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# COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

# COMPLIANCE BUILDING UNDER THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

**by**

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This document was prepared at the request of the Secretariat of the Commission on Genetic Resources for Food and Agriculture, acting as Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture, in order to provide information on compliance provisions in other international agreements and stimulate thinking regarding the implementation of Article 21 of the International Treaty on Plant Genetic Resources for Food and Agriculture, which establishes that "the Governing Body shall, at its first meeting, consider and approve cooperative and effective procedures and operational mechanisms to promote compliance with the provisions of the Treaty and to address issues of non-compliance".

The text is the responsibility of the authors and does not necessarily represent the views of the FAO or its member states.

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# COMPLIANCE BUILDING UNDER THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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## 1. INTRODUCTION

1. The objective of the paper is to stimulate thinking regarding the implementation of the provision of the 2001 FAO International Treaty on Plant Genetic Resources for Food and Agriculture (IT/PGRFA) that instructs the Governing Body to adopt a compliance procedure, namely Article 21:

> The Governing Body shall, at its first meeting, consider and approve cooperative and effective procedures and operational mechanisms to promote compliance with the provisions of this Treaty and to address issues of non-compliance. These procedures and mechanisms shall include monitoring, and offering advice or assistance, including legal advice or legal assistance, when needed, in particular to developing countries and countries with economies in transition.

Taking into account the work already undertaken by the secretariat,[2] this paper (which was completed in December 2003) draws materials together from operational and emerging compliance procedures, compliance related procedures, and guidelines for the development of compliance procedures (Section 2). It continues with analyses of the differences between compliance procedures and dispute settlement procedures (Section 3), and the elements of Article 21 IT/PGRFA (Section 4). The core of the paper consists of "building blocks" -- elements which the operational and emerging compliance procedures have in common (Section 5) -- that could be considered when developing the compliance procedure under Article 21 IT/PGRFA. Finally, the paper provides an indication of the costs involved in the operation of a compliance procedure (Section 6).

2. In this paper, the term "compliance" means the fulfilment by a Party of its commitments under a multilateral agreement.[3]

## 2. STATE OF PLAY

### 2.1 Compliance Procedures in Operation

1. As of December 2003, compliance procedures are in operation in five environmental treaties (multilateral environmental agreements). The non-compliance procedure under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to the 1985 Vienna Convention for the Protection of the Ozone Layer (Montreal Protocol or MP) has been in operation for the longest time.[4] The procedure was first formulated in 1990, pursuant to Article 8 MP by way of a decision of the Meeting of the Parties. After two years of *ad interim* application, the fourth Meeting of the Parties gave full effect to the procedure in 1992. As of December 2003, the Implementation Committee, *i.e.,* the body that administers the procedure, has held thirty-one meetings.

2. In 1997, the Executive Body of the 1979 UNECE Convention on Long-range Transboundary Air Pollution (LRTAP Convention) adopted a compliance procedure.[5] The Convention does not contain a clause which instructs the Executive Body to adopt a compliance procedure. Its 1991 and 1994 Protocols do however incorporate such a clause, inspired by the developments under the Montreal Protocol. Rather than developing compliance procedures separately under the different protocols, it was decided to opt for a single, "joint" procedure, applicable not to the Convention itself, but to all its Protocols in force. As of December 2003, the Implementation Committee, *i.e.,* the body that administers the procedure, has held twelve meetings.

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2 See CGRFA/MIC-1/02/7.

3 Cf. Chapter I, section C, para. 9(a) of the UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (see Section 2.4).

4 See Decision IV/MP.5, as amended by Decision X/MP.10, UNEP/OzL.Pro.10/9 (3 December 1998), Annex II, pp. 47-49 (MP CP). The original decision was amended in 1998 to improve the continuity of the membership of the Implementation Committee and introduced more detailed timeframes

5 See Decision 1997/2, as amended by Decision 1998/3, ECE/EB.AIR/75 (16 January 2002), Annex V, pp. 35-38 (LRTAP CP). The original decision was amended in 1998, expanding the size of the Implementation Committee from eight to nine members.

3. In 2001, the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention or EC), which does not contain a clause instructing the Meeting of the Parties to adopt a compliance procedure, followed with its compliance procedure.[6] This compliance procedure relies heavily on the compliance procedure under the LRTAP Convention. Currently, the procedure is under review, with a view to incorporating provisions on public participation. The procedure is expected to be amended at the third Meeting of the Parties, scheduled for 2004. As of December 2003, the Implementation Committee has met five times.

4. In 2002, the 1998 UNECE Convention on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention or AC) was the third UNECE Convention to adopt a compliance procedure, pursuant to Article 15 AC.[7] The procedure is unique in that it allows, under certain conditions, members of the public to trigger the procedure. As of December 2003, the Compliance Committee has met two times, but has not yet undertaken work on substantive matters.

5. The compliance procedure under the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention or BC) was adopted in December 2002 by the sixth Conference of the Parties.[8] The Convention does not contain a clause instructing the Conference of the Parties to adopt a compliance procedure, the development of such a procedure being prompted by a decision of the Conference of the Parties.[9] In March 2003, the process of the election of the members of the Committee, which administers the procedure, was finalised. The first meeting of the Committee was convened in October 2003.

6. After intense and high-profile negotiations, the compliance procedure under the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change (Kyoto Protocol or KP) was successfully concluded in 2001, at the seventh session of the Conference of the Parties to the Convention.[10] The compliance procedure finds its basis in Article 18 KP. Though finalised, the procedure is not yet operational, as it awaits the entry into force of the Kyoto Protocol. At their first meeting, the Parties to the Protocol have to formally adopt the procedure.

7. Finally, the Parties to the subregional 1991 Convention on the Protection of the Alps (Alpine Convention) adopted a compliance procedure in 2002.[11] The procedure is to a large extent based on the compliance procedures adopted in the framework of the UNECE. It has, however, some special features, namely the integration of a system of monitoring into the procedure (see Section 5.2), the participation of observers in the body that administers the procedure (see Section 5.3), and the attribution to observers of the right to set the procedure in motion (see Section 5.4).

### 2.2 Compliance Procedures under Negotiation

1. Five compliance procedures are currently under negotiation.

- The compliance negotiations under the 2000 Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity (Biosafety Protocol or CPB), which entered into force in September 2003, are in an advanced stage and expected to be finalised by the Parties to the Protocol at their first meeting, scheduled for February 2004, in accordance with Article 34 CPB.[12]
- The negotiations on a compliance procedure under Article 17 of the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention or PIC), which will enter into force in March 2004, are showing relative

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6 See Decision II/4, MP.EIA/4 (7 August 2001), pp.72-76 (EC CP).
7 See Decision I/7 (advanced unedited copy of 31 October 2002) (AC CP).
8 See Decision VI/12, UNEP/CHW.6/40 (10 February 2003), pp. 45-50 (BC CP).
9 See Decision III/11, UNEP/CHW.3/35 (17 October 1995).
10 See Decision 24/CP.7, FCCC/CP/2001/13/Add.3 (21 January 2002), pp. 64-77 (KP CP).
11 See Decision VII.4, 33 *Environmental Policy and Law* (2003), pp. 179-180.
12 For text under consideration, see ICCP Recommendation 3/2, UNEP/CBD/ICCP/3/10 (27 May 2002), pp. 34-43 (draft CPB CP).

progress. A draft procedure is currently on the table, with talks continuing at the first Conference of the Parties scheduled for September 2004.

- Under Article 17 of the 2001 Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention or POPs), which is expected to enter into force in 2004, views on a compliance procedure were solicited in 2002. It is expected that the first meeting of the Conference of the Parties will address a future compliance procedure in detail for the first time.
- Within the International Maritime Organization, talks on a compliance procedure under Article 11 of the 1996 London Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Protocol or LP) are at an early stage. By way of a questionnaire, views were solicited in 2002 that were discussed at a meeting in October 2003. The discussion will be continued in 2004
- Preliminary discussions on a compliance procedure are also ongoing under the 1996 UNECE Water and Health Protocol to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water and Health Protocol or WHP), pursuant to Article 15 WHP.

2. In addition, two recently adopted UNECE Protocols contain clauses instructing their respective supreme bodies to adopt a compliance procedure. Under the 2003 Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention (PRTR Protocol), the procedure shall operate separately from the compliance procedure under the Aarhus Convention (Article 22). In contrast, the future procedure under the 2003 Protocol on Strategic Environmental Assessment to the Espoo Convention (SEA Protocol) will be integrated, insofar as possible, into the procedure operating under the Espoo Convention (Article 14.6). The elaboration of both compliance procedures is expected to commence in the course of 2004.

### 2.3 Related Procedures

1. Two compliance-related procedures can be found under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[13] and the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).[14] Although these procedures address cases of non-compliance, they differ from a compliance procedure from a procedural and institutional perspective. Special bodies to administer the procedure have not been established. When the secretariat of these conventions becomes aware of a potential case of non-compliance, *e.g.,* through information provided by a Party or a non-state actor, it examines the case and decides whether or not to act on it. When action is warranted, the secretariat seeks the opinion and further information from the Party concerned. Following the response from that Party, the secretariat, in case of the Bern Convention with the agreement of the Bureau, decides whether there is sufficient reason to put the case on the agenda of other treaty bodies for the adoption of responses to address the case of non-compliance. Currently, the procedure under CITES is under review. The review aims to bring together and codify the practice as it has developed during the past years, and is expected to bring the structure of the procedure closer to the compliance procedures under other multilateral environmental agreements.

2. It should also be noted that two multilateral environmental agreements contain a clause instructing their respective supreme bodies to adopt a so-called multilateral consultative process – a type of procedure that has some procedural and institutional features in common with a compliance procedure, but which focuses on resolving questions of implementation of individual Parties, rather than on addressing cases of non-compliance. First, the Parties to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) have elaborated a draft for a multilateral consultative process under Article 13 UNFCCC. However, due to unresolved issues relating to the composition of the body envisaged to administer the multilateral consultative process, the process has not been completely finalised and has thus not come into operation.[15] Second, Article 27 of the 1994 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) contains a provision for a similar consultative process. The Article has, as yet, not been granted a high priority. Hence,

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[13] See esp. Article XIII CITES and Resolution 11.3; for an overview of the CITES procedure, see CoP12 Doc. 26 (2002).

[14] See T-PVS (93) 48, Appendix 4, for detailed text of the system of opening and closing of files.

[15] For text under consideration, see 10/CP.4, FCCC/CO/1998/16/Add.1 (20 January 1999), pp. 42-46 (draft UNFCCC MCP).

no substantive progress has been made in elaborating the process. At the sixth Conference of the Parties, it has been decided to invite further views and to put the issue on the agenda of the seventh Conference of the Parties for continued consideration.

3. In April 2001, the Interim Commission on Phytosanitary Measures under the 1951 International Plant Protection Convention adopted Guidelines for the Notification of Non-Compliance and Emergency Action (IPPC Guidelines).[16] These Guidelines belong to the international standards for phytosanitary measures (ISPMs) that are applied by members of the World Trade Organization under the Agreement on the Application of Sanitary and Phytosanitary Measures. The purpose of ISPMs is to achieve international harmonisation of phytosanitary measures with the aim to facilitate trade and avoid the use of unjustifiable measures as barriers to trade. Since the procedure has been designed to address instances of non-compliance arising out of imported materials covered by the IPPC, the Guidelines apply in a bilateral context. An importing Party may notify the exporting Party of significant instances of non-compliance and emergency actions applied to imports. The exporting Party must investigate these instances to determine the possible cause and to make the necessary corrections.

### 2.4 Guidelines

1. Furthermore, reference should be made to two sets of Guidelines addressing the issues of compliance and implementation. The UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements were adopted in 2002 by the Governing Council (UNEP Guidelines).[17] The Guidelines provide a "toolbox" of considerations, proposals, suggestions, and potential measures that governments and other stakeholders may take to improve the compliance with and enforcement of all multilateral environmental agreements, both current and future. The Guidelines are not legally binding. Although not applicable in the FAO context, they may and can be used as a source of information.

2. The "Guidelines for strengthening compliance with and implementation of multilateral environmental agreements (MEAs) in the ECE region" (ECE Guidelines) were recently adopted in the context of the UNECE at the fifth Pan-European "Environment for Europe" Ministerial Conference (Kiev, May 2003).[18] These Guidelines are also advisory. To avoid overlap with the UNEP Guidelines, the ECE Guidelines focus on implementation, rather than on compliance. They do, however, contain an overview of possible building blocks of a compliance procedure, and provide a clear insight into the intrinsic link between implementation at the national level and compliance at the treaty level.

## 3. COMPLIANCE AND DISPUTE SETTLEMENT

1. It is generally recognised that compliance procedures differ from the traditional procedures on the settlement of disputes. In terms of drafting, all compliance procedures make this difference explicit by including a provision which states that the compliance procedure shall operate "without prejudice" to the treaty provisions on dispute settlement.[19] It should, however, be noted that the extent of the difference between the two types of procedures is not always fully appreciated or understood. A detailed exposé on these differences falls beyond the scope of this paper – a brief overview will have to suffice.

2. *Beyond legal disputes.* Disputes settlement procedures are confined to addressing legal disputes. In the context of treaties, this involves the interpretation and application of treaty provisions. A compliance procedure may also involve the interpretation and application of treaty provisions, but it is not restricted to such questions.

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16 See FAO, ISPM Pub. No. 13.

17 See UNEP/GCSS.VII/6 (5 March 2002), pp. 43-44; for text, see UNEP/GCSS.VII/4/Add.2 (23 November 2002).

18 See ECE/CEP/107 (2003).

19 See BC CP, para. 27; KP CP, section XVI; MP CP, *châpeau*; LRTAP CP, para. 12; EC CP, para. 12; AC CP, para. 38.

3. *Common treaty interests*. A dispute settlement procedure provides a state with an instrument to primarily protect its individual legal interests,[20] whereas a compliance procedure is an instrument to protect a common treaty interest. Put differently, a Party may also invoke a compliance procedure against another Party in the absence of an infringement of an individual legal interest. The concern that an interest shared by the community of the Parties is or may be undermined suffices as a ground to initiate the compliance procedure. Obviously, this characteristic will only materialise in full when a Party-to-Party trigger is incorporated in a compliance procedure (see Section 5.4). In the context of the issue of common treaty interests, it is important to recall the third recital of the preamble of IT/PGRFA, which recognises that plant genetic resources for food and agriculture are "a common concern of all countries". It may be considered, therefore, that a bilateral approach, as adopted in the IPPC Guidelines, is not suitable to give effect to Article 21 IT/PGRFA.

4. *Non-adversarial*. As opposed to dispute settlement procedures, compliance procedures are non-adversarial. Once a case has been brought to the attention of the body that administers the procedure, a solid compliance procedure will not pit the triggering Party against the other Party. Hence, provisions of an adversarial nature, such as those on the admissibility of evidence or rogatory powers, should not be included in compliance procedures. Moreover, the procedure should not "bilateralism" the compliance case. In fact, the triggering Party should remain in the background, while the body that administers the procedure and the allegedly non-compliant Party enter into their dialogue. The term "non-adversarial" should not be confused, or seen as interchangeable with, the term "non-confrontational" (see also Section 4.3). The term "non-adversarial" is an objective notion characterising a process, while the term "non-confrontational" reflects a subjective emotion. Even the most facilitative aspects of a compliance procedure may be experienced as very confrontational.

5. *Compulsory process*. Once adopted, the compliance procedure is to be regarded as a compulsory process. This should not be confused with the outcome of the procedure, which may or may not be binding on the Parties. In contrast, dispute settlement procedures are, as a rule, consensual. There are exceptions to this where states have committed themselves to compulsory dispute settlement procedures.

6. *Future-oriented and multifaceted responses.* Compliance procedures are future-oriented and proactive. Once a compliance difficulty has been identified, the goal is to find its root cause and to formulate the response most appropriate to remain in compliance or to return to a state of compliance as soon as possible. These responses range from facilitative to stronger measures. Dispute settlement procedures, however, are past-oriented and reactive. They provide an avenue for the injured state to seek redress. Responses under dispute settlement procedures focus on the consequences of internationally wrongful acts, namely cessation, non-repetition, and reparation, such as restoration, compensation and satisfaction.

## 4. ARTICLE 21 IT/PGRFA

1. Article 21 IT/PGRFA contains an instruction for the Governing Body to adopt compliance procedures. Following the first appearance of such an instruction in the Montreal Protocol, similar instructions have been incorporated in many multilateral environmental agreements. Compared with these provisions, Article 21 IT/PGRFA has several features with them in common but it also has several unique features. It is noted that Article 21 IT/PGRFA does not contain any optional elements.

2. *Temporal element.* The prescribed time of adoption of compliance procedures may be related to a certain event, such as a meeting of the supreme treaty body,[21] or may be open-ended.[22] The Governing Body must adopt compliance procedures "at its first meeting". This is a compulsory time limit that should not be ignored lightly. The deferral of this time limit by the Governing Body may lead to a long period of stagnation as may be illustrated by the pending impasses relating to the establishment of the multilateral

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[20] For an emerging exception, see Article 48.1 of Responsibility of States for Internationally Wrongful Acts, UN Doc. A/Res/56/83, annex.

[21] See Articles 34 CPB; 18 KP; 11 LP; 8 MP; 22 PRTR; 14.6 SEA; 15 WHP.

[22] See Articles 17 POPs ("as soon as practicable"); 17 PIC ("as soon as practicable"); 15 Aarhus (no indication).

consultative process under the UNFCCC and the adoption of the rules of procedure under all three UNCED Conventions.[23]

3. *Nature of compliance procedures.* Article 21 IT/PGRFA states that the procedures on compliance must be "cooperative" and "effective".[24] The reference to "cooperative" suggests that the compliance procedures should stimulate amicable review and dialogue to address compliance difficulties, and should not become a dispute settlement procedure with adversarial elements (see Section 3, para. 4).[25] The reference to "effective" suggests that the response to a Party's compliance difficulties should be balanced against the cause, type, degree, and frequency of such difficulties.[26] Pursuant to Article 21 IT/PGRFA, the mechanisms on compliance must be "operational" as opposed to the more common qualification, "institutional".[27] The term "operational" suggests more flexibility with respect to the question of institutional structure (see Section 5.3).

4. *Objectives of compliance procedures.* Article 21 IT/PGRFA also indicates the purpose of the compliance procedures, namely to promote compliance and address issues of non-compliance (see also Section 5.1).[28] That issues of non-compliance must be addressed suggests a specific approach to compliance, *i.e.,* the consideration of submissions relating to compliance difficulties of individual Parties.[29] The reference to the promotion of compliance suggests that compliance issues should not only be addressed through a specific approach, but also through a generic approach, *i.e.,* an aggregate analysis of compliance with provisions of the IT/PGRFA (see also Section 5.2).

5. *Minimal compliance procedures.* The compliance procedures adopted under Article 21 IT/PGRFA must, as a minimum, address monitoring and the offering of advice or assistance. First, the reference to monitoring is unique. A system to monitor compliance is an essential element of compliance procedures and will require a reporting system (see Section 5.2). Second, the compliance procedures must provide for the provision of advice and measures relating to the provision of assistance.[30] The reference to legal advice or legal assistance is also unique (see Section 5.7). The offering of advice and assistance are facilitative measures to assist a Party with compliance difficulties. However, the list of measures in Article 21 IT/PGRFA has not been meant to be exhaustive and does not exclude that stronger measures are incorporated in the compliance procedure (see Section 5.7).

6. *Developing countries and economies in transition.* The reference to developing countries and countries with economies in transition in Article 21 IT/PGRFA is also a unique feature.[31] It should, however, be stressed that all Parties to a treaty are required to fully comply with its provisions from the date of entry into force for the Party concerned. The special situation of developing countries and countries with economies in transition cannot justify non-compliance. However, their special needs could be taken into account in decisions on the application of measures (see Section 5.7), notably in relation to the application of facilitative measures, such as the provision of advice and measures relating to the provision of assistance.[32]

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[23] See, on the multilateral consultative process, Article 13 UNFCCC; on rules of procedure, Articles 7.3 UNFCCC, 23.3 CBD; 22.3 UNCCD.

[24] Pursuant to UNECE Conventions, the compliance procedures must be non-confrontational, non-judicial, and of a consultative nature; see Articles 22 PRTR; 15 WHP; 15 AC. Other Conventions do not contain qualifiers; see Articles 17 POPs; 17 PIC; 11 LP; 8 MP.

[25] See also Articles 34 CPB; 22 PRTR.

[26] See also Article 18 KP.

[27] See Articles 17 POPs; 34 CPB; 17 PIC; 8 MP; 22 PRTR.

[28] See also Articles 34 CPB; 22 PRTR; cf. Articles 11 LP ("assess and promote").

[29] Cf. Articles 17 POPs; 17 PIC; 18 KP; 8 MP ("determining non-compliance […] and treatment of Parties found to be in non-compliance").

[30] See also Article 34 CPB.

[31] See also BC CP, para. 2.

[32] See KP CP, para. XIV; draft CPB CP, paras. 6.1 and 6.2.

## 5. BUILDING BLOCKS

### 5.1 Objective, Principles, and Nature

1. All negotiations on compliance procedures address the issues of the objective, the principles, and the nature of such procedures. Discussions on these issues are often necessary to create a shared knowledge-base for the negotiators and to gain insight into their views or ambitions. The practice of negotiations, however, shows that consensus on these issues is difficult to achieve. Some compliance procedures do not address these issues at all,[33] whereas others cover these issues, or some of them, in the operative part of the compliance procedure,[34] in the cover decision to the compliance procedure,[35] and/or in the preamble to the compliance procedure.[36] In the absence of consensus, an alternative solution for solving the dilemma on objective, principles, and nature may be to copy the treaty clause that instructs the supreme treaty body to adopt a compliance procedure, as it is agreed treaty language.

*Objective*

2. While descriptions of the objective differ, five core elements can be distilled. Compliance procedures provide a vehicle:

(i) to identify compliance difficulties, including possible or alleged situations of non-compliance
(ii) at an early stage,
(iii) to establish the root causes of such difficulties and non-compliance situations, and
(iv) to formulate the most appropriate responses, with a view
(v) to solving such difficulties or correcting the state of non-compliance without delay.[37]

It is notable that the IPPC Guidelines have some of these elements in common with compliance procedures. Thus, the Guidelines state that the procedure is intended "to help in investigating the cause of the non-compliance, and to facilitate steps to avoid recurrence".[38] This is also true for the draft multilateral consultative process under the UNFCCC.[39] Thus, the proposed objective of this process is to help Parties to overcome their difficulties, and to prevent disputes from arising. Another objective of this process is to promote the understanding of the treaty under which it operates.

3. Descriptions of the objective tend to contain two perspectives, though often implicitly. The first perspective is uncontroversial and relates to the procedure serving as a "help-desk" for Parties with compliance difficulties. This is reflected in wording, such as to "facilitate" compliance, "assist" Parties with compliance difficulties, or "provide advice or assistance". While the first perspective underlines the facilitative aspect of the compliance procedure, the second perspective is more contentious as it relates to possible stronger measures to correct situations of non-compliance. This may be reflected in the objective with wording, such as to "secure" compliance, "aim to secure" compliance, or "enforce" compliance. It should be noted that discussions on the objective are often closely intertwined and overlap with those on the functions. Hence, the section on functions may contain references that reflect the objective of that particular function, and thereby of the procedure.[40] Since Article 21 IT/PGRFA contains a reference to monitoring, this is likely to be discussed in the context of the objective of the compliance procedure (see also Sections 4, para. 5, and 5.2).[41]

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33 See LRTAP CP; AC CP.
34 See BC CP, paras. 1 and 2 (objective and nature); KP CP, section I (objective); MP CP, paras. 7(d) and 8 (objective in combination with functions); EC CP, para. 3 (objective in combination with functions).
35 See BC CP, paras. 4 to 7 (objective again).
36 See KP CP, 3rd recital (principles).
37 See also UNEP Guidelines, para. 14(d)(ii); BC CP, preamble to the cover decision, recitals 4-7.
38 See IPPC Guidelines, section 1.
39 See draft UNFCCC MCP, para. 2.
40 See EC CP, para. 3; MP CP, para. 8.
41 See also BC CP, para. 1.

*Principles and nature*

4. Associated with the objective of the compliance procedure are references to the principles and the nature of the procedure. These two categories are never clearly defined and tend to overlap. The category of principles often contains notions associated with due process and procedural rights. Such notions include fairness, transparency, predictability, and due process. Because it could be argued that the reference to specific principles modifies provisions of a compliance procedure, some argue or fear that the notions included in this category are actionable before the body that administers the procedure. The category of the nature often contains general characteristics of the compliance procedure, such as simple, flexible, and cost-effective. The terms "non-confrontational", "non-adversarial", and "non-judicial" are also recurrent, and reflect the wish for a procedure that addresses compliance cases by way of dialogue rather than by the traditional approach of dispute settlement (see Section 3, para. 4). It should be noted that even when included in the opening section of the compliance procedure, the principles and nature only take on true meaning when they are made operational in the remainder of the procedure. Finally, the negotiations on the principles and nature may also include the question as to the extent to which the special needs of developing countries and countries with economies in transition should be reflected in the compliance procedure (see also Section 4.6).

### 5.2 Functions

1. It should first of all be noted that the section on functions is often mixed with elements related to the objective, information gathering, and consequences. Such mixing undermines the transparency of the text and may hamper the interpretation of the mandate of the body that administers the procedure. In its purest form, the section on functions should be confined to what a body that administers the procedure does, rather than setting out why and how it does so. A clear list of functions enables the body that administers the procedure to determine its mandate. Integrating the list of functions in other sections, such as in the compliance procedure under the Basel Convention, will hamper this and should therefore be avoided.

2. Three main compliance functions can be distinguished.

- First, and included in all operational compliance procedures, is the function to address compliance difficulties of individual Parties.[42]
- A second function that can be found in many compliance procedures is the analysis of general issues of compliance with the aim of identifying and addressing aggregated and systemic compliance difficulties.[43] A variation to this function exists where aggregated compliance with a specific treaty provision is analysed.[44] This type of review of compliance will rely heavily on national reports that are submitted by Parties to the treaty concerned. Such review will thus focus on the implementation of a treaty, *i.e.,* the transposition by parties of their treaty commitments in national policies, regulations, and other measures. In another variation of this function, a compliance procedure could arrange for the preparation, for consideration by the supreme treaty body, of interpretations of treaty provisions with the aim of facilitating compliance by Parties in uniform way.[45] This variation has not been explicitly provided for in any of the operational compliance procedures.
- A third function that can be found in many compliance procedures is to review compliance with reporting obligations.[46] Strictly speaking, the function to address compliance difficulties of individual Parties automatically includes dealing with cases of non-compliance with reporting obligations. However, most compliance procedures acknowledge that reporting obligations warrant additional

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[42] See BC CP, para. 19; KP CP, sections IV, paras. 4 to 6 (facilitative branch), and V, paras. 4 to 6 (enforcement branch); MP CP, para. 7(a); AC CP, para. 13(a); EC CP, para. 3(a); LRTAP CP, para. 3(b); draft CPB CP, section III, para. 1(a).

[43] See BC CP, para. 21; AC CP, para. 13(b); EC CP, para. 3(b); draft CPB CP, section III, para. 1(d).

[44] See BC CP, para. 21(f); EC CP, para. 3(d); LRTAP CP, para. 3(d).

[45] Cf. the "general comments" on the articles of the 1966 International Covenant on Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights; and the 1966 International Covenant on Civil and Political Rights by the Human Rights Committee.

[46] See BC CP, para. 21(e) in the context of general review; MP CP, para. 7(b); AC CP, para. 13(c); LRTAP, para. 3(a).

attention, and include a special provision on them. There are several reasons for such additional attention. First, a national report contains information on compliance by an individual Party. Second, the total of national reports provides insight into the aggregated compliance by the Parties to the treaty. Third, non-compliance with reporting obligations often signals or precedes compliance difficulties with other obligations. Fourth, the verification of compliance with reporting obligations is a relatively objective exercise, especially where the focus is on whether deadlines for reporting are met, or whether the national report is complete. Under this third function, the role of the secretariat is pertinent, notably where the secretariat has the right to trigger the compliance procedure (see Section 5.4).

3. Under some treaties, the second function has been assigned to open-ended subsidiary bodies, such as the Subsidiary Body for Implementation under the UNFCCC, the Committee for the Review of the Implementation of the Convention under the UNCCD, and the Open-ended Working Group of the Basel Convention that has been created to advise on and continuously review the implementation of the Convention. Similar open-ended subsidiary bodies have been established under regional fisheries conventions to enhance compliance with and implementation of conservation and management measures.[47] Although the term "compliance" is used in the title of these bodies, their functions are by and large comparable to the above-mentioned open-ended subsidiary bodies that review implementation. The assignment of this function to a compliance body or an open-ended subsidiary body will be determined by the institutional organisation of the treaty concerned.

4. It should also be recalled that Article 21 IT/PGRFA makes reference to "monitoring" (see Section 4.5). In the negotiations on the compliance procedure, the process of monitoring compliance with the IT/PGRFA will have to be designed.[48] First, it is noted that monitoring will be an ongoing process. Second, monitoring does not require the compliance procedure to be set in motion by means of a trigger (see Section 5.4). Third, it has to be resolved by whom and how the process of monitoring is to be carried out. The input for the process of monitoring is information and such information can be obtained from various sources (see Section 5.6). Leaving aside unorthodox alternatives, a regular flow of information for an ongoing process of monitoring requires the establishment a system of reporting by Parties.[49] Hence, there is a direct link between monitoring and compliance with reporting obligations.

### 5.3 Institutional Structure

1. The operation of compliance procedures may require the support of an institutional structure. All compliance procedures that have been adopted in the framework of multilateral environmental agreements establish a compliance body that has a central role in the operation of the compliance procedures. Only the IPPC Guidelines have not, as yet, established such a body, but it has been seen that the functions of these Guidelines differ from those of other compliance procedures (see Section 2.4). The need for a compliance body must therefore be assessed in combination with the functions of compliance procedures. If the support of a compliance body is considered desirable, it will be necessary to select such body and to determine its composition.

2. As for the selection of the compliance body, the question arises whether compliance functions should be entrusted to an existing body or a new body. Existing bodies at the entry into force of the IT/PGRFA that could be designated to perform such functions are the Governing Body, the Bureau or an extended Bureau, or the secretariat. The designation of any one of these bodies would be cost-effective. Although proposals to that effect have been made in the framework of negotiations on compliance procedures, none of the operational procedures have designated an existing body. In spite of the costs, the incompatibility of functions, the expertise required of individuals, the desire to ensure due process, and the need for transparency have invariably led to the decision to set up a new body. Similarly, in spite of higher costs, operational compliance procedures invariably have established standing bodies – and not *ad hoc* bodies.

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[47] See *e.g.,* 2001 Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (Article 9); 2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Article 14).

[48] The monitoring process has also been integrated in the compliance procedure under the Alpine Convention; see Alp CP, section I.

[49] For possible features of a system of reporting, see *e.g.,* Section IV of the ECE Guidelines (see Section 1.13).

Standing bodies have been established to further the continuity of process and people as well as the prompt response to any compliance issue that has arisen. In this respect, it must be noted that there may be considerable time gaps between the emergence of a compliance difficulty and the next session of the supreme treaty body at which an *ad hoc* body could be set up.

3. As for the composition of the compliance body, several issues need to be resolved, namely (a) the size of the body, (b) the representation of interest groups in the body, (c) the capacity in which members are acting, and (d) the qualification of persons to be eligible to serve on the body.

- The size of existing compliance bodies range from 8 to 15 members;[50] a special case is the compliance body established under the Kyoto Protocol, which is composed of 20 members, 10 of whom serve in the facilitative branch and 10 of whom in the enforcement branch.[51] Factors influencing the size of the body are primarily effective decision-making and the equitable representation of interest groups, notably regional groups. It is noted that relatively small bodies have been established given the number of Parties to the multilateral environmental agreements in the framework of which such bodies have been set up. The exact number is a function of the formula that is selected to represent interest groups in the body.
- Since the FAO has seven regional groups, the size of the compliance body is likely to have 7*x* as a basis. This formula may be adjusted if interests other than regional groups are to be represented on the compliance body. Seats on the compliance body may also be reserved for observers.[52] Since the international institutions referred to in Article 15 IT/PGRFA and natural and legal persons referred to in Article 11.3 IT/PGRFA have a legitimate interest in compliance with the treaty, the reservation seats for these entities on the compliance body deserves consideration.
- In the majority of existing bodies, Parties are elected to the compliance body and individual members are appointed by such Party to represent it.[53] To stress that individual members are not – only – supposed to serve national interests or the interests of their constituency, but also the interests of the treaty community, it has been made explicit in one instance that members are nominated by Parties but will serve in the best interest of the Convention.[54] However, several compliance procedures have adopted a different approach and provide for the appointment of members to act in their personal capacity.[55] The objective of this alternative approach is to lessen the degree of control by the Party and/or constituency over the member, to enhance the expert character of the body, and to safeguard the continuity of membership during the period for which a member has been elected. Even if it is agreed to appoint members to act in their personal capacity, interest groups will still seek representation of their interests through the process for nomination and election of members.
- Finally, a compliance body can only perform its functions if its members are sufficiently qualified to serve on it. A compliance body is not a judicial body, though sometimes being referred to as a quasi-judicial body. The membership should therefore not only reflect legal expertise, but also other expertise related to the subject matter of the treaty concerned. It may be noted that Article 21 IT/PGRFA explicitly refers to legal advise and legal assistance which may be taken as an indication that legal expertise should be sufficiently represented in the membership (see Section 4, para. 5).

### 5.4 Triggers

1. Compliance procedures have to be set in motion before compliance functions can be performed. The right to set compliance procedures in motion has been limited in compliance procedures. These procedures therefore identify the persons that can set them in motion. This right may differ according to the compliance function that has to be performed.

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[50] See BC CP , para. 3 (15 members); MP CP, para. 5 (10 members); AC CP, para. 1 (8 members); EC CP, para. 1 (8 members); LRTAP CP, para. 1 (9 members).
[51] See KP CP, section II, para. 3.
[52] See Alp CP, Section II, para. 1.1.
[53] See MP CP, para. 5; EC CP, para. 1; LRTAP CP, para. 1.
[54] See BC CP, para. 5.
[55] See KP CP, section II, para. 6; AC CP, para. 1.

2. As for compliance difficulties of individual Parties, the following triggers have been accepted in operational compliance procedures or proposed during negotiations.

- First, compliance procedures could be triggered by a Party with respect to itself. This "self-trigger" is not controversial, can be found in all compliance procedures,[56] and has also been frequently invoked. The success of the self-trigger, however, is clearly related to the measures envisaged in compliance procedures, notably the provision of advice or assistance to a Party with compliance difficulties.
- Second, compliance procedures could be triggered by one Party with respect to another Party. Although controversial, the Party-to-Party trigger can be found in all compliance procedures.[57] The Party-to-Party trigger enables a Party to trigger compliance procedures in the common treaty interest (see Section 4, para. 3). The risk of politically motivated cases and the risk of cases becoming adversarial can be overcome by the introduction of procedural safeguards (see Section 5.5). In one instance, the right to invoke the Party-to-Party trigger has only been conferred on Parties that are directly involved with another Party.[58] This implies that the use of this trigger requires the demonstration of an individual interest. As a result, an adversarial element is introduced in compliance procedures. It will therefore not be possible to raise compliance difficulties of other Parties in the common treaty interest and this approach thus encroaches upon one of the fundamental features of compliance procedures (see Section 3, para. 3).
- Third, compliance procedures could be triggered by the secretariat. Although the secretariat is the centre of information of a treaty and its implementation, it has been questioned whether a right to trigger compliance procedures in the case of compliance difficulties of individual Parties is compatible with the administrative nature of secretariat functions and the impartiality with which it should perform these functions. A secretariat trigger has nevertheless been accepted in some compliance procedures.[59] Furthermore, a limited right of the secretariat to trigger compliance procedures in the case of compliance difficulties of individual Parties has been accepted in most of the compliance procedures, namely with respect to compliance with reporting obligations (see also below).
- Fourth, compliance procedures could be triggered by the compliance body itself. None but one of the operational compliance procedures have bestowed such a right to trigger on the compliance body in the case of compliance difficulties of individual Parties.[60] Such right would create a situation where the compliance body would become a "judge" in its own case and the compliance body may therefore not be perceived as an impartial body in such a case.
- Fifth, compliance procedures could be triggered by the supreme treaty body or other treaty bodies. However, such right is generally not considered to have an added value over and above a Party-to-Party trigger. An exception is the right of expert review teams to trigger the compliance procedures under the Kyoto Protocol which originates in the treaty-specific functions of these treaty bodies.[61]
- Sixth, the right to trigger compliance procedures could be attributed to states that are not party to the treaty concerned. There are no specific examples of such a right to trigger in any of the operational compliance procedures. It would also be difficult to argue in favour of the attribution of such a right to states that have decided not to become a Party to a treaty. However, there may be merit in extending such as right to state that cannot become a Party to a treaty, *e.g.* because its geographical scope is confined. One compliance procedure attributes the right to trigger to observers which includes all states that are not a Party to the geographically confined treaty in question and does not limit such right to states that cannot become a Party to it.[62]
- Seventh, international organisations could be bestowed with a right to trigger compliance procedures. One could think of international organisations that are competent in the field of a specific treaty but that cannot become a Party to it. Although there are no specific examples of such a right to trigger in any of the operational compliance procedures, one compliance procedure attributes such a right to

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[56] See BC CP, para. 9(a); KP CP, section VI, para. 1(a); MP CP, para. 4; AC CP, para. 16; EC CP, para. 4(b); LRTAP CP, para. 4(b).

[57] See BC CP, para. 9(b); KP CP, section VI, para. 1(b); MP CP, para. 1; AC CP, para. 15; EC CP, para. 4(a); LRTAP CP, para. 4(a).

[58] See BC CP, para. 9(b).

[59] See AC CP, para. 17; LRTAP CP, para. 5.

[60] See EC CP, para. 5.

[61] See KP CP, section VI, para. 1.

[62] See Alp CP, Section II, para. 2.3, in combination with Articles 5.5 and 8.2 Alpine Convention.

observers and this category includes international organisations.[63] Since the international institutions referred to in Article 15 IT/PGRFA have a legitimate interest in compliance with the treaty, consideration deserves to be given to extending the right to trigger the compliance procedures to these international organisations.

- Eighth, the right to trigger compliance procedures could be attributed to non-governmental organisations. One could think of non-governmental organisations that are competent in the field of a specific treaty. The risk of a heavy workload and the risk of politically motivated cases can be overcome by procedural safeguards (see Section 5.5). Such a "public" trigger has been incorporated in one compliance procedure that has been adopted in the framework of the UNECE, but the right to trigger extends in this case to all members of public and has not been limited to non-governmental organisations that are competent in the field of that treaty.[64] Moreover, one compliance procedure attributes the right to trigger to observers and this category includes non-governmental organisations that are competent in the field of that treaty and have been admitted as an observer to meetings in the framework of that treaty.[65] In view of the explicit recognition of the special position of the legal persons referred to in Article 11.3 IT/PGRFA, consideration deserves to be given to extending the right to trigger the compliance procedure to the non-governmental organisations within the scope of these articles.
- Finally, natural persons could be given a right to trigger compliance procedures. The risk of a heavy workload and the risk of politically motivated cases can be overcome by procedural safeguards (see Section 5.5). Such a "public" trigger has been incorporated in one compliance procedure that has been adopted in the framework of the UNECE.[66] In view of the explicit recognition of the special position of the natural persons referred to in Article 11.3 IT/PGRFA, consideration deserves to be given to extending the right to trigger the compliance procedure to these persons.

3. As for the review of compliance with reporting obligations, it has been noted that the submission of national reports is critical in assessing the state of compliance with a treaty (see Section 5.2). The timely submission of these reports therefore requires structural supervision. Since national reports will normally have to be submitted to the secretariat, this body will be in a good position to assess the state of compliance with reporting obligations. Since this is a relatively objective exercise, a limited right to trigger compliance procedures has been conferred on the secretariat in several compliance procedures.[67]

4. As for general or aggregated issues of compliance, operational compliance procedures confer the right to trigger such procedures on the supreme treaty body.[68] Such right has not been conferred on other treaty bodies in any of the operational compliance procedures. In contrast to cases of compliance difficulties of individual Parties, the consideration of general or aggregated issues of compliance does not raise questions with respect to the impartiality of the compliance body. In spite of this, such right to trigger has not, as yet, been conferred on the compliance body under operational compliance procedures. However, nothing prevents a compliance body from making recommendations to that effect in reports on its activities.

### 5.5 Procedural safeguards

1. Procedural safeguards are not concentrated in a particular section, but dispersed throughout a compliance procedure. These safeguards are exponents of, and make operational, the principle notions of due process, transparency, fairness, and predictability. Therefore, procedural safeguards contribute significantly to the perceived legitimacy of the compliance procedure. Whereas the earlier compliance procedures include relatively few safeguards, more recently adopted procedures tend to include detailed provisions. Procedural safeguards are particularly important in relation to politically contentious building blocks, and their inclusion often significantly increases the chances of reaching compromise solutions on such contentious

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63 See Alp CP, Section II, para. 2.3, in combination with Article 5.5.

64 See AC CP, para. 18. The incorporation of a "public" trigger is under consideration in connection with the revision of the EC CP (see Section 1) and the elaboration of a compliance procedure under the WHP.

65 See Alp CP, Section II, para. 2.3, in combination with Article 5.5.

66 See AC CP, para. 18. The incorporation of a "public" trigger is under consideration in connection with the revision of the EC CP (see Section 1) and the elaboration of a compliance procedure under the WHP.

67 See BC CP, para. 9(c); MP CP, para. 3; AC CP, para. 17; LRTAP CP, para. 5.

68 See BC CP, para. 21; MP CP, para. 14; AC CP, para. 13(b); EC CP, para. 3(d); LRTAP CP, para. 3(d).

issues. They play an especially important role in procedures which contain stronger measures. Generally, these safeguards involve provisions on six aspects of a compliance procedure: (i) timetables and deadlines; (ii) representation and entitlement to participate; (iii) requirements for submissions; (iv) confidentiality, (v) decision-making, and (vi) reasoning of decisions.

2. *Timetables and deadlines.* Timetables and deadlines feature most prominently in the first phase of a compliance case, and are considered especially important in the case of a Party-to-Party trigger. This type of procedural safeguard may indicate the timeframes within which (i) the secretariat is to inform a Party that a submission has been filed against that Party;[69] (ii) that Party has an opportunity to respond to the contents of such a submission;[70] and (iii) decisions have to be adopted by the compliance body in respect of such a submission.[71]

3. *Representation and entitlement to participate.* A second type of a procedural safeguard addresses the entitlement to participate in the procedure. This relates to the participation of the Party or Parties whose compliance is at issue, and to the question of whether the process should be open or closed (see para. 5). As regards the Parties involved, the most evident form of participation, and a fundamental feature of due process, is the right to make representations, including the possibility for written and oral statements. With respect to the physical presence of the Party concerned, a distinction is made between two phases of the proceedings. First, the phase in which the compliance body considers the facts and circumstances of the case and, second, the phase in which the compliance body draws its conclusions and formulates and adopts its recommendations or decisions. Typically, compliance procedures stipulate that Parties in respect of which a submission has been made are entitled to participate or be represented during the first phase, but not during the second phase.[72] In case of a composition based on Party representation, this safeguard may equally apply to the members of the compliance body themselves.[73]

4. *Requirements for submissions.* A third type of a procedural safeguard involves the formal requirements of a submission. All compliance procedures require that a submission from a Party with respect to compliance of another Party should be accompanied with corroborating information.[74] Increasingly used are the requirements that submissions should not be *de minimis*, ill-founded, or manifestly unreasonable. These requirements may apply to all submissions,[75] or to a specific category of submissions.[76] Such requirements provide the compliance body with the mandate to reject those submissions which are clearly politically motivated, or which raise only diminutive and inconsequential compliance issues. A particular requirement which serves as a procedural safeguard exists in case of a secretariat trigger. With such a trigger, the secretariat, having become aware of compliance difficulties, often has the responsibility to first approach the Party concerned to solicit additional information or an explanation of the compliance difficulties.[77] The aim is to try to resolve the compliance difficulties through administrative action or diplomatic contacts, before formally triggering the procedure. In order to prevent undue prolongation of this phase, or a procedural impasse when the Party concerned does not respond, the compliance procedure will also provide for a timeframe within which the secretariat is required to pursue this route, before bringing the case to the attention of the compliance body. It should finally be noted that one compliance procedure provides that the compliance body, when considering submissions from members of the public,

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[69] See BC CP, para. 13; KP CP, sections VI, para. 2; MP CP, para. 2; AC CP, paras. 15 and 23; EC CP, para. 4; LRTAP CP, para. 4(a).

[70] See BC CP, para. 14; KP CP, sections IX, para. 1, and X, para. 1(b); MP CP, para. 2; AC CP, para. 15; EC CP, paras. 4 and 5; LRTAP, para. 4(a).

[71] See KP CP, sections VII, para. 3, IX, paras. 4 and 8, and X, paras. 1(d) and 1(f).

[72] See BC CP, para. 15; KP CP, section VIII, para. 2; MP CP, para. 10-11; AC CP, para. 32-33; EC CP, para. 8; LRTAP CP, para. 8.

[73] See MP CP, para. 11 ("No Party, *whether or not a member of the Implementation Committee*"; italics added).

[74] See BC CP, para. 10(c); KP CP, section VI, para. 1(b), and section VII, para. 2(a); MP CP, para. 1; AC CP, para. 15; EC CP, para. 4(a); LRTAP CP, para 4(a).

[75] See BC CP, para. 18.

[76] See KP CP, section VII, para. 2, where the requirements apply to submissions brought by Parties with respect to compliance by another Party; AC CP, para. 20, where the requirements relate to submissions brought by members of the public.

[77] See BC CP, para. 9(c); MP CP, para. 3; AC CP, para. 17; LRTAP CP, para. 5.

should "at all relevant stages take into account any available domestic remedy".[78] This procedural safeguard bears resemblance with a rule of international law pursuant to which individuals must exhaust domestic remedies, before their state of nationality can bring a claim on their behalf against another state under a traditional dispute settlement procedure (local remedies rule). It is noted, however, that this procedural safeguard is not an admissibility requirement in the compliance procedure, but a discretionary power of the compliance body. This is a significant difference that originates in the distinction between traditional dispute settlement procedures and compliance procedures. First, a submission from a member of the public under a compliance procedure is not intended to protect that member's individual interest or to provide redress. Second, a compliance difficulty encountered by a Party may find its root cause in a systemic flaw in domestic laws and regulations which a compliance procedure seeds to address proactively (see Section 3, para. 6). Another procedural safeguard that could be introduced with respect to submissions by members of the public is a political filter. Thus, it could be required that a submission from a member of the public may only be forwarded to the compliance body if it is supported by one or more Parties. In this respect, it is recalled that it deserves consideration to confer the right to trigger the compliance procedure on natural and legal persons referred to in Article 11.3 IT/PGRFA (Section 5.4). It could be required that submissions by these persons must be supported by the Party to whose jurisdiction they are subject. Although these persons could also request such Party to trigger the compliance procedure with respect to another Party (Party-to-Party trigger), it goes without saying that an independent right to trigger the procedure, albeit subject to a political filter, will create a dynamic of its own.

5. *Confidentiality.* Fourth, all compliance procedures contain provisions on the treatment of confidential information. Typically, a compliance procedure may provide that "the members [of the compliance body] and any Party involved in its deliberations shall protect the confidentiality of information they receive in confidence".[79] Any clauses on the extent of confidentiality of information contained in the treaty, under which the compliance procedure operates, are equally applicable to the procedure.[80] The issue of confidentiality may also relate to the question whether the meetings of the compliance body are open, *i.e.,* public, or closed (see also para. 3). Precedents are mixed. Some compliance procedures are silent on the matter,[81] in which case the Rules of Procedure under the treaty may be determinative. Other compliance procedures state that the meetings of the compliance body are open in principle, but allow exceptions.[82] In contrast, a compliance procedure may provide that the meetings dealing with individual cases are closed, unless otherwise agreed.[83]

6. *Decision-making.* Most compliance procedures contain a provision on how decisions are taken.[84] The principal point of departure is that every effort should be made to reach decisions by consensus. Different approaches exist as to the situation where all efforts to reach consensus have been exhausted. Where consensus is not possible, it may be provided that the report of the compliance body shall reflect the views of all the members of the body.[85] The compliance procedure may also provide for different types of majority voting in case consensus proves unattainable.[86]

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78 See AC CP, para. 21.

79 See MP CP, para. 15 (and para. 16 as regards the report of the compliance body); see also BC CP, para. 26; KP CP, section VIII, para. 6; AC CP, paras. 26-31; EC CP, para. 7; LRTAP CP, para. 7; draft CPB CP, section IV, para. 4.

80 See, *e.g.,*, Article 13.2(a) IT/PGRFA.

81 See MP CP; EC CP; LRTAP CP; draft CPB CP.

82 See KP CP, section IX, para. 2 (hearings of the enforcement branch); AC CP, para. 30.

83 See BC CP, para. 16.

84 Under the MP CP, decisions are taken by consensus in practice; under the LRTAP CP, decisions are taken by consensus on the basis of a decision of the Implementation Committee.

85 See AC CP, para. 35; EC CP, para. 9.

86 See BC CP, para. 25, which requires a 2/3 majority, or 8 members, whichever is the greater; KP CP, section II, para. 9, which requires a ¾ majority for decisions to be adopted, and, in case of decision- making by the enforcement branch, also requires both a majority of members from developing countries and of members from developed countries.

7. *Reasoning of decisions.* One compliance procedure has explicitly included a procedural safeguard requiring that decisions of the compliance body shall include reasons.[87] In practice, however, all compliance bodies provide elaborate explanations and arguments for their recommendations and decisions.

### 5.6 Sources of information

1. Practice shows that the effectiveness of a compliance procedure significantly increases when the compliance body has a broad mandate for information gathering, especially as regards the entities, agencies and other actors it is allowed to invite to join the dialogue. In particular, the involvement of implementing agencies of the Global Environmental Facility (GEF) in the process has contributed significantly to finding solutions to compliance difficulties. All but one of the operational compliance procedures contain a specific section listing the sources of information for the compliance body.[88] Answers to the following questions are useful for identifying the scope and implications of this building block, and provide insight into the discretion which the compliance body has in using these sources. Is the list open-ended, or closed? Is the use of a source on the list subject to restrictions or not? Does the section only cover the sources from which the compliance body can actively seek or request information, or does it include provisions stating which entities are allowed to submit – unsolicited – information to the compliance body? In principle, an open-ended list will provide the compliance body with the highest degree of discretion.[89] However, the use of a source on such an open-ended list may be subject to restrictions, thereby conditioning the degree of discretion.[90] A closed list of sources will, in principle, set a small degree of discretion. However, items on the list may provide a broad mandate for information gathering by the compliance body, thereby granting a high degree of discretion.[91] In addition to sources from which the compliance body may seek information, the section may also include which information the body may receive, or which entities may provide information.[92] Since the compliance body obviously draws its final conclusions on the basis of the information available to it, the inclusion of sources over which Parties have no control or influence may prove contentious in the negotiations.

2. The Parties are a main and prominent source of information. This source may feature in several ways. First, they may be included explicitly, with focus on the Party concerned that is the Party whose compliance is at issue.[93] In case of a Party-to-Party trigger, the triggering Party may also be explicitly included.[94] Second, the national reports of Parties may be explicitly included as a source.[95] Third, the Parties may feature as a source where the compliance procedure provides for the possibility of on-site visits on the territory of a Party. Such visits are always conditional on the consent or an invitation of the Party in question.[96]

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87 See KP CP, section VIII, para. 7.

88 See BC CP, para. 22; KP CP, section VIII, paras. 3-6; AC CP, para. 25; EC CP, para. 6; LRTAP CP, para. 6; draft CPB CP, para. 5.1-5; MP CP does not contain a specific section, although reference to sources is made its section on functions.

89 See BC CP, para. 22, where the list of sources opens with "*inter alia*"; draft CPB CP, section V, para. 2, where the list opens with "including from".

90 See BC CP, para. 22 (a), where the compliance body "may, *inter alia*, request further information from all Parties", but only as it relates to general issues of compliance; similarly, under para. 22(c), which allows the compliance body to "request further information from any sources", but only "with the consent of the Party concerned or as directed by the Conference of the Parties".

91 See AC CP, para. 25(a), providing that the compliance body may "request further information on matters under its consideration".

92 See KP CP, section VIII, para. 4; AC CP, para. 25(c), providing that the compliance body may "consider any relevant information submitted to it"; draft CPB CP, section V, para. 2, *châpeau*, providing that the compliance body "may seek or receive".

93 See BC CP, para. 22(a), pursuant to which all Parties can be requested for further information on general issues of non-compliance; KP CP, section VIII, para. 3(b); draft CPB CP, section V, para. 1(a);.

94 See KP CP, section VIII, para. 3(c); draft CPB CP, section V, para. 1(b).

95 See BC CP, para. 22(f).

96 See BC CP, para. 22(d); MP CP, para. 7(e); AC CP, para. 25(b); EC CP, para. 6(b); LRTAP CP, para. 6(b).

3. Treaty bodies, or their reports, are often included as a source of information. These bodies may include the supreme treaty body and subsidiary bodies,[97] and the secretariat.[98] International organisations may also be included as a source.[99] Moreover, some compliance procedures explicitly allow the compliance body to draw upon outside expertise and/or seek the services of experts and advisers.[100] In the context of the IT/PGRFA, the information generated in the monitoring process of the 1996 Global Plan of Action for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture as well as information of international institutions referred to in Article 15 IT/PGRFA may also be considered as a relevant source.

4. The explicit inclusion of non-state actors, in particular non-governmental organisations (NGOs), as a source of information is often a sensitive issue. Obviously, such entities are implicitly included as a possible source where the compliance procedure contains an open-ended list of sources or a generally formulated mandate for information gathering. Some procedures contain explicit provisions on these entities as a source.[101] In the context of the IT/PGRFA, the information of natural and legal persons referred to in Article 11.3 IT/PGRFA may be considered as a relevant source. It should also be mentioned that where no agreement could be reached on a trigger for non-state actors, non-governmental organisations, or members of the public, a compromise solution has been to include such entities in the section on sources of information.[102]

### 5.7 Responses

1. International law requires full compliance with treaty obligations, unless the treaty itself provides for transitional periods for all or a special category of Parties. The IT/PGRFA does not provide for such transitional periods and all Parties are therefore required to fully comply with its provisions from the date of entry into force for the Party concerned. In case a Party is found to be in non-compliance, it must therefore return to a state of compliance as soon as possible. The majority of compliance procedures have a tool box that provides without exception for measures that have been designed to facilitate compliance, but may also provide for measures that have been designed to enforce compliance.[103] Some compliance procedures do, however, not contain an exhaustive list of measures and leave it to the discretion of the competent treaty organs to adopt appropriate measures to address compliance difficulties.[104] The application of measures in a particular case should take into account the cause, type, degree, and frequency of compliance difficulties, and demands a balanced use of carrot and stick. If the cause of compliance difficulties is lack of capacity, the compliance body is likely to apply facilitative measures to induce compliance rather than enforce compliance. However, facilitative measures may not always be the most effective measures. In case of flagrant, continued, or repeated non-compliance, compliance may only be secured by the application of stronger measures.

2. Facilitative measures that can be found in compliance procedures relate to (a) the provision of advice or the issuance of recommendations, (b) the provision of assistance, and (c) the development and submission of a voluntary compliance action plan. Article 21 IT/PGRFA itself explicitly refers to advice and assistance, but this reference is not exhaustive of the list of measures that could be agreed on (see Section 4, para. 5).

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97 See BC CP, para. 22(b); KP CP, section VIII, para. 3(a), 3(d); MP CP, para. 7(f), under functions; draft CPB CP, section V, para. 2(a).

98 See BC CP, para. 22(e); EC CP, para. 6(c); LRTAP CP, para. 6(c); draft CPB CP, section V, para. 2(d).

99 See KP CP, section VIII, para. 4; draft CPB CP, section V, para. 2(b).

100 See AC CP, para. 25(d); EC CP, para. 6(e); draft CPB CP, section V, para. 3 (restricted to experts on the biosafety rosters of experts).

101 See BC CP, para. 17 ("a Party may also consider and use relevant and appropriate information provided by civil society on compliance difficulties"); KP CP, section VIII, para. 4 (NGOs "may submit relevant factual and technical information"); draft CPB CP, section V, para. 2(c) (the compliance body "may seek or receive and consider relevant information, including from […] (c) Non-governmental organizations").

102 See BC CP, para. 17.

103 See BC CP, para. 20; KP CP, sections XIV and XV; AC CP, para. 37; draft CPB CP, section VI.

104 See MP CP, para. 9; EC CP, para. 11; LRTAP CP, para. 11; see also AC CP, para. 37(h).

(a) Through the provision of advise[105] or the issuance of recommendations,[106] the compliance body can make concrete suggestions – *e.g.,* of a technical, organisational, or legal nature – to a Party to overcome its compliance difficulties. Although the list of measures of several compliance procedures includes the provision of advice as well as the issuance of recommendations, they are not conceptually distinct. The IT/PGRFA makes explicit reference to the provision of legal advice. Such advice could relate to the implementation of the IT/PGRFA in domestic law, the interpretation of provisions of the IT/PGRFA itself, and the application of the IT/PGRFA, *e.g.,* the use of material transfer agreements.
(b) Assistance may be of a technical, financial, or legal nature. The IT/PGRFA makes explicit reference to legal assistance. Such assistance could be in the form of measures relating to the provision of assistance with respect to the development of domestic laws and regulations, *e.g.,* through the involvement of the FAO Development Law Service, or the consultation and representation in disputes relating to the application of the IT/PGRFA. Compliance procedures vary with respect to the level of involvement of the compliance body and other treaty bodies in the provision of assistance. This could either take the form of the provision of assistance,[107] the facilitation of assistance,[108] or advise on the procurement of assistance.[109] If the role of the compliance body is to provide assistance, it may provide such assistance itself or arrange for such assistance to be provided by other treaty bodies or external bodies. Such a direct involvement of the compliance body has, of course, budgetary implications. If the role of a compliance body is limited to the facilitation of assistance, it may actively mediate between the Party with compliance difficulties and agencies that may provide assistance, *e.g.,* implementing agencies of the GEF. If a compliance body may only advise on the procurement of assistance, it will only bring to the attention of the Party with compliance difficulties possible agencies that may provide assistance to it.
(c) A compliance action plan is a road map for a Party to return to a state of compliance and it may include benchmarks and timelines.[110] Although the Party with compliance difficulties will be invited to develop, adopt, and implement the compliance action plan itself, it will be advised to submit a draft of the plan to the compliance body for advice and also to invite the compliance body to supervise the implementation of the plan.

3. Stronger measures that can be found in compliance procedures are (a) the issuance of a caution, (b) the issuance of a declaration of non-compliance, (c) the development and submission of a compulsory compliance action plan, and (d) the suspension of rights and privileges.

(a) The issuance of a caution is a means to give an early warning to a Party with compliance difficulties that has not been found in non-compliance.[111]
(b) A declaration of non-compliance is a formal determination that a Party has been found in non-compliance and, hence, has breached the treaty concerned.[112] To provide in a compliance procedure for the mere publication of non-compliance as a stronger measure is conceptually not correct,[113] because such publication can only follow a determination of non-compliance and publication is envisaged of all measures that are recommended and/or adopted by the compliance body.
(c) As in the case of a voluntary action plan, a compulsory action plan has to be developed, adopted, and implemented by the Party with compliance difficulties.[114] In this case, the drafting of the plan and its implementation will be subject to supervision by the compliance body.
(d) The suspension of rights and privileges raises many questions, notably the legal basis of such measure, and the application of this measure is highly controversial.[115] Generally, the notion, "rights and

[105] See BC CP, paras. 19(b) and 20(a); KP CP, section XIV(a); AC CP, para. 37(a); draft CPB CP, section VI, para. 1(a).
[106] See BC CP, para. 19; KP CP, section XIV(d); AC CP, para. 37(b, d); draft CPB CP, section VI, para. 1(b).
[107] See BC CP, para. 20(a); draft CPB CP, section VI, paras. 1(a) and 2(a).
[108] See KP CP, section XIV(a to c); AC CP, para. 37(a); MP CP, para. A of the indicative list of measures.
[109] See BC CP, para. 19(b); draft UNFCCC MCP, para. 6(b).
[110] See BC CP, para. 19(c); AC CP, para. 37(c); draft CPB CP, section VI, para. 1(c).
[111] See BC CP, para. 20(b); MP CP, para. B of the indicative list of measures; AC CP, para. 37(f); draft CPB CP, section VI, para. 2(b).
[112] See KP CP, section XV, paras. 1(a) and 5; AC CP, para. 37(e).
[113] See draft CPB CP, section VI, para. 2(c).
[114] See KP CP, section XV, paras. 1(b) and 5(b).
[115] See MP CP, para. C of the indicative list of measures; AC CP, para. 37(g); draft CPB CP, section VI, para. 2(d).

privileges" relates to rights, such as the right to vote, and privileges, such as the right to be elected to serve as an officer on a treaty body. In the absence of a treaty provision to that effect, it has been questioned whether the suspension of rights conferred on Parties by a treaty can be introduced in compliance procedures that are adopted by means of a mere decision of a supreme treaty body. It could be argued that the theory of implied powers, as applied to autonomous institutional arrangements, such as the IT/PGRFA, justifies the suspension of such rights. It could, furthermore, be argued that rights can be suspended in accordance with general international law, notably the relevant rules of the law of treaties and the law of state responsibility. Some compliance procedures provide for the suspension of treaty-specific rights and privileges, *e.g.,* the suspension of access to financial mechanisms or the suspension of trade.[116]

4. The imposition of financial penalties cannot be found in any of the operational compliance procedures. Although it has been discussed in some negotiations, there has never been sufficient support for such measure because of its punitive character.

5. The above-mentioned measures are suitable to be applied in cases of compliance difficulties of individual Parties, including cases of non-compliance with reporting obligations. As for general or aggregated issues of compliance, the measures to be applied are more likely to be of a general nature. Such measures may take the form of an interpretation of rules in treaty instruments or the development of new rules that may contribute to the level of compliance with the treaty.

### 5.8 Institutional Embedding

1. The compliance body does not perform its functions in isolation from other treaty bodies. With respect to decision-making on the application of measures in the cases of compliance difficulties of an individual Party, including non-compliance with reporting obligations, compliance procedures differ according to the level of (in)dependence of a compliance body. A compliance body may either:

- recommend the application of measures with respect to a Party with compliance difficulties to the supreme treaty body for adoption;[117] or
- apply such measures, or some of them, itself, subject to policy guidance of the supreme treaty body.[118]

The delegation of the competence to apply measures to the compliance body originates in the desire to avoid political distortions in the handling of compliance issues and to provide for a prompt response. Since supreme treaty bodies do not meet frequently, ranging from annual meetings to meetings every four years, a prompt response can only be achieved through the delegation of decision-making powers to the compliance body. In more recently adopted compliance procedures, a distinction has been made in this respect between facilitative measures and stronger measures. Compliance bodies may adopt facilitative measures themselves, but not stronger measures.[119] The application of these measures still requires the approval of the supreme treaty body.

2. As for the application of measures with respect to general or aggregated issues of compliance, the compliance body may only make recommendations to the supreme treaty body under operational compliance procedures. Although the compliance body has expertise to examine such general or aggregated issues of compliance, the general nature of the measures to be applied still requires the approval of the supreme treaty body (see Section 5.7).

3. Other treaty bodies may be an important source of information for the compliance body (see Section 5.6).

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[116] See KP CP, section XV.5(a and c); MP CP, para. C of the indicative list of measures.
[117] See BC CP, para. 20; MP CP, para. 9; AC CP, para. 37; EC CP, para. 11; LRTAP CP, para. 11; draft CPB CP, section VI, para. 2.
[118] See BC CP, para. 19; KP CP, sections XIV and XV; AC CP, para. 36; draft CPB CP, section VI, para. 1.
[119] See BC CP, para. 19; AC CP, para. 36; draft CPB CP, section VI, para. 1.

4. In recent compliance procedures, provisions have been introduced to stimulate co-operation with compliance bodies established under other treaties.[120]

### 5.9 Scope

1. The scope of a compliance procedure could cover (1) all provisions of a treaty or only selected provisions and/or (2) legal instruments that are adopted to implement a treaty. As for the first issue, it appears that compliance procedures invariably cover all provisions of the treaty concerned. Proposals in negotiations to exclude certain provisions from a treaty have to date always been rejected. Although this is also true for the compliance procedure under the Kyoto Protocol, it may be noted that questions of implementation are allocated to either the facilitative branch or the enforcement branch in accordance with their mandates.[121] In practice, this means that questions of implementation relating to obligations incumbent on developing countries will only be allocated to the facilitative branch. In this respect too, the IPPC Guidelines differ from standard compliance procedures. The IPPC Guidelines only apply to selected articles of the 1951 International Plant Protection Convention.[122]

2. As for the second issue, *i.e.,* whether the compliance procedure should also cover legal instruments that are adopted to implement a treaty, reference may first be made to protocols that are adopted in the framework of a particular treaty. Joint compliance procedures covering the provisions of a treaty and/or one or more of its protocols are operational or envisaged in the framework of several UNECE treaties.[123] Reference may, furthermore, be made to decisions that are adopted by the supreme treaty body. Even though these decisions will usually not be legally binding, it will still be useful to review compliance with these decisions and to subject compliance with these decisions to the scrutiny of a compliance body. None of the operational compliance procedures has excluded decisions of the supreme treaty body from its scope. With respect to the IT/PGRFA, this issue is not without significance. Some important obligations of the IT/PGRFA are to be implemented through private parties, in particular material transfer agreements (Article 12.4 IT/PGRFA), and international institutions referred to in Article 15.1 IT/PGRFA, in particular the agreements between the Governing Body and International Agricultural Research Centres. Compliance with these legal instruments could be brought within the scope of the compliance procedure under Article 21 IT/PGRFA.

## 6. COSTS

The financial resources required to operate compliance procedures vary depending, primarily, on the size of the compliance body, the reimbursement of participation costs for individual members of the compliance body, and the number of meetings in a particular budget period. The compliance procedure under the Montreal Protocol may serve as an example. An amount of 115,000 US$ per year is allocated for the compliance body under the Montreal Protocol under the core budget.[124] This sum is based on two meetings per year covering the participation costs at each meeting for eight members from developing countries and countries with economies in transition, and two Party representatives invited by the compliance body.[125]

[120] See AC CP, para. 39.
[121] See KC CP, Section VII, para. 1.
[122] See IPPC Guidelines, para. 3.
[123] See LRTAP CP; Article 14.6 EC.
[124] See UNEP/OzL.Pro.14/9, p.71, budget line 3305.
[125] See UNEP/OzL.Pro.14/9, p. 78.

*Appendix*

**List of abbreviations used in the text**

| | |
|---|---|
| AC or Aarhus Convention | 1998 UNECE Aarhus Convention on Access to Information, Participation in Decision-Making and Access to Justice in Environmental Matters |
| Alp or Alpine Convention | 1991 Convention on the Protection of the Alps |
| BC or Basel Convention | 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal |
| Bern Convention | 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats |
| CITES | 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| CP | Compliance Procedure |
| CPB or Biosafety Protocol | 2000 Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity |
| CGRFA | Commission on Genetic Resources for Food and Agriculture |
| EC or Espoo Convention | 1991 UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context |
| ECE Guidelines | 2003 UNECE Guidelines for strengthening compliance with and implementation of multilateral environmental agreements (MEAs) in the ECE region |
| FAO | Food and Agricultural Organisation |
| GEF | Global Environmental Facility |
| IPPC | 1951 International Plant Protection Convention |
| IPPC Guidelines | 2001 Guidelines for the Notification of Non-Compliance and Emergency Action under the 1951 International Plant Protection Convention |
| ISPMs | International standards for phytosanitary measures |
| IT/PGRFA | 2001 International Treaty on Plant Genetic Resources for Food and Agriculture |
| KP or Kyoto Protocol | 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change |
| LP or London Protocol | 1996 London Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter |
| LRTAP Convention | 1979 UNECE Convention on Long-Range Transboundary Air Pollution |
| MEAs | Multilateral environmental agreements |
| MP or Montreal Protocol | 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to the 1985 Vienna Convention on the Protection of the Ozone Layer |
| PIC or Rotterdam Convention | 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade |
| POPs or Stockholm Convention | 2001 Stockholm Convention on Persistent Organic Pollutants |
| PRTR Protocol | 2003 UNECE Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention |
| SEA Protocol | 2003 UNECE Protocol on Strategic Environmental Assessment to the Espoo Convention |
| UNECE | United Nations Economic Commission for Europe |
| UNCCD | 1994 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification |
| UNCED | United Nations Conference on Environment and Development |
| UNEP | United Nations Environmental Programme |
| UNEP Guidelines | 2002 UNEP Guidelines on Compliance and Enforcement of Multilateral Environmental Agreements |
| UNFCCC | 1992 United Nations Framework Convention on Climate Change |

| | |
|---|---|
| WHP or Water and Health Protocol | 1996 UNECE Water and Health Protocol to the 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes |