STRONG HIGH SEAS

# Ensuring effective implementation of a high seas biodiversity treaty: Lessons learned and options for an implementation and compliance committee

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# Abbreviations

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| **ABMTs** | Area-based management tools |
| **ABNJ** | Marine areas beyond national jurisdiction |
| **BBNJ** | Marine biodiversity beyond national jurisdiction |
| **BBNJ Agreement** | International legally binding instrument on the conservation and sustainable use of biodiversity in ABNJ |
| **CITES** | Convention on International Trade of Endangered Species of Wild Fauna and Flora |
| **CoP/MoP** | Conference/Meeting of the Parties |
| **EIAs** | Environmental impact assessments |
| **IGC** | Intergovernmental conference |
| **ILBI** | International legally binding instrument |
| **MEA** | Multilateral environmental agreements |
| **MGR** | Marine genetic resources |
| **MPA** | Marine protected areas |
| **NGO** | Non-governmental organisations |
| **RST** | Review of Significant Trade |
| **UNCLOS** | United Nations Convention on the Law of the Sea |
| **UNGA** | United Nations General Assembly |

# Key messages

- Experience with existing multilateral environmental agreements suggests that effective implementation and compliance mechanisms are underpinned by explicit treaty provisions that directly establish a dedicated Implementation and Compliance committee.
- Although a future high seas treaty is not expected to provide detailed parameters for the structure and functioning of such a Committee, Parties could prioritise development in early meetings and decisions of the Conference of the Parties. Empowering Parties to take decisions by vote where efforts to reach consensus have been exhausted would facilitate this process.
- An Implementation and Compliance committee is most effective when it takes a collaborative, transparent and non-confrontational approach, encouraging Parties themselves to seek assistance to implement their treaty obligations and inviting civil society to provide information.

# 1. Introduction

The high seas have long been out of sight and out of mind. The United Nations Convention on the Law of the Sea (UNCLOS, 1982) sets out some rights and duties for Parties, and a range of sectoral agreements and bodies have been developed to manage human activities, yet gaps remain in the global governance framework of areas beyond national jurisdiction (ABNJ). One of these gaps relates to the conservation and management of marine biodiversity in ABNJ, which is impacted by a variety of anthropogenic threats, including pollution, overexploitation of resources, climate change, and ocean acidification. States have been negotiating a new international legally binding instrument (ILBI) on the conservation and sustainable use of biodiversity in ABNJ (BBNJ Agreement) since 2017.[1]

The decision of the United Nations General Assembly (UNGA) decision to start negotiations was based on a "Package Deal" of issues agreed in 2011, comprising: (i) marine genetic resources (MGRs), including issues relating to the sharing of benefits linked to their exploitation; (ii) measures such as area-based management tools (ABMTs), including marine protected areas (MPAs); (iii) environmental impact assessments (EIAs); and (iv) capacity building and the transfer of marine technology. Cross-cutting issues have also regularly been the subject of a dedicated agenda item, with States discussing compliance, financing, and institutional arrangements. Three meetings of the intergovernmental conference (IGC) tasked with negotiating an instrument have taken place, with the fourth scheduled for March 2022.[2]

Compliance with the provisions of the future instrument will be crucial to its effectiveness but the focus of the negotiations has primarily been on the core elements of the package deal, so critically important questions regarding implementation have received limited attention. The current provisions regarding compliance in the draft text of the BBNJ agreement remain unclear and subject to change. For example, the current draft text would require the Conference of the Parties (CoP) to "consider and adopt cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Agreement and to address cases of non-compliance"[3] but there are no indications in the text as to what form this should take. The CoP would be empowered, not required, to establish a Compliance Committee,[4] though this provision remains in brackets.

This paper presents an overview of compliance mechanisms (Section 2) and explores good practices and lessons learned from implementation and compliance committees in several multilateral environmental agreements (MEAs), based on an extensive review of the literature and existing provisions, as well as targeted interviews with experts (Section 3). Finally, it provides reflections and options for the development of the BBNJ treaty (Sections 4 & 5).

1 Informal discussions at the UN began in 2006 under the auspices of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (see UNGA A/61/6, 20 March 2006).

2 The UN General Assembly twice postponed the meeting due to the COVID-19 pandemic.

3 Draft Article 53.

4 Draft Article 48.4(d): "*The Conference of the Parties shall [monitor and] keep under review the implementation of this agreement, and for this purpose shall... establish such subsidiary bodies as deemed necessary for the implementation of this agreement, which may include [(iii) an implementation and compliance committee*".

# 2. Compliance in international environmental law

## 2.1. Definitions

While there are no internationally agreed definitions, it is helpful to clarify key terms - compliance, implementation, and enforcement - as they are often conflated or used interchangeably.

- **Implementation** refers to "*all relevant laws, regulations, policies and other measures and initiatives that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement*" (Goeteyn and Maes, 2011). These measures can be legislative, administrative, or judicial, and are taken so as to make international agreements operative.

- **Compliance** is "the fulfilment by contracting parties of their obligations under a multilateral environmental agreement".[5]

- **Enforcement** comprises "the range of procedures and actions employed by a State... to ensure that organizations or persons potentially failing to comply with environmental law or regulations implementing multilateral environmental agreements, can be brought or returned into compliance and/or punished through civil, administrative or criminal action" (Goeteyn and Maes, 2011).

- **Compliance mechanisms** are "a body of procedures, ranging from the gathering of information, consideration of the information provided, the causes and degree of non-compliance and the decision-making by the CoP, meeting of the parties (MoP), or a specifically designed and designated Compliance Committee with regard to a Party to the treaty that encounters difficulties in meeting the treaty requirements".[6]

- **Implementation/compliance committee**: MEAs commonly convene dedicated committee(s) for facilitating implementation and compliance and many of the MEAs discussed below have developed hybrid bodies that focus on both. In the BBNJ context, it appears that there is a tendency to refer to an "Implementation and Compliance Committee". This report will simply refer to a Committee or "dedicated Committee", i.e. a specialised committee whose mandate includes facilitating both implementation and compliance.

Processes to facilitate compliance generally take a preventive and non-confrontational approach, aiming to support adherence to an agreement and avoid resorting to formal dispute settlement procedures (Lee, 1999; Tanzi and Pitea, 2009). As these efforts take place within the framework of an instrument, they do not involve a third party (in contrast to dispute settlement procedures) and are tailored toward assisting a party to comply with the provisions of an agreement. Implementation support, compliance mechanisms and dispute settlement mechanisms should be seen as complimentary, escalating tools to improve the effectiveness of environmental conventions, though MEAs vary in their use of different options.

Several more recent MEAs have established dedicated Committees in the text of the instrument itself. By contrast, compliance mechanisms for many older instruments were created by subsequent decisions of the CoP.[7]

5 UNEP, Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements: https://wedocs.unep.org/bitstream/handle/20.500.11822/17018/UNEP-guidelines-compliance-MEA.pdf?sequence=1&isAllowed=y

6 Ibid, p. 797.

7 Such a decision must nonetheless be anchored in the treaty text, e.g. reporting requirements.

## 2.2. Elements common to all compliance mechanisms

All MEAs are different and contain specific compliance provisions, though there are some common elements:

- **Reporting obligations** requiring Parties to provide information regarding their implementation of MEA provisions. The convention or a subsequent CoP decision specifies both what information should be submitted and other modalities, such as timing and format. Such obligations can build trust and a sense of shared responsibility and ambition between parties.

- **Review and verification** of the information provided by Parties. This information is collected and collated by a secretariat. Secretariats usually do not have a mandate to take compliance-related decisions but will process the information, sometimes conducting an initial analysis and providing recommendations, for the CoP or a dedicated Committee to review.[8] The information collected and analysed is used to monitor and assess the level of implementation of treaty obligations and formulate suggestions for parties to reach compliance.

- **Response measures**: There are two broad approaches to non-compliance, which may be termed *facilitative* and *coercive*. The former assumes the Party is willing to fulfil its obligations but is unable to do so without assistance, so measures tend to focus on technical and financial assistance, advice, and information exchange. The latter assumes that the party is at best negligent or at worst unwilling to implement the provisions of the agreement and that additional measures are necessary to coerce Parties to comply with their agreed obligations (e.g. formal proceedings, official warnings, and financial or other penalties). These approaches are not mutually exclusive and can be combined as part of an ongoing compliance process that takes different forms at different times. The resulting "carrot and stick" dynamic allows for the provision of assistance and support with coercive measures available as a last resort.[9]

## 2.3. Overview of implementation and compliance committees

A Committee can be established as a specific body endowed with its own procedures to ensure Parties effectively fulfil their obligations under the convention. This body, either *ad hoc* or permanent, can be established either under a specific provision of the convention text, or after the adoption of the treaty through a decision of the CoP. The functions carried out by such committees often include:

- Providing **opinions and findings** on the implementation of, and compliance with, the convention by State parties. Committees often have a mandate to review the information provided by State parties and deliver in a report to the CoP or the MoP their conclusions and recommendations;

- Issuing **advice** and triggering **assistance and technical support** to non-complying Parties; and

- Applying **sanctions**, such as declarations of non-compliance, cautions and suspension of rights and privileges.

Compliance procedures are usually triggered by a Party, either in relation to another Party or with regard to its own non-compliance, but an MEA can also provide for the secretariat or communications from the public to trigger a procedure.

The relationship between the Committee and other bodies of the convention varies (Brunnée, 2005; Churchill and Ulfstein, 2000). In some cases, the Committee sets out recommendations and the final decision is left to the CoP or the MoP. In others, the Committee is fully independent and empowered to take its own decisions. For example, the CoP/MoP of the Kyoto Protocol has only limited power to decide on appeals against its decisions;

8 E.g. A compliance or equivalent committee, an ad hoc working group, a particular commission, or an expert team review which may choose to delegate all or part of the tasks to other bodies

9 The reality may also be simply that the implementation of the MEA in question is not high enough of a priority for a Party, i.e. they are willing and able but do not currently view it as a priority.

whereas the equivalent body of the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES), the Standing Committee, can apply sanctions against non-complying parties.[10] Several conventions also take a middle-ground approach, where the Committee can adopt certain measures but the CoP takes final decisions. The Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (the Aarhus Convention) allows the Committee to adopt facilitative measures (such as advice or technical assistance) in collaboration with the non-complying party.

Members of the Committee can be either representatives of Parties or individuals acting in their personal capacity so as to reduce the risk that decisions are influenced by political considerations.

By resolving, or at least predigesting, compliance related issues prior to the CoP, a Committee also helps the CoP to run efficiently by working on complex and potentially sensitive issues and (where it has a mandate) and taking decisions, thereby reducing the workload of the CoP. There is also a cost-saving benefit as Committees are usually smaller in size and draw fewer attendees than a CoP.

Civil society often plays a role in compliance procedures. Non-governmental organisations (NGOs) and other civil society organisations can be observers to Committee meetings and some conventions endow them with specific rights. Such organisations are often be well placed to compile and provide information on situations of potential non-compliance to the Committee. In rare cases, non-State actors are also empowered to trigger a non-compliance procedure. Both the Alpine Convention and Aarhus Convention have seen several cases of non-compliance initiated by civil society, though this can prove controversial and Parties may feel that it undermines the cooperative and non-confrontational nature of the mechanism.

10 Generally, Compliance Committees of MEAs only have a mandate to provide recommendations to the CoP/MoP, which then takes the final decision on whether to adopt or not such recommendations.

# 3. Implementation and compliance committees in existing multilateral environmental agreements

This section provides an overview of committees in several instruments, namely CITES, the Aarhus, Alpine and Minamata Conventions, the Paris Agreement and the Kyoto and Montreal Protocols.

## 3.1. The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES)

The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES, 1973), the oldest MEA discussed in this paper, focusses on regulation of the international wildlife trade. Species requiring protection are listed in the appendices of the convention and new species can be added by the CoP, which takes place every three years. The appendices also specify the level of protection given to each species.

The Convention generally places trust and responsibility for implementation in the designated national authorities, including the requirement to ensure that trade in listed species is sustainable. CITES' compliance processes therefore aim to ensure durable long-term compliance through a supportive and non-adversarial approach, though coercive measures are available as a last resort.

A foundational aspect of the CITES compliance mechanism is strict reporting and review obligations. Parties are required to submit an annual report on international trade in CITES-listed species (including information regarding permits granted, quantities and species commercialised, and trade partners). Non-submission of the annual report for three consecutive years without adequate justification triggers a compliance process.[11] Other ad hoc reports may be requested by the CoP and other Convention bodies.

Building on an obligation in the Convention for Parties to ensure international trade is not detrimental to the survival of a listed species, CITES Parties also established a process for identifying situations of potential concern in the form of a Review of Significant Trade (RST). Parties' Potential candidates for review are pre-selected based on Parties' annual reports in the form of species-country combinations that may require further assessment. On that basis a CITES Technical Committee,[12] composed of independent experts, finalizes the selection. Based on the selection of the Technical Committee, Parties are requested to provide a scientific rationale for exported levels of the relevant species. The Technical Committee reviews the Parties' submissions and, where necessary, makes time-bound recommendations on how to improve the situation and reviews their implementation. The Technical Committee can make recommendations to the Standing Committee to take compliance measures if the Party in question does not respond or make progress within the timeframe provided. A similar process, with the Secretariat leading the analysis, is in place to ensure that Parties have passed adequate national legislation to implement CITES.

The Standing Committee[13] has a broad mandate that encompasses compliance and implementation, coordination and oversight of the work of other committees and working groups, and other tasks as instructed by the CoP. It meets in the two years in between the triannual CoPs.

11 Parties are also required to submit a biennial report on the implementation of the convention, i.e. on specific legislative and administrative measures that have been taken. This report is not subject to a compliance mechanism.

12 In practice, CITES has two such committees – one each for animals and plants.

13 The Standing Committee and its compliances processes were established via CoP decisions, though they are anchored in specific treaty obligations (including mandatory annual reports). It is likely that decision-making by voting, rather than by consensus, facilitated the development of a strong compliance mechanism.

The strongest coercive measure in its toolbox is to recommend a suspension of trade with a specific Party.[14] Measures can be species-specific, recommending a suspension of trade in a particular species with the Party concerned, or country-specific, recommending that all trade with the Party be suspended. It is the Standing Committee itself that has the mandate to take such measures based on expert input, rather than the CoP. Suspension of trade is lifted once the Party returns to compliance. The Standing Committee usually takes several steps before considering a suspension of trade (such as advice, recommendations and prior notifications), though non-compliance procedures are often triggered because the State does not respond or engage with the Committee.

Although there is a recent tendency to move towards more facilitative measures, suspension of trade is commonly used.[15] Through trade suspensions, countries are excluded from accessing lucrative legal export markets and trade embargos can be applied to non-parties to the Convention failing to comply with documentation standards.[16] This economic incentive makes the CITES non-compliance procedures particularly efficient and in most cases the Party quickly returns to compliance and trade suspensions are lifted.[17]

## 3.2. The Convention on the Protection of the Alps (Alpine Convention)

The Convention on the Protection of the Alps (Alpine Convention, 1991)[18] is the first agreement for the protection of a mountain region worldwide that is binding under international law (Cristofaro *et al.,* 2019), aiming to protect and sustainably develop the cultural and ecological diversity of the region. The CoP meets every two years and decision-making is done primarily by consensus, although in some specific cases decisions can be taken by voting majority. The Convention is relatively young and the Compliance Committee responsible for issues of compliance and implementation has been in place for fifteen years.

Reporting and reviewing is the primary compliance mechanism. The ordinary compliance procedure requires each Party to submit an extensive report on their efforts to implement the Convention and its Protocols.[19] These reports are made public by the Secretariat. The Compliance Committee is composed of two representatives of each Party and two representatives of observer organisations. Its primary role is to analyse national reports and decide upon measures to be taken in cases of non-compliance. Based on the reports, the Committee can take measures such as: providing advice and support; arranging consultations with experts; conducting enquiries on the spot into potential non-compliance (if agreed to by the Party itself); adopting measures to promote cooperation; and requiring the affected Party to develop a compliance strategy. No punitive measures can be adopted by the Permanent Committee.

The Alpine Convention is one of very few MEAs to provide specific powers to its observers. Not only can relevant accredited organisations attend the CoP and send representatives to the discussions of the Compliance Committee (Koester and Young, 2007), they can actually trigger a non-compliance procedure. Observers can ask the Compliance Committee to start a non-compliance procedure if they have reason to believe a certain development by a Party is contrary to

14 The legal basis for suspension of trade measures can be found in Article 13.

15 CITES, Countries currently subject to a recommendation to suspend trade. https://cites.org/eng/resources/ref/suspend.php (accessed February 17, 2022).

16 Article X: "Trade with States not Party to the Convention": "*Where export or re-export is to, or import is from, a State not a Party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party.*"

17 Sand (2013) found that in 80% of cases, Parties returned to compliance within a year.

18 The convention was signed in 1991 by eight countries and the EU, and entered into force in 1995.

19 The ordinary compliance procedure was undertaken in 2005 and in 2009. In 2012, Parties decided to extend the reporting period from four to ten years and introduce an in-depth review phase.

provisions of the Convention. This provision has been used three times to date.[20] Providing observers with the opportunity to trigger a non-compliance procedure has been seen to place some pressure on Parties to meet their agreed obligations and may increase compliance with the agreement.

## 3.3. The Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (the Aarhus Convention)

The Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (the Aarhus Convention) was adopted in 1998. A Compliance Committee was established during the first MoP in 2002.[21] The Committee is mandated to review Parties' compliance and report back to the MoP. It is composed of nine independent lawyers, nominated by the MoP. A compliance review may be triggered by: a Party regarding another Party; the non-complying Party itself, so as to receive assistance; the Secretariat; the MoP; or the public.

The Convention provides extensive rights to the public to trigger a non-compliance procedure. Members of the public can communicate their concerns regarding non-compliance directly to the Compliance Committee. Although there are strict requirements, the procedure is relatively simple.[22] The Committee conducts a preliminary analysis and, if it deems the complaint admissible, a preliminary inquiry where the Party is required to provide reasons for non-compliance.

The Committee can then begin a non-compliance procedure, nominating a rapporteur to oversee the case and decide whether to proceed to hearings. During hearings, any member of the public can provide additional information. The Compliance Committee then prepares its findings and determines whether the Party is non-compliant. If so, the Committee provides recommendations (that must be endorsed at the MoP). These recommendations, from a committee composed entirely of legal experts, are extremely precise and are often used in national courts. After endorsement by the MoP, the non-compliant Party is required to submit a report on how it will implement such recommendations before the next meeting. The report is made public and discussions are open to the public. If the Party does not follow the recommendations of the Committee, the MoP can decide to issue a caution, or, in extreme cases, suspend the Party's rights.

While traditionally viewed as a "soft" non-judicial mechanism, commentators have noted that the Arhus Committee has developed a more "judicialized" nature over time that allows for decisions that more resemble legally binding rulings (Fasoli and McGlone, 2018; Kravchenko, 2007; Samvel, 2020). Nonetheless, an assessment of early practice showed that Parties recorded some degree of compliance with the rulings of the Committee in fewer than 41% of the cases, whereas in 59% they recorded no progress (Samvel, 2020). This reflects a broader theme in compliance, where the "normative character of the Committee and its rulings play an auxiliary role in the process of ensuring compliance [...] The decision of parties to comply is determined typically by the substance of the rulings as they stand in relation to domestic circumstances rather than by the institutional features of the Committee and binding effect of its rulings" (Samvel, 2020).

20 In 2013, the organisation Club Arc Alpin (CAA), an observer organisation, asked the Permanent Committee to verify if Austria, by authorising a project of ski lift in the site of Piz Val Gronda was in accordance with article 6 of the protocol on tourism to the Convention. Similarly in 2014 the NGO International Commission for the Protection of the Alps (CIPRA) expressed concerns to the committee when Germany started a series of modifications of the landscape, doubting this was in line with article 11 of the Protocol on the preservation of nature under the Alpine Convention. (see https://www.alpconv.org/fileadmin/user_upload/Organization/CC/CC_request_Egartenlandschaft_report_fr_fin.pdf - https://www.alpconv.org/fileadmin/user_upload/downloads/downloads_en/2_organisation_en/organisation_compliancecommittees_en/CC_request_CAA_PVG_decision_fr_fin.pdf)

21 The MoP of the Aarhus Convention meets every three years.

22 In comparison, in the Espoo Convention submitting a similar concern to the public requires approximatively two-months of full-time work from experts.

## 3.4. The Minamata Convention on Mercury

Negotiators of the Minamata Convention on Mercury (2013) included a provision establishing an Implementation and Compliance Committee in the text. Two key factors facilitated States' support for a compliance mechanism in the Minamata Convention (Templeton and Kohler, 2014): 1. The clarity and strength of the financial provisions provided "credible assurances" that States would be able to access funding to support them in implementing their obligations; and 2. The mechanism is facilitative in nature and "contains virtually all 'carrots' and no 'sticks'; this approach ensured that many States will be better off as a result of the inclusion of the mechanism and no States will be worse off".

The Committee is facilitative in nature with a mandate to review issues of implementation and compliance and make recommendations to the CoP. The initial members were elected at the first CoP, with subsequent appointments subject to rules of procedure approved by the CoP. The members of the Committee must have competence in a relevant field and reflect an appropriate balance of expertise.[23] The Committee may consider compliance issues on the basis of: written submissions from a Party with respect to its own compliance; national reports; and requests from the Conference of the Parties. In cases where efforts to take a decision by consensus have been exhausted, recommendations of the Committee can be adopted by a three-quarter majority vote.

## 3.5. The Paris Agreement under the United Nations Framework Convention on Climate Change (Paris Agreement)

The 2015 Paris Agreement under the United Nations Framework Convention on Climate Change (Paris Agreement) includes provisions for:

> *a mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement [consisting] of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive [and pays] particular attention to the respective national capabilities and circumstances of Parties.*

While the provision is less detailed than that in the Minamata Convention, it similarly specifies the composition of the Compliance Committee and sets the tone for how the Committee should proceed with its work.

## 3.6. The Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)

One of the specificities of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC Kyoto Protocol, 1997) is that its Compliance Committee is divided into two independent branches: a facilitative branch, providing assistance and advice to Parties; and an enforcement branch, responsible for determining the consequences for Parties not meeting their commitments. Both branches are composed of ten members and ten alternate members serving in their personal capacity for four years.

23 Minamata Convention on Mercury, article 15§3

The Facilitative Branch provides advice to Parties facing difficulties. It is guided by the principle of "common but differentiated responsibilities" and respective capacities.[24] The Enforcement branch controls compliance with methodological and reporting obligations. A non-compliance procedure can be triggered by expert review teams,[25] by one Party regarding another Party, and by the Party itself. Unlike the facilitative branch, the enforcement branch operates under precise rules and determines the consequences of non-compliance. Besides Parties, expert review teams can trigger a compliance procedure; in practice, this has proven particularly efficient (Fournier, 2017). After triggering, the Bureau of the Compliance Committee examines the case and determines which Branch should have responsibility. The Compliance Committee is independent and has the final say on compliance issues - the CoP has no authority over its decisions, except in the case of an alleged breach of due process requirements.

## 3.7. The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)

The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol, 1987) is an international agreement to phase out the chemicals that deplete it. The compliance mechanism of the Protocol mixes both facilitative and coercive measures, with sanctions in cases of non-compliance as well as incentives for Parties to comply with obligations.

Besides establishing an Implementation Committee with a mandate to gather and review information on implementation, as well as making recommendations to the MoP,[26] the Protocol permits parties to "continue to produce, consume, and trade in ozone-depleting chemicals until the turn of the century albeit at reduced levels" (Kelly, 2004). Parties are thus encouraged to join the agreement to benefit from import and export opportunities.

When State parties adopted the Protocol, it did not provide a mechanism to assist developing countries to comply with their obligations. The agreement differentiates the responsibilities of developed and developing states, "recognizing that the latter had contributed little to the global challenge of ozone depletion and hence were entitled to special consideration, despite the fact that all nations are responsible for protecting the ozone layer" (Kelly, 2004). The 1990 London Amendment to the Montreal Protocol established the Multilateral Fund for the Implementation of the Montreal Protocol, which covers incremental compliance costs of developing countries. The Fund is managed by an Executive Committee with an equal representation of developing and developed states annually elected by the MoP.

24 A principle that establishes that although all States must address global environmental destruction, they are not all equally responsible for it and their very different capacities makes it difficult for them to address these issues in the same way.

25 Expert review teams are responsible for reviewing the two reporting obligations of Parties: the annual report that includes countries greenhouse gas inventory and periodic national communications.

26 Article 8.

# 4. Lessons learned and implications for the BBNJ treaty

It is clear that a robust implementation and compliance commitee, which typically takes the form of a dedicated committee, can bring a range of benefits to Parties when implementing MEAs. These include advice, assistance and tools, and the provision of a cost-effective and non-confrontational alternative to dispute resolution procedures. Such provisions also contribute to the overall functioning and development of an instrument, facilitating the work of the CoP and will often lead to the development of a community of practice that can provide a flexible and adaptable source of expertise and support as needed (Wenger-Trayner and Wenger-Trayner, 2015).

A key lesson learned from existing practice is that MEAs that do not directly establish a compliance mechanism have faced significant challenges in developing one post-adoption. Experts with first-hand experience of the negotiation of these agreements highlight that this subsequently led to politicised discussions and indefinite delays to establishment of a compliance mechanism. Many such instruments therefore remain without a compliance mechanism, in some cases decades after their negotiation. Experienced negotiators, cognisant of these pitfalls, have therefore advocated for the inclusion of such provisions in a number of recent international treaties, including the Paris Agreement.

Consensus decision-making can be a barrier to progress, as a small number of Parties (or even just one) can stall progress by voting against the overwhelming majority, so it is advisable to allow for some form of majority voting where efforts to reach consensus have been exhausted.

Negotiators have already included a draft article on compliance in the BBNJ agreement reticent is not possible at this stage to ascertain the level of ambition that will characterise the final steps of the BBNJ negotiations. Three options are suggested below: 1. Require the CoP to establish a Committee; 2. Establish a Committee directly through a provision in the treaty text; and 3. Prioritise an early CoP decision that provides further detail on the modalities of the Committee. Annex I provides proposed wording to reflect Options 1 and 2 in the treaty text.

# 5. Options for establishing an Implementation and Compliance Committee

**Option 1**: *Require the Conference of the Parties to establish a Committee.*

The current draft article, which remains in brackets, merely empowers the CoP to establish subsidiary bodies as it deems necessary. This provision could easily be strengthened by instead requiring the CoP to establish a compliance mechanism:

> *The Conference of the Parties shall monitor and keep under review the implementation of this Agreement and, for this purpose, shall establish an implementation and compliance committee.*

**Option 2**: *Establish a Committee directly through a provision in the treaty text.*

Including a provision establishing a compliance committee directly in the treaty text not only sends a strong signal that compliance is a priority, it would also guarantee that such a mechanism is established from the beginning and help avoid undue delays in developing the relevant infrastructure and procedures. The relevant provision from the Minamata Convention could be instructive:[27]

> *A mechanism, including a Committee as a subsidiary body of the Conference of the Parties, is hereby established to promote implementation of, and review compliance with, all provisions of this Convention.*

Further text could be included to provide some general high-level principles and indications that reflect common practice in other agreements:

> *The mechanism, including the Committee, shall be facilitative in nature and shall pay particular attention to the respective national capabilities and circumstances of Parties.*
>
> *The Committee shall promote implementation of, and review compliance with, all provisions of this Convention. The Committee shall examine both individual and systemic issues of implementation and compliance and make recommendations, as appropriate, to the Conference of the Parties.*

27 Minamata Convention, Article 15.

### **Option 3**: *Prioritise a decision of the first Conference of the Parties that establishes the foundational elements of a Committee.*

If Parties are keen to kickstart the development of the Committee, they could prioritise the adoption of a decision during the first CoP that provides further details regarding its form and functions.

Given the breadth of issues covered by the BBNJ Agreement, it will be necessary for Parties and stakeholders to reflect more deeply on how a BBNJ Committee would organise its work, its relationship to other treaty bodies such as the proposed clearing-house mechanism, and if/how it could coordinate and cooperate with other sectoral bodies and processes when considering cases of non-compliance.

An initial decision could provide a high-level framework for a Committee that could include:

- **Nature and approach**: Compliance mechanisms appear to work best when they are non-adversarial, transparent and consultative, with a focus on assisting countries to meet their obligations. The Committee could nonetheless also allow for the possibility of stronger measures being taken in certain cases.

- **Composition**: A Committee could include both representatives nominated by Parties and relevant experts. There could be modalities for the participation of civil society, ideally including the possibility that NGOs could be represented on the Committee. At a minimum, civil society organisations should be able to attend meetings as observers and submit information to the Committee for its consideration.

- **Mandate**: Specifying the role of the Committee and clarifying its relationship with other subsidiary bodies. The Committee would likely work best if permitted to work independently from the CoP with a mandate to take its own measures to address cases of non-compliance.

- **Triggers**: Parties would need to decide who would have the right to trigger a compliance procedure in relation to suspected non-compliance. A Party should be empowered, even encouraged, to trigger a procedure in relation to itself where it wishes to return to compliance. Parties could consider empowering a treaty body, such as the CoP or Committee itself to trigger a procedure. Though it is rare to invite civil society to directly trigger a procedure, observers could be invited to provide information on cases of suspected non-compliance to Parties or directly to the Committee for its consideration.

- **Consequences of non-compliance**: Though use of coercive measures is uncommon, experience shows that they can be a strong incentive when well-integrated into the functioning of a treaty, balanced with assistance, and only used as a last resort. The Committee could, for example, recommend the CoP to issue a caution to a non-complying Party.

# 6. Conclusion

As negotiators prepare for the final stages of the negotiation of a treaty for the conservation and management of marine biodiversity in ABNJ, it is crucial that compliance is given due attention. These issues have been the subject of relatively little attention to date and the current provisions regarding compliance in the draft text of the BBNJ agreement remain unclear and subject to change. Experience in a range of existing multilateral environmental agreements suggests that effective compliance mechanisms begin with dedicated treaty provisions establishing a compliance committee, with further guidance being provided in the treaty text or soon after adoption by the Conference of the Parties. Effective compliance mechanisms tend to focus on facilitating a collaborative, transparent and non-confrontational approach to compliance, rather than on dispute resolution proceedings and coercive measures. State representatives and experts are typically involved, with civil society also being invited to play a role.

In the immediate-term, negotiators can conclude an agreement that establishes an Implementation and Compliance Committee, along with some initial high-level indications as to its purpose and approach. In the longer term the focus will be on the practical aspects of agreeing operational modalities and developing effective compliance procedures. The ultimate ambition and effectiveness of a Committee and compliance processes will be dictated by the level of collective political will and ambition of the negotiators and parties.

# Annex I. Proposed treaty text

*Option 1: require the CoP to establish a Committee*

- **Article 48 (4):** The Conference of the Parties shall [monitor and] keep under review the implementation of this Agreement and, for this purpose, shall: [...]
- (d) Establish such subsidiary bodies as deemed necessary for the implementation of this Agreement [, which may include:
- **~~[(iii) An implementation and compliance committee;]~~** [...]
- **(e)(new) Establish an implementation and compliance committee.**

*Option 2: Establish a Committee in the treaty text*

- ~~Article 53(3): [3. The Conference of the Parties shall adopt consider and adopt cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Agreement and to address cases of non-compliance.]~~
- **Article 53(4)(new): An implementation and compliance committee is hereby established to promote implementation of, and review compliance with, all provisions of this Convention.**
- **(a) The mechanism, including the Committee, shall be facilitative in nature and shall pay particular attention to the respective national capabilities and circumstances of Parties.**
- **(b) The Committee shall promote implementation of, and review compliance with, all provisions of this Convention. The Committee shall examine both individual and systemic issues of implementation and compliance and make recommendations, as appropriate, to the Conference of the Parties.**

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**ViSdP**
Sébastien Treyer, Executive Director
March 2022

# About the STRONG High Seas Project

The STRONG High Seas project is a five-year project that aims to strengthen regional ocean governance for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. Working with the Secretariat of the Comisión Permanente del Pacífico Sur (CPPS; Permanent Commission for the South Pacific) and the Secretariat of the West and Central Africa Regional Seas Programme (Abidjan Convention), the project will develop and propose targeted measures to support the coordinated development of integrated and ecosystem-based management approaches for ocean governance in areas beyond national jurisdiction (ABNJ). In this project, we carry out transdisciplinary scientific assessments to provide decision-makers, both in the target regions and globally, with improved knowledge and understanding on high seas biodiversity. We engage with stakeholders from governments, private sector, scientists and civil society to support the design of integrated, cross-sectoral approaches for the conservation and sustainable use of biodiversity in the Southeast Atlantic and Southeast Pacific. We then facilitate the timely delivery of these proposed approaches for potential adoption into the relevant regional policy processes. To enable an interregional exchange, we further ensure dialogue with relevant stakeholders in other marine regions. To this end, we set up a regional stakeholder platform to facilitate joint learning and develop a community of practice. Finally, we explore links and opportunities for regional governance in a new international and legally-binding instrument on marine biodiversity in the high seas.

**Project duration:** June 2017 – May 2022

**Coordinator:** Institute for Advanced Sustainability Studies (IASS)

**Implementing partners:** BirdLife International, Institute for Sustain-able Development and International Relations (IDDRI), International Ocean Institute (IOI), Universidad Católica del Norte, WWF Colombia, WWF Germany

**Regional partners:** Secretariat of the Comisión Permanente del Pacífico Sur (CPPS), Secretariat of the Abidjan Convention

**Website:** prog-ocean.org/our-work/strong-high-seas

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