreal Protocol or WTO Trade Policy Review Mechanism rely in part or in whole on self-reporting, in their systematic approach to implementation and compliance review they resemble police patrols “searching” for crime. The WTO dispute resolution institution (and the World Bank Inspection Panel and the North American Agreement on Environmental Cooperation, discussed below) more resemble fire alarms because they rely instead on individuals or individual parties who are empowered to trigger investigations through a formalized institution. Like real fire alarms, these techniques are reactive, decentralized, and rely on the actions and interests of individual stakeholders.

The fire alarm model has advantages and disadvantages. It shifts the costs of searching for violations to individuals and other stakeholders. The fire alarm model is generally more comprehensive than the police patrol model, in that it “deputizes” many actors who can cover more ground than centralized authorities can. It also may provide greater legitimacy and perceived accountability because it directly empowers individuals in the legal process. But as a result, the fire alarm model depends crucially on the interests of individuals or individual states, which may be particularistic and may promote goals that are not in the best interest of the broader community or the treaty regime. The fire alarm model also may prove ineffective in practice because individual interest is too low or the procedural or substantive requirements to bring a claim too high. In the WTO, the high caseload suggests that procedural or substantive barriers have not been a problem. In the North American Agreement on Environmental Cooperation, discussed below, the caseload has been lower, suggesting that the opposite may be true.

The overall WTO system — including both the dispute resolution institution and the TPRM — is a mixture of police patrol and fire alarm approaches to implementation and compliance review.

THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

The North American Free Trade Agreement (NAFTA) negotiations between Canada, Mexico and the US led to the creation of two “side accords,” one on labour and one on environment. The environmental accord, the North American Agreement on Environmental Cooperation (NAAEC), came into force in 1994. It focuses primarily on promoting environmental cooperation in North America and ensuring that existing domestic environmental laws are properly enforced. The NAAEC created a Commission for Environmental Cooperation (CEC), composed of a council of environment ministers, a public advisory body, and a secretariat.

The NAAEC contains a unique procedure for the review of parties’ enforcement of their own domestic environmental law. Articles 14 and 15 of the NAAEC permit any citizen in a NAFTA party to submit a complaint to the CEC alleging that a party is “failing to effectively enforce its (domestic) environmental law.” A similar procedure can be invoked by a NAFTA party. Like the WTO dispute resolution institution, the citizen submissions process is a decentralized, fire alarm form of review. Unlike the analogous WTO process, it is not only initiated by governments. It is also, unlike the WTO, not a process that results in a binding remedy, but rather one that relies on transparency and the public dissemination of information about party behaviour vis-à-vis their enforcement of domestic environmental law. The NAAEC citizen submissions process has in practice been only moderately employed.





Nearly 30 citizen submissions to the CEC secretariat have been brought since 1995, with about one-third of these still active.¹⁵⁵ The CEC secretariat first determines whether a submission meets the basic admissibility criteria and, if so, requests a response from the party in question. If the secretariat considers that the submission, in light of the response provided, warrants further investigation, it informs the council, which is composed of the environment ministers of each of the three parties. It can approve an investigation by majority vote. The investigation results in a “factual record,” which may then be made public by a two-thirds vote of the council. Two submissions have thus far resulted in a factual record, and a third is under preparation. In one case to date, a request for a factual record from the Secretariat has been explicitly denied by the council.

A parallel process is possible at the initiation of one of the parties to NAAEC, though the legal standard (“persistent pattern of failure to effectively enforce domestic environmental law”) is higher. Under this process, if the problem is still unresolved after diplomatic efforts by the parties, the council may convene an arbitral panel. If the arbitral panel agrees with the allegation, it can propose an action plan in conjunction with the parties involved. If the complaining party believes that the plan is not being adequately implemented a monetary penalty may be imposed. In another innovation, the penalty does not accrue to the complaining state but rather to a fund established in the name of the CEC council, which then must use the funds to improve environmental enforcement in the losing party. Failure to pay the monetary penalty can lead to trade sanctions in the form of suspension of NAFTA benefits.

In addition to the citizen submission and party-to-party procedures, the CEC secretariat prepares an annual report that addresses “the actions taken by each party in connection with its obligations under this agreement, including data on the Party’s environmental enforcement activities.”¹⁵⁶ The secretariat can also initiate an investigation into and prepare a report on any matter related to the NAAEC, unless two-thirds of the parties object. The secretariat thus has substantial powers of initiative to review party performance and to review NAAEC effectiveness. In practice, the Secretariat has been cautious in utilizing these powers of initiative. Despite this overall caution, and the Secretariat’s generally well-received record of work, the citizen submissions procedure has come under attack by the NAAEC parties themselves.¹⁵⁷ In one recent instance, for example, Canada refused to participate in the preparation of a factual record concerning Canadian enforcement of domestic law.¹⁵⁸

The NAAEC citizen submissions and party complaint procedures, like the WTO dispute resolution institution, do not engage in review *per se*. But in a similar fashion they permit parties to bring complaints forward, and these complaints result, in practice, in a review of implementation and compliance. An important difference between the WTO and NAAEC systems, however, is that the NAAEC citizen submission procedure is triggered not by states party to the treaty but by individuals or NGOs. The comparatively moderate use rate of the NAAEC procedure (an average of five per year) suggests that procedural and/or substantive barriers to bringing claims forward may be high, and hence the efficacy of the fire alarm approach may be low in this setting. In part, this moderate usage may reflect the backlog of cases that developed in the late 1990s. The low rate of use may also reflect the non-binding nature of the remedy — a factual record which, while potentially of political importance, has no legal force. Alternatively, the low rates of usage may reflect the presence

¹⁵⁵ See www.cec.org

¹⁵⁶ NAAEC Article 12

¹⁵⁷ See the discussion ongoing within the Joint Public Advisory Committee at www.cec.org/who_we_are/jpac/Art14-15/index

¹⁵⁸ See BC Hydro Factual Record, at www.cec.org





of alternative modes of action by aggrieved parties (domestic lawsuits or political action), the newness of the process, or high standards of enforcement by the parties. Since only two submissions have gone the full route and resulted in a factual record, assessing the NAAEC submissions system, and its efficacy, remains difficult.

INTERNATIONAL HUMAN RIGHTS REGIMES

The human rights treaty system contains both global accords, such as the International Covenant on Civil and Political Rights, and regional accords, such as the African Charter on Human and People's Rights. Reporting requirements are common to human rights treaties, though reporting rates vary widely and only in some cases do the treaty review institutions go beyond state reporting. In the International Covenant on Civil and Political Rights, for example, parties self-report on implementation and compliance to the UN Human Rights Committee composed of independent experts (McGoldrick 1994). The committee then meets with representatives of the party in question and issues a report, including recommendations for the party. In the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) each party must report every four years on its implementation of its obligations and present its report to the Committee on the Elimination of All Forms of Discrimination Against Women, or CEDAW Committee. (NGOs also frequently issue "shadow reports" that critique the party's performance, and these are occasionally referred to by the CEDAW Committee in its reports and deliberations). The CEDAW Committee may question the party on its report, often pointedly. The committee then issues a written response with recommendations. It also issues general recommendations to the parties on implementation.

In addition, many human rights accords also rely upon fire alarm procedures like that of the NAAEC citizen submissions procedure. In the Inter-American Human Rights system, any person or organization legally recognized within a party may lodge a complaint with the Inter-American Commission on Human Rights alleging non-compliance by a party with the American Convention on Human Rights (Weston, et al. 1987). The UN Human Rights Commission employs what is known as the 1503 procedure, in which individuals or NGOs make submissions about human rights violations. Other human rights treaties, through optional protocols, maintain similar systems. The Optional Protocol to the International Covenant on Civil and Political Rights, for example, permits any citizen of a state party to make a submission to the Human Rights Committee claiming that the state has violated a provision of the Covenant.¹⁵⁹

Like the NAAEC and WTO systems, these fire alarm systems do not review implementation, compliance, or effectiveness directly, yet they quite efficiently draw millions of individuals into the international legal process by empowering them to identify and submit complaints. Particularly in the context of human rights law, in which many implementation or compliance "failures" result in concrete, individuated harms, a fire alarm approach has the potential to be relatively efficient and effective. In practice, however, given the tremendous number of human rights abuses around the world it is clear that the vast majority of victims fail to use the existing complaints system. Moreover, were even a slightly larger fraction of victims to use the system, the current machinery for processing and responding to complaints would be overwhelmed.

¹⁵⁹ Domestic remedies must first be exhausted; this is a common provision in citizen-triggered decentralized review systems





ARMS CONTROL AGREEMENTS

Arms control agreements have pioneered many elaborate forms of implementation and compliance review. The focus on compliance in arms control is apparent in measures for verification of compliance, often performed on-site by multinational teams. For example, the 1968 Nuclear Non-Proliferation accord granted the International Atomic Energy Agency significant on-site inspection powers. Similarly, the 1987 Intermediate Nuclear Forces agreement between the US and the then USSR gave each party the right to conduct on-site investigations and continuous monitoring in specified facilities. Arguably an even more intrusive inspection regime is created in the 1992 Chemical Weapons Convention, which permits “challenge inspections” on the territory of a party by another party, with the aim of verifying compliance and resolving questions about possible non-compliance.

These arms control examples represent the outer limits of compliance review, in which review is physical and performed by outsiders on sovereign territory. The unusual reliance on on-site inspection stems in part from the nature of the harms that result from arms control violations, which are not seen as diffuse, generalized harms like ozone depletion but rather as risks directly relevant to another party’s core national security interests. These arms control examples illustrate how the structure of the underlying cooperative problem can impact the utility and choice of different review institutions. They also demonstrate that when governments are interested enough in assuring particular outcomes, they will create international institutions for the review of performance that are surprisingly intrusive and compromise many traditional notions of sovereignty.

THE WORLD BANK INSPECTION PANEL

The World Bank Inspection Panel was created in 1993 to review the World Bank’s compliance with its own internal rules and regulations and to improve public accountability. Various critics, both internal and external, had pointed to the Bank’s repeated failures to abide by its own policies with regard to the environmental and social impacts of its lending programmes.¹⁶⁰ The Inspection Panel’s aim is to improve World Bank compliance with these policies by permitting two or more individuals that are directly effected by a World Bank public sector project to bring forward a claim concerning Bank actions. A member of the World Bank’s Board of Executive Directors may also bring claims. The Inspection Panel process and structure relies on decentralized action by individuals and is thus a fire alarm procedure similar to that of the NAAEC discussed above.

The Inspection Panel rules are straightforward. Claims brought before the panel must allege that acts or omissions have caused or could potentially cause the individual claimants harm, and that these acts or omissions violate World Bank policy (Clark 1999). In other words, the inquiry revolves around whether the World Bank’s own policies are complied with – a similar structure to the NAAEC citizen submission system, which also focuses on the parties’ own laws and rules. The inspection panel determines whether the claim meets certain eligibility criteria. If the claim does the panel evaluates it and any response by World Bank management. If the panel so deems it recommends a full investigation to the World Bank Board of Directors. Reports on investigations are presented to the Board of Directors and which ultimately determines what actions should be taken. A total of 15 claims have been brought to date, with about eight reports resulting.¹⁶¹

¹⁶⁰ E.g. the Morse Commission and the Wapenhans report

¹⁶¹ The register can be accessed at www.worldbank.org/html/ins-panel/panel_reports.html





The success of the World Bank's Inspection Panel to date is unclear. As with the NAAEC citizen submission procedure, it has not been as widely used as some advocates had hoped, and the procedural rules have stymied many claims. On the other hand, part of the impetus for an inspection panel was the need for greater public accountability, and the creation of the panel was an important symbolic step towards that goal, and in turn towards greater public legitimacy for the World Bank.





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CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS



As Peter Sand anticipated in his analysis of the state of MEAs a decade ago, the review institution has become a regular, even central part of international environmental cooperation (Sand 1990). With the exception of UNCLOS, every MEA examined in this report uses some kind of formal reporting system, many engage in implementation review, and an increasing number use or are developing a compliance review institution.

OVERVIEW OF MEA REVIEW INSTITUTIONS

The general pattern in the MEAs examined in this report is illustrated in Annex 3. As indicated in the Annex, there is a wide range of approaches to the review of party performance, with the Montreal Protocol and CITES containing the most extensive and formalized review institutions and the CMS and CCD the least. Compliance review presently exists in the Montreal Protocol through its Non-Compliance Procedure, and in practice within CITES via the National Legislation project and Infractions Report/trade suspension process. The Basel Convention and UNFCCC are actively negotiating formal compliance review institutions along the lines of the Montreal Protocol model. Reporting, the backbone of any review institution, is present in every MEA examined save UNCLOS, but even in that case some reporting occurs via an informal process created by the secretariat. Implementation review is less common, occurring in less than 50 per cent of the MEAs surveyed. Effectiveness review is even more rare but is more common than compliance review. The fact that the least common form of review focuses on state compliance with its MEA obligations may be disconcerting to some observers. But is not surprising in a world of sovereign states unsure of their ability to implement many MEA obligations, and generally unwilling to open themselves and their policies and performance to scrutiny by others.

The basis for almost all review institutions — national reporting — varies widely along many dimensions. MEA reporting rates are generally not publicized and often accurate records are not kept. But reporting rates appear generally to be low (frequently under 50 per cent).¹⁶² Secretariat staff across the MEAs surveyed noted the often widely divergent quality of reports and the difficulty of comparing reports. One common effort to alleviate these disparities has been the development of standardized reporting formats. The Montreal Protocol exhibits the most developed format scheme, with five integrated reporting formats and a comprehensive guide to reporting prepared for use by governments. Other MEAs surveyed are considering electronic filing, and the five biodiversity related MEAs (the CBD, CITES, World Heritage, Ramsar, and CMS) are considering an integrated reporting system. Ramsar has developed and distributed its new “National Planning Tool” (discussed below), which is supposed to integrate reporting and implementation planning. Overall, a main conclusion to emerge from this study is that MEA reporting systems, while vitally important to all review institutions, do not operate as comprehensively or effectively as they should.

¹⁶² See also US GAO, *supra*





Overall, one clear theme is the increased interest in and emphasis on implementation, compliance, and effectiveness within MEAs. There is significant activity taking place in many MEAs to either expand or develop review institutions. Within this general trend, however, there are few temporal patterns discernable in the structure and process of review institutions across the 10 MEAs examined. Neither older nor newer MEAs in the sample examined exhibit a greater tendency toward the development of review institutions. There is, however, evidence that review institutions are most developed where MEA commitments are most specific. The Montreal Protocol, with the most elaborate review institution, contains detailed commitments that are amenable to careful review. CITES similarly contains detailed, concrete commitments and has accordingly developed, through discrete decisions and interpretations, a well-functioning set of review institutions. Similarly, with the negotiation of the Kyoto Protocol, the UNFCCC has created more specific, concrete commitments and is now beginning to create the institutions necessary to review their implementation and compliance. The positive link between specificity of commitments and the elaboration of review institutions is predictable from a functional perspective. If review institutions are created to aid the parties in reviewing performance, the most detailed obligations should give rise to the most extensive review systems.

Another striking feature of current international environmental governance demonstrated in this report is the high degree of cross-fertilization among the review institutions of different MEAs. This is currently dramatized in the ongoing efforts to create compliance review institutions in the UNFCCC and Basel conventions, where the Montreal Protocol experience is looked to frequently and the proposals for institutional design are similar. While a lack of coordination among the major MEAs is, in the view of some experts, a serious problem, this experience suggests that there is evidence that while formal links are uncommon, informal links are frequent.¹⁶³ Many government officials, particularly in the case of developing countries, are involved in more than one MEA process. Even among OECD country officials, it is common to have overlapping responsibilities, and some individuals have come to be seen by many governments involved as expert in important aspects of implementation and compliance review.¹⁶⁴

This overlap in duties can be expected to, and appears to, foster awareness of the processes taking place in other MEAs and facilitates convergence in institutional design. It remains an open question whether this convergence is positive or negative. The lack of coordination among MEA processes may, by providing scope for experimentation, ultimately be beneficial.¹⁶⁵ Many observers, however, see greater coordination among MEAs as a necessary element for the future. The recent proposal to combine the reporting requirements for the five biodiversity-related MEAs is an effort to reduce redundancy and improve reporting rates and report quality (WCMC n.d.). The central question is whether the gains from harmonization — in terms of lower effort for governments and, perhaps, correspondingly more complete, comparable, and frequent reports — will outweigh the loss in terms of report specificity. As MEAs grow more specific and elaborate in their obligations, harmonization of reporting across related MEAs may make detailed reporting on individual MEA obligations difficult. In addition, harmonization may pose challenges if other MEAs follow the lead of the Ramsar Convention and its National Planning Tool. Ramsar's attempt to merge reporting with a tool that can assist parties in implementation — consequently turning reporting into a by-product of implementation planning — holds substantial promise and is a notable innovation. Whether this sort of system can satisfactorily co-exist with reporting harmonization is unclear.

¹⁶³ The UN University held an International Conference on Synergies and Coordination Between Multilateral Environmental Agreements in 1999. Most experts present viewed the lack of coordination among MEAs as a problem, but the papers reflected the many informal links that do exist

¹⁶⁴ Interviews with MEA secretariats

¹⁶⁵ Paper by David G. Victor at the UN University International Conference on Synergies and Coordination Between Multilateral Environmental Agreements (Tokyo, 14-16 July 1999)





With regard to compliance review, it is notable that in none of the MEAs examined in which compliance review exists, or is being considered, was the compliance system itself present in the original MEA text.¹⁶⁶ Often the MEA authorized the future creation of such a system, as was the case with the Montreal and Kyoto Protocols (and, most recently, with the Cartagena Protocol to the CBD). As noted in Chapter 1 of this report, some analysts have argued that the pattern of negotiating substantive obligations first and review mechanisms later — a sequential strategy — is problematic from an effectiveness perspective. It is instead preferable, they suggest, to negotiate substantive obligations alongside the mechanisms that will review implementation of and compliance with those obligations: what might be termed an omnibus negotiation strategy (e.g. Victor, Raustiala and Skolnikoff 1998).

While this suggestion to avoid sequential negotiation has substantial merit, there are political obstacles to implementing it in practice. There may be an inverse relationship in MEAs between the stringency of review mechanisms and substantive commitments (Szell 1995). In other words, stringency in one may trade-off stringency in the other. Combining the negotiation of MEA review institutions and of substantive commitments into one omnibus negotiation may in fact help to better manage these trade-offs, as proponents of an omnibus strategy argue, and consequently may weaken this posited inverse relationship (Victor, Raustiala and Skolnikoff 1998). But this strategy carries with it potential risks. For example, governments may be initially uncertain about what particular MEA commitments demand and consequently may overestimate their ability to fully implement and consistently comply over time (though underestimating is far more likely; see Raustiala and Victor 1998). If governments overestimate their ability to comply, they may then in turn agree to relatively demanding review mechanisms, particularly to strict compliance mechanisms, in conjunction with stringent substantive obligations. In this hypothetical situation, the inverse relationship identified by Szell and others may be broken or at least weakened.¹⁶⁷

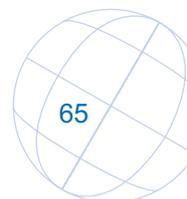
One negative result of agreeing to stringent compliance procedures in this fashion, however, may be a compliance crisis later on — as is arguably happening currently in the WTO system with regard to the *Meat Hormones* and *Foreign Sales Corporation* disputes.¹⁶⁸ If a party finds itself in a difficult compliance situation, and yet faced with a demanding compliance review system, the result could be damaging to the MEA: complete non-compliance, disregard of the review system, or possibly even withdrawal from the MEA itself. The likelihood of these events is highly speculative. But depending on the nature of the issue, the state involved, and the depth of non-compliance, the MEA regime could be worse off in such a case than if compliance mechanisms and substantive obligations had been negotiated sequentially — even if the result of sequential negotiations is weakness in one or the other. Ultimately, however, even if review mechanisms and substantive obligations are negotiated in an omnibus fashion there is little reason to expect governments to be markedly less wary of the process of review, and hence markedly less prone to weaken either the substantive MEA commitments themselves or the accompanying review mechanisms.

Lastly, it is important to underscore what the existing MEA review institutions surveyed here systematically lack. Unlike in, for example the WTO, there is no judicialized dispute settlement system (which performs *de facto* implementation and compliance review) that is in practice relied upon by the parties. There is also no formalized system of citizen-triggered, decentralized, fire alarm review, as is found in several human rights regimes, the ILO, and the North American environmental regime.

¹⁶⁶ One possible exception is UNCLOS. UNCLOS contains the International Tribunal for the Law of the Sea, which in practice may engage in elements of compliance review through its adjudicatory process

¹⁶⁷ Or governments may be uncertain whether they can meet future commitments, and thus even be more wary of accepting stringent compliance procedures. In other words, the inverse relationship suggested by Szell may be exacerbated

¹⁶⁸ See www.wto.org





RECOMMENDATIONS AND LESSONS LEARNED

This section concludes by making eight basic recommendations based on the preceding analysis. They are outlined below.

RECOMMENDATION 1:

Develop good data gathering and reporting systems early on, and make the reporting process useful to the parties individually.

Data are the backbone of any review institution, and the importance of establishing well-functioning, reliable, and comprehensive data gathering systems cannot be overstated. As described in this report, most data on the implementation of MEAs come from governments through national reports. Self-reporting by governments is sometimes derided as intrinsically weak and unimportant, and it is true that there is evidence that parties are not always accurate or timely in their reporting.¹⁶⁹ Yet engaging in regularized reporting early on in the history of an MEA can build the reporting process into the bureaucratic structure of the parties, where it becomes a regular and accepted practice. This may capitalize on the inertia of bureaucratic practices (Chayes and Chayes 1995). It can also help acclimate parties to the general notion of performance review, and familiarize them with its benefits.

Nonetheless, the fact that many MEAs require regular reporting means that the associated resource demands can overtax the capacity and resources of many parties, particularly developing country parties. While attempts to streamline or merge MEA reporting requirements have some potential, MEA commitments show a clear trend toward greater complexity over time. As commitments grow more detailed, efforts to merge reporting requirements are likely to be undermined. Such merging or streamlining efforts may in turn undermine the ability of national reports to provide necessary information for the specific MEAs involved.

A very promising course of action may be that recently undertaken by the Ramsar Bureau. Ramsar officials are seeking to recast the reporting process as a by-product or outcome of a national planning process related to the implementation of Ramsar's substantive commitments. In the bureau's words, this signals "*a significant shift in the purpose of the national reports* from the previous 'one-off' description of actions ... to a dynamic and ongoing framework for strategic planning and action by national governments, *which also meets* the obligation to provide a national report every three years."¹⁷⁰ The Ramsar Bureau distributed, in early 2000, the first version of the national planning tool, which when completed by a Ramsar party, it functions as a comprehensive national report while simultaneously organizing the party's implementation efforts and forcing the party to consider all aspects of Ramsar commitments. The bureau is also creating an interactive electronic form for the national planning tool, which should facilitate both preparation and dissemination through the Ramsar and other websites. One brief component of the National Planning Tool is reproduced in Box 1 below:

¹⁶⁹ As shown above in the need for and practice of "clarifications" in many MEAs and in the often low reporting rates found in many MEAs

¹⁷⁰ Ramsar Doc. SC24-12, *supra*, at 2





BOX 1

National Planning Tool for the implementation of the Ramsar Convention on Wetlands

(and the approved format for National Reports to be submitted for the 8th Meeting of the Conference of the Contracting Parties, Spain, 2002)

* * *

(excerpt)

GENERAL OBJECTIVE 2

To ACHIEVE THE WISE USE OF WETLANDS BY IMPLEMENTING AND FURTHER DEVELOPING THE RAMSAR WISE USE GUIDELINES”

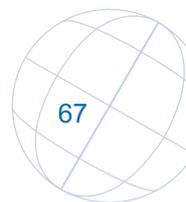
Operational Objective 2.1: To review and, if necessary, amend national or supra-national (e.g. European Community) legislation, institutions, and practices in all Contracting Parties, to ensure that the Wise Use Guidelines are applied.

Actions-Global and National Targets

2.1.1 Carry out a review of legislation and practices, and indicate in National Reports to the COP how the Wise Use Guidelines are applied. [CPs]

- This remains a high priority for the next triennium. The Guidelines for reviewing laws and institutions (Res. VII.7) will assist these efforts)
- Global Target - For at least 100 CPs to have comprehensively reviewed their laws and institutions relating to wetlands by COP8.
 - » Has your country **completed** a review of its law and institutions relating to wetlands? **Yes/No**
 - » If **No**, what are the impediments? **Please elaborate**
 - » If a review is **planned**, what is the expected timeframe for this to be done?
 - » If the review has been **completed**, did the review result in amendments to laws or institutional arrangements to support implementation of the Ramsar Convention? **Yes/No**
 - » If **No**, what are the impediments to these amendments being completed? **Please elaborate.**
 - » If **Yes**, and changes to laws and institutional arrangements were made, please describe these briefly.
 - » Proposed national actions and targets:
 - » Ministry, agency/department, or organization responsible for leading on this action:

While the Ramsar process is only of recent vintage, the notion that reporting can be redefined from an activity that governments do to satisfy a specific procedural MEA obligation to an activity that is helpful in substantive implementation at the national level is potentially of great importance. Doing so should increase the incentives for governments to report fully, accurately, and in a timely manner by making reporting a directly beneficial activity for them. But as the specificity of the excerpt of the Tool reproduced in Box 1 indicates, harmonizing Ramsar reporting with other MEA reporting may prove challenging.





While the Ramsar proposal most closely links substantive implementation with procedural duties of reporting, it is also worth noting the approaches of the Montreal Protocol and CITES. In general, the timeliness, quality, and completeness of data are largely dependent on parties having the relevant skills, resources, and incentives to fulfil their reporting obligations.

The Montreal Protocol system illustrates two important steps that have been taken in this regard:

- The Multilateral Fund has allocated funds to developing country parties for the creation of national ozone units, whose function is, among others, the preparation and submission of national reports. This financial assistance directly builds capacity where it is most needed.
- The Montreal Protocol Multilateral Fund has made its general financial assistance conditional on the preparation of annual progress reports on implementation. Reporting in this context (which may in the near future be combined with the regular reporting process under the protocol) is thus a necessary step for countries seeking assistance from the Multilateral Fund.

While such incentive and capacity based efforts are costly, they appear to have been effective in promoting accurate and timely reporting. Data completeness and usability is also furthered by the development of databases.

In CITES, the secretariat in conjunction with NGOs and other actors, including UNEP, has developed extensive data systems that track the many permits granted for trade in CITES species and also track infractions by private parties (as in the Trade Infraction and Global Enforcement Recording System, or TIGERS).

RECOMMENDATION 2:

Incorporate multiple sources of data where possible and feasible, in particular in-depth country studies by secretariats or independent teams

While most governments fulfil MEA reporting obligations in good faith and to the best of their abilities, self-reporting nonetheless in practice can fall short of ideal disclosure. Whether through inadvertence, lack of capacity, or deliberate omission, reports can fail to present a complete or optimal picture. Review systems that incorporate multiple sources of data-gathering are likely to be more robust than those that rely strictly on self-reports from parties.

The in-depth review institution in the UNFCCC, for instance, provides for country visits by expert teams to help supplement and corroborate data on greenhouse gas emissions supplied in national reports from the industrialized parties (or Annex I parties). Though not specifically occurring in the context of national reporting, the World Heritage Convention also employs missions to parties to investigate problem sites, as does the Ramsar Convention and CITES. More analogous to the UNFCCC institution, the WTO Trade Policy Review Mechanism uses national self-reports but also employs a secretariat-organised country visit process that produces a distinct report. In the WTO context, both the national report and the WTO Secretariat report feed into the larger review institution and meetings. The North American Agreement on Environmental Cooperation, though it lacks a national reporting process, also permits expert teams from the secretariat to prepare reports on specific environmental problems or situations within the territory of a party.

There are clearly sovereignty concerns that may arise from the use of reports from other actors, particularly if they involve, as they should to be accurate, on-site or country visits.





Each party should retain the explicit right to refuse a country/expert visit, and site-visit teams should where possible be composed of respected, independent experts acting in their personal capacities. But the UNFCCC, World Heritage, Ramsar, and WTO experiences illustrate that there is precedent for such visits and subsequent reports and that many states appear comfortable with them in certain contexts. Over time this acceptance seems to lead to the development of a norm in favour of site visits, making denial of a proposed site visit quite difficult for parties.

Expanding the role of such alternative data gathering methods has clear cost implications which will, in some cases, be prohibitive. But where feasible, the use of in-depth country visits should both bolster the national reporting process (by providing an incentive for states to be thorough and honest) and provide an alternative perspective on the situation in question, which may permit minority viewpoints to come to the fore. Such non-party driven data gathering need not occur on exactly the same cycle as the national reporting process. Given the expenses and issues entailed, it may not be possible or desirable to do so. But as an ancillary method of data-gathering about party performance, the use of on-site visits, perhaps by expert teams, offers significant advantages.

RECOMMENDATION 3:

Utilize the internet for the filing and publication of reports and reviews, where applicable

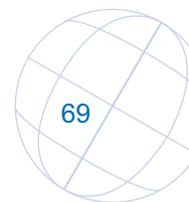
The development and spread of the internet creates significant opportunities for improving MEA review systems. In particular, the internet can aid the preparation, filing, and access of reports by parties and interested stakeholders. The preparation of reports by parties can be aided by the use of interactive electronic forms that are easier for government staff to fill out and distribute. Filing is similarly aided by interactive forms. Perhaps most importantly, the internet provides a means by which reports can be more readily accessed and searched, strengthening the public nature and transparency of review institutions. In some cases (such as the Ramsar Convention), reports have been nominally public documents which in practice have received little attention because they were difficult to obtain. Posting of reports to websites enables those interested parties and stakeholders with access to the internet to readily obtain reports and other review documents. This also makes transparency meaningful.

Where aspects of review, as in the Montreal Protocol system, are confidential for commercial or intellectual property reasons, that confidentiality should be respected. But where review is largely public, the internet creates comparatively low-cost and fast access that bolsters the effective transparency of the process. This transparency may increase the public and “reputational” pressures on governments to implement and comply with their international obligations.

RECOMMENDATION 4:

Provide assistance and training to parties in the gathering and reporting of relevant data.

Reporting is burdensome for many states party to MEAs. This burden is particularly high for developing countries, who often have small environmental ministries and lack adequate funds for staff. Assistance to such countries could take the form of technical training and help in forming relevant MEA “focal points” within the national government. For example, the Montreal





Protocol Multilateral Fund has funded meetings of the national ozone focal points in particular regions. These regional meetings help foster networks of government officials and provide a forum for collective learning and information-sharing. In addition, manuals on data reporting — either in written form or in electronic form, perhaps integrated directly into the reporting template itself — can be of great assistance to overtaxed government officials. The UNEP-prepared manual for the Montreal Protocol parties could serve as a model.¹⁷¹

RECOMMENDATION 5:

Consider the use of dual (technical and political) bodies in compliance review

Compliance review is centrally important to MEAs with concrete, specific obligations. Compliance review is, however, politically delicate. One lesson from both the ILO and World Bank Inspection Panel systems is the utility of having dual institutional structures. In these systems, a more technical body makes initial determinations about compliance issues or problems which are in turn forwarded to a more political body which makes final determinations and/or applies measures.

The basic structure is illustrated by the Committee of Experts and Conference Committee structure in the ILO. The former is composed of experts sitting in an independent capacity. The committee of experts reviews national reports, and is generally viewed as technically adept and apolitical. The committee often requests further information from the parties, makes suggestions, and takes issue with claims. It then submits its findings on implementation or compliance difficulties to the larger conference committee, which is more representative and more accountable, and makes final decisions on response measures. The committee of experts report is thus advisory and not binding on the conference committee.

This structure is advantageous because it ensures that the factual predicates of any decisions are made by a technically-qualified body. Having the members serve in their personal capacities strengthens the legitimacy and perceived neutrality of the body. It may also enhance the degree to which parties will respect and accept its findings as valid and fair. That a more representative and accountable body of government delegates acts on any recommendations and/or reports from the technical body helps to ensure political acceptability of the overall process by the parties. Political control of final outcomes provides for discretion in complex cases and keeps the ultimate decisions political, which is important in an international legal system controlled by sovereign states. Even the new WTO dispute resolution system employs this basic structure, though the rules are such that the political decision to reject a panel or appellate body report is quite difficult. In an MEA context, it is not reasonable or necessarily optimal to create WTO-like rules, but a similar dual institutional structure can be created with a greater role for the political body.

A dual institutional structure is not without its drawbacks. Some states — particularly small developing countries — may feel that they will be excluded from the critical first, technical, stage by their inability to provide suitably qualified experts.¹⁷² In addition, many states are concerned about the proliferation of international environmental institutions and the attendant resource implications, and may resist the creation of more cumbersome administrative structures. While these concerns have merit, on balance the advantages of a dual structure will often outweigh the disadvantages, particularly in cases where compliance is a significant concern and measuring and assessing compliance-related behaviour is technically complex.

¹⁷¹ UNEP TIE Ozone Action Programme, *Handbook on Data Reporting under the Montreal Protocol* (1999)

¹⁷² I thank Michael Wilson of Environment Australia for making this point in his review of this report



For example, a dual structure could be built into the proposed compliance entity in the UNFCCC and Kyoto Protocol.¹⁷³ The technical component analogue could be the Kyoto Protocol Article 8 expert review teams, which are coordinated by the UNFCCC Secretariat and composed of experts nominated by the parties. These expert review teams are obliged to report back to the COP on the implementation of commitments and problems relating to such implementation. They could be empowered to forward factual determinations to whatever compliance body emerges. This more political component of the emerging Kyoto compliance system is yet to be determined, but will likely be a body similar in spirit to the Implementation Committee in the Montreal Protocol system but more formalized. Alternatively, the compliance body itself could be divided into broadly technical and political components, as in the ILO example above. It is important to underscore that in many if not most of the existing UNFCCC party submissions on the topic the envisioned compliance body is split into two parts, but on different grounds. One part is intended to be more “facilitative” and consensual, while the other is more judicial and enforcement-oriented. This emerging structure differs from the dual, technical-political structure found in the ILO and proposed here.

The exact structure of the emerging UNFCCC and Basel compliance review systems is still unclear. But experience in other regimes suggests that it may in the long run be advantageous to build these systems with a dual institutional structure, with one body to provide the necessary, initial, technical review of implementation and compliance that will feed into a more political body focused on response.

RECOMMENDATION 6:

Consider the use of individual or NGO-triggered “fire alarm” review institutions

Fire alarm-style mechanisms are those in which parties or other individuals and groups can make official submissions, to a central international body, relating to implementation and compliance. Fire alarms enhance both the effectiveness and efficiency of review. They enhance the effectiveness of review because they “deputize” a wide range of parties and/or stakeholders who may frequently have private information about implementation or compliance difficulties in their own states or others. They improve the efficiency of review because, unlike centralized review institutions, they largely utilize information that the submitters already possess as a result of their normal activities and that would be expensive for a centralized review institution to uncover.

Fire alarm systems can come in several forms. Submissions may be made by parties only, as in the WTO dispute resolution system, or by individuals or groups, as in the human rights, World Bank Inspection Panel, and North American Agreement on Environmental Cooperation systems. They may be automatically-triggered by submission, as in the WTO system, triggered only under a specific set of rules, as in the North American system, or triggered at the discretion of the receiving body as well as in conjunction with specific rules, as in some human rights regimes.

Party-only initiated systems like the WTO’s are limited in that they do not capitalize on the wealth of privately-held information directly. In practice, such information does enter the WTO system, however, because of the nature of international trade, in which specific firms or groups often suffer concrete economic harm as a result of non-compliance with international commitments. In MEAs, where such specific, targeted harm is unlikely, a party-only fire alarm system is not likely to work

¹⁷³ See e.g. [Note by the Secretariat, Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol: Submissions by the Parties](#) (17 Feb. 2000)





well. One clear lesson of global environmental politics is that states have shown an intense reluctance to use confrontational dispute settlement methods (Romano 2000). In this context, individual or NGO-triggered systems may hold greater promise. Both the North American and World Bank fire alarm systems are too new to draw firm conclusions about their efficacy. But the evidence to date indicates that they are being used, if perhaps not as much as anticipated, and that they appear thus far to have been moderately effective. In certain human rights regimes, particularly the European system, fire alarm systems are widely used and are considered critically important to the operation of those regimes.

The creation of individual or NGO-initiated fire alarm systems also has the important effect of legitimizing and “democratizing” global governance, by empowering individuals and civil society groups to play a direct role in the operation of the regime. This aspect of fire alarm systems, however, also raises some concerns. Without adequate rules of “standing,” or access, the system may be swamped by frivolous and/or incorrect accusations made by unaccountable private actors. Such concerns are central to debates in domestic jurisdictions that employ fire alarm-like procedures in their domestic legal systems, such as the United States. Yet in practice, to date there is little evidence that loose or inadequate rules of standing have been problematic in the existing international regimes that employ fire alarm systems. In some cases, such as the North American system, the process arguably exhibits the opposite problem: too few submissions being made, and very few of those made successfully resulting in factual records. The chilling effect of overly complicated or tight procedural hurdles may prove to be more pervasive than is abuse of the system by politically unaccountable actors.

In short, while NGOs and other non-parties in practice play a role in providing compliance or implementation-relevant data in many MEAs (such as CITES, which receives such information regularly), a formalized and regularized fire alarm review system has significant merit. There are undoubtedly serious political hurdles to the adoption of the individual or NGO-triggered fire alarms in MEAs. But their inclusion would, by enhancing the effectiveness and the efficiency of review processes, and by providing greater access for civil society, provide a major advance in the development of MEA review institutions.

RECOMMENDATION 7:

Non-confrontational, soft or “managerial” approaches to compliance review are important, but both incentives and disincentives are needed in compliance review institutions

Compliance review differs from other forms of review because it is explicitly focused on the legality of actions and omissions by governments. The Montreal Protocol Non-Compliance Procedure, for example, is facilitative, non-confrontational and forward-looking: what has been called “managerial” in nature (Chayes and Chayes 1995). Managerial approaches to non-compliance eschew deterrence and punitive strategies in favour of assistance aimed at helping the non-compliant state return to compliance. In practice these managerial qualities have been important to the success of the NCP because they have made governments comfortable with and acceptant of the process. This in turn, has encouraged them to come forward with potential or extant compliance problems. (See also the discussion under Recommendation 8 below). As demonstrated in this report, in other MEAs surveyed the facilitative approach to compliance is preferred by most governments and appears likely to be replicated.

While a soft, managerial approach to non-compliance can be effective, there is also evidence that in practice other, more coercive factors were important to the success of the Montreal Protocol NCP.





For example, in the Montreal Protocol system funding for implementation costs in developing country parties (funding which is provided by the Multilateral Fund) is withheld if those parties do not report their baseline data on time. This threat or financial conditionality appears to have proved important in raising reporting rates among these parties. More significantly, the threat of denied funding from the GEF for Russia and other Eastern European parties experiencing compliance difficulties was instrumental to the success of the mid-1990s NCP cases involving those states. The GEF decided that unless the Montreal Protocol's Implementation Committee approved the implementation plans of the parties in question further disbursement of funds would be denied. Though the GEF is formally external to the Montreal Protocol system, and this threat was not textually required by the protocol or by subsequent formal decisions, it proved in practice quite significant.

Similarly, in CITES the trade suspensions that have been collectively undertaken by the parties have largely been successful at bringing about positive change in non-compliant CITES parties. Often the mere threat of action has been enough to stimulate satisfactory change in the party targeted. The CITES sanctioning system is perhaps the best example of the power of sticks rather than carrots in environmental governance, though as noted above much of that power is derivative of the particular nature of international trade, which CITES governs.

In sum the evidence, while not comprehensive, suggests that while the focus in current negotiations over potential compliance review institutions in the UNFCCC and Basel Convention is wisely on creating an institution with facilitative and managerial qualities, in practice disincentives and sanctions have an important role to play in both promoting compliance and addressing non-compliance.

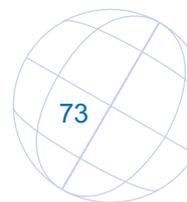
RECOMMENDATION 8:

Build legitimacy and expertise in review institutions slowly and as early as possible

Review institutions are often politically delicate and controversial. States are traditionally wary of the external review of their performance. The limited role for review institutions in most MEAs is evidence of this concern. Only among certain countries and in certain contexts, such as within the WTO Trade Policy Review Mechanism, is external performance review relatively well-accepted and institutionalized. Government concerns about the potentially-negative implications of review institutions can be alleviated only with care. Yet satisfying these concerns is central to successful environmental cooperation in a world of sovereign states and consensus decision making.

Evidence from the Montreal Protocol's implementation review process suggests that the slow accretion of experience is extremely valuable in creating legitimacy for the review institution when more complex, contentious issues arise. This is particularly true for compliance review. In the Montreal Protocol case, the implementation committee met regularly for several years and addressed relatively mundane matters well before it ever tackled an instance of non-compliance. When submissions of compliance difficulties from Belarus and other countries with economies in transition entered the system, this prior experience appeared to be helpful in both creating the expertise to address the submissions and in creating the perception of legitimacy and neutrality that encouraged these states to permit the process to unfold as it did (Victor 1998).

While the experience of one MEA and one set of cases is not dispositive, it does suggest that a similar trajectory of slow but steady learning and experience in other MEA review institutions would be beneficial. A corollary of this argument is that review institutions, particularly compliance review institutions, should be designed and implemented as early as possible – preferably right from the start of the regime's operation.





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APPENDIX 1: THE 10 MULTILATERAL ENVIRONMENTAL AGREEMENTS

The MEAs addressed in this report are the following, in chronological order, the:

- 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar)
- 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage)
- 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS)
- 1982 United Nations Convention on the Law of the Sea (UNCLOS)
- 1987 Montreal Protocol on Substances That Deplete the Ozone Layer (to the Vienna Convention for the Protection of the Ozone Layer) (Montreal Protocol)
- 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)
- 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol (not yet in force)
- 1992 Convention on Biological Diversity (CBD)
- 1994 Convention to Combat Desertification in Countries Experiencing Serious Drought And/Or Desertification, Particularly in Africa (CCD)



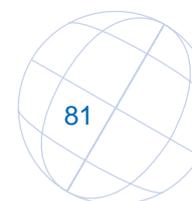
APPENDIX 2: OVERVIEW OF MEA REVIEW INSTITUTIONS

| MEA | Reporting Process | Implementation Review | Compliance Review | Effectiveness Review |
|-------------------|---|---|--|---|
| Ramsar | Yes | Not formally; see Ramsar Advisory Missions/ Montreux Record | No | Proposed under 1996 Strategic Plan; formal evaluation not begun |
| World Heritage | Yes | No; but see Danger List process | No | No |
| CITES | Yes | Yes | Yes, though not formally designated | Yes |
| CMS | Yes | No | No | No |
| UNCLOS | Not formally; limited <i>de facto</i> Practice exists | No | No, but <i>International Tribunal For the Law of The Sea</i> created | No |
| Montreal Protocol | Yes | Yes | Yes | Yes |
| Basel | Yes | Under development | Under development | Yes |
| UNFCCC | Yes | Yes | Under development | No |
| CBD | Yes | Under consideration | No | Only financial mechanism |
| CCD | Yes | Under consideration | No | No |



APPENDIX 3: ACRONYMS

| | |
|----------|---|
| CBD | Convention on Biological Diversity |
| CCD | Convention to Combat Desertification |
| CEC | Commission for Environmental Cooperation |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CITES | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| CMS | Convention on the Conservation of Migratory Species of Wild Animals |
| COP | Conference of the Parties |
| ETEU | UNEP Economics, Trade, and Environment Unit |
| GEF | Global Environment Facility |
| GEO 2000 | Global Environment Outlook 2000 |
| ILO | International Labour Organization |
| IMF | International Monetary Fund |
| IPCC | Intergovernmental Panel on Climate Change |
| IUCN | World Conservation Union |
| MEAs | Multilateral Environmental Agreements |
| MOP | Meeting of the Parties |
| NAAEC | North American Agreement on Environmental Cooperation |
| NAFTA | North American Free Trade Agreement |
| NCP | Montreal Protocol's Non-Compliance Procedure |
| NGO | Non-Governmental Organization |
| ODS | Ozone-Depleting Substances |
| OECD | Organization for Economic Cooperation and Development |
| SBI | Subsidiary Body on Implementation |
| SBSTA | Subsidiary Body for Scientific and Technological Advice |
| SBSTTA | Subsidiary Body on Scientific, Technical, and Technological Advice |
| SIRs | Systems for Implementation Review |
| TEAP | Technology and Economic Assessment Panel |
| TRAFFIC | Trade Records Analysis for Flora and Fauna in International Commerce |
| TRIPs | Trade-Related Intellectual Property Rights Agreement |
| TPRM | WTO Trade Policy Review Mechanism |
| UNCED | United Nations Conference on Environment and Development |
| UNCLOS | United Nations Convention on Law of the Sea |
| UNDP | United Nations Development Programme |
| UNEP | United Nations Environment Programme |
| UNFCCC | United Nations Framework Convention on Climate Change |
| WCMC | World Conservation Monitoring Centre |
| WTO | World Trade Organization |



APPENDIX 4: SECRETARIAT WEBSITES

Ramsar Convention. www.ramsar.org

World Heritage Convention. www.unesco.org/whc/nwhc/pages/home/pages/homepage.htm

Convention on International Trade in Endangered Species. www.cites.org

Convention on Migratory Species. www.wcmc.org.uk/cms

Law of the Sea Convention. www.un.org/Depts/los/index.htm

Montreal Protocol. www.unep.org/ozone/index.shtml

Basel Convention. www.basel.int/

UN Framework Convention on Climate Change. www.unfccc.de

Convention on Biological Diversity. www.biodiv.org

Desertification Convention. www.unccd.int/main.php

