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Preparation of a global legally binding instrument on mercury

Key concepts, procedures and mechanisms of legally binding multilateral agreements that may be relevant to furthering compliance under the future mercury instrument

Note by the secretariat

Background

At its meeting held in Bangkok from 19 to 23 October 2009, the ad hoc open-ended working group to prepare for the intergovernmental negotiating committee on mercury agreed on a list of information that the secretariat would provide to the committee at its first session to facilitate the committee's work. Among other things, the secretariat was requested to provide materials addressing key concepts, procedures and mechanisms of legally binding multilateral agreements that might be relevant to furthering compliance under the future mercury instrument. The present note responds to that request.

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Contents

Introduction

1. In responding to the request for materials addressing key concepts, procedures and mechanisms of legally binding multilateral agreements relevant to compliance, the present note focuses on procedures, mechanisms and approaches that a legally binding multilateral environmental agreement of global scope might use to support the ability of parties to comply with their commitments under the instrument. The note takes into account research that the United Nations Environment Programme (UNEP) has previously undertaken in the area of compliance under multilateral agreements. That research includes, in particular, the 2007 study, *Compliance Mechanisms under Selected Multilateral Environmental Agreements*,[1] published by the UNEP Division of Environmental Law and Conventions, and the guidelines on compliance with and enforcement of multilateral environmental agreements adopted in 2002 by the UNEP Governing Council at its seventh special session.[2] The note also takes into account literature on compliance theory and effectiveness and compliance-related reports and analyses produced under the auspices of the conventions that were reviewed.

2. In considering compliance procedures and mechanisms, the note primarily relies on examples from multilateral environmental agreements of global scope, especially those that pertain to atmospheric and hazardous substances pollution. To a lesser extent it also relies on trade, labour, financial and arms control agreements; in doing so, however, it recognizes that the differing purposes of such agreements might, in some cases, diminish their value as sources from on which to draw in crafting a legally binding instrument on mercury.

3. Chapter I of the note defines key compliance concepts and explains why some mechanisms, in areas such as dispute settlement and liability, serve functions that are distinct from multilateral compliance procedures and are therefore beyond the scope of the present note.

4. Chapter II provides examples of the basic components that could constitute a compliance system under a multilateral environmental agreement. Those components include provisions for supplying information about a party's performance under the agreement; procedures and mechanisms for evaluating a party's compliance with its commitments under the agreement; and response measures that might be employed when a party does not meet its commitments. Some multilateral environmental agreements use all of these components, others use some and a few use none.

5. Chapter III identifies and discusses considerations that might assist the intergovernmental negotiating committee to develop a convention that is effective and supports a high level of compliance. Chapter IV briefly discusses possible approaches to timing for the development and adoption of the mercury convention's compliance system.

I. Compliance concepts

6. A bedrock principle underlying every international treaty is *pacta sunt servanda*: "agreements must be kept". This principle, codified in article 26 of the Vienna Convention on the Law of Treaties,[3] provides the foundation for compliance concepts in multilateral environmental agreements.

7. Modern global multilateral environmental agreements are often complex instruments dealing with environmental, health or natural resource challenges that cannot be adequately met by individual countries acting alone or on a regional basis. A multilateral environmental agreement is effective when it leads to collective action by its parties that eliminates or reduces an environmental threat to an acceptable level. Different parties may assume different responsibilities under a multilateral environmental agreement, depending on their respective levels of economic development and contributions to the environmental challenge that the treaty addresses. Whatever their individual responsibilities under the agreement may be, all parties need assurance that their efforts will be supported by appropriate, sustained efforts from all other parties. A well-designed compliance system can provide such assurance by enhancing trust and confidence that each party is doing its fair share to achieve the agreement's objectives.

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1 Available at http://www.unep.org/dec/docs/Compliance%20mechanisms%20Under%20selected%20MEAs.pdf.

2 Hereinafter referred to as the "UNEP compliance guidelines", available at http://www.unep.org/DEC/docs/UNEP.Guidelines.on.Compliance.MEA.pdf.

3 Vienna Convention on the Law of Treaties (A/CONF.39/27), art. 26, (1969) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith").

8. The present note defines key compliance concepts; distinguishes compliance from effectiveness, implementation and enforcement; and further distinguishes dispute settlement and liability mechanisms from a multilateral environmental agreement compliance system.

A. Definitions

9. The present note uses the term "compliance" as it is defined in the UNEP compliance guidelines:

> "Compliance" means the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement.[4]

10. Thus, a party complies with a multilateral environmental agreement when its performance conforms to its obligations as stated in the agreement.

11. A compliance system is the set of rules, procedures and mechanisms intended to promote compliance with a multilateral environmental agreement. Compliance systems are generally non-adversarial and non-punitive; they are intended to support collective action in the interests of all parties to a multilateral environmental agreement when an individual party's compliance difficulties could weaken the agreement's effectiveness. Compliance systems are necessary because the traditional international legal principle of reciprocity, pursuant to which the material breach of a treaty by one party entitles another party to terminate or suspend the operation of the treaty, would defeat the very goals that motivated the parties to adopt the multilateral environmental agreement in the first place.

12. A compliance system may have three basic components, although not every multilateral environmental agreement has all three. The three components are, first, provisions for supplying information about a party's performance under a multilateral environmental agreement; second, procedures and mechanisms for evaluating a party's compliance with its commitments under the agreement; and, third, response measures, that is, measures that might be employed when a party does not meet its commitments. These components may be established, in whole or part, by explicit language in a multilateral environmental agreement. Alternatively, they may be developed and adopted by the governing body of the agreement after it has entered into force. The three components of a compliance system are discussed in greater detail in chapter II below.

B. Effectiveness, implementation and enforcement

13. Compliance should be distinguished from three related subjects: effectiveness, implementation and enforcement.

14. Effectiveness is the extent to which a multilateral environmental agreement accomplishes its objectives, in particular whether it solves the environmental problem that inspired its adoption. Effectiveness thus goes to the performance of the agreement as a whole rather than the performance of individual parties. Effectiveness can be influenced by many factors, such as how ambitious an agreement's provisions are and how clearly they are stated; how many parties an agreement has and whether they include major contributors to the problem that the agreement addresses; the extent to which financial and technical assistance is provided to help parties meet their commitments; the overall level of compliance achieved by all parties; and other factors. It is important to note that a multilateral environmental agreement with unambitious objectives may achieve a high level of party compliance yet still be ineffective in solving the problem that gave rise to it. Some multilateral environmental agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer, are designed to allow parties to adjust them fairly easily, which allows parties to increase their effectiveness by strengthening their control measures quickly in response to changing circumstances.

15. Implementation refers to the actions that a party to a multilateral environmental agreement takes to achieve compliance with its treaty commitments. The UNEP compliance guidelines define implementation as:

> 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 and its amendments, if any.[5]

4 UNEP compliance guidelines, p. 2.

16. A party's implementation of a multilateral environmental agreement is no guarantee that it will comply with its obligations under the agreement, because the implementing actions that it takes may be insufficient to meet those obligations. Conversely, a party may be able to comply with its obligations under an agreement without implementing it in any significant way if the agreement is not ambitious, if the party does not engage in activities controlled under the agreement or if the party took sufficient action prior to becoming a party.

17. Enforcement, in the context of multilateral environmental agreement compliance systems, is associated with procedures to be employed when a party is found not to be in compliance with its treaty obligations, which under some agreements may include sanctions. Because most multilateral environmental agreement compliance systems are facilitative and non-punitive, enforcement provisions are relatively uncommon and are found primarily among agreements that include provisions dealing with international trade. Perhaps the most prominent example is found in the non-compliance procedure of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The Protocol's Compliance Committee includes an enforcement branch that, among other things, is responsible for suspending the right of a party to engage in international emissions trading if it fails to satisfy eligibility requirements. The enforcement branch is also responsible for determining when a developed country party has failed to comply with its emissions targets and setting an appropriate emissions penalty.

C. Dispute settlement and liability

18. Most multilateral environmental agreement compliance systems are non-adversarial and non-punitive, and are intended to support collective action in the interests of all parties when an individual party's compliance difficulties could weaken the effectiveness of the agreement. Dispute settlement and liability, in contrast, are inherently adversarial and thus generally fall outside the scope of compliance systems. Nonetheless, questions about those issues may arise during discussions of the mercury convention's compliance system; hence, the present section provides a description of each below for informational purposes.

19. As used in a multilateral environmental agreement the term "dispute settlement" describes procedures for resolving disagreements between two or more parties to the agreement. Most multilateral environmental agreements provide for such procedures.[6] Most include a paragraph stating that parties should settle any disputes that arise between them through negotiations or any other peaceful means that they may choose. Such provisions are of little practical effect, however, because parties to a multilateral environmental agreement will typically resolve their differences through negotiation regardless of whether the agreement contains such a provision.

20. Most dispute settlement articles also allow individual parties to agree in advance to submit their disputes to binding arbitration or the International Court of Justice or, in the absence of such agreement, to have the dispute heard by a conciliation commission authorized to issue a non-binding recommendation. Parties rarely use these formal procedures, however, perhaps because to do so would represent a breakdown in the ability of States to resolve their differences diplomatically and because they are reluctant to subject themselves to a third-party arbitrator empowered to make binding decisions.

21. The compliance provisions of some multilateral environmental agreements explicitly state that they shall be separate from, and without prejudice to, dispute settlement procedures established under the agreements.[7] Such provisos may provide clarity but their absence in other agreements does not imply that non-compliance and dispute settlement procedures overlap.

22. While formal dispute settlement procedures are not often used in multilateral environmental agreements that address global commons or collective action issues such as atmospheric and chemical pollution, they can be effective in promoting and enforcing compliance in multilateral agreements that regulate international trade, where reciprocity is a viable option between States. For example, arbitral panels established under the World Trade Organization's Dispute Settlement Understanding have resolved dozens of trade-related disputes between members of the Organization since its establishment in 1994.

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5 Ibid.

6 See, for example, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) art. 20; Stockholm Convention on Persistent Organic Pollutants art. 18.

7 See, for example, Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 34.

23. Liability mechanisms in multilateral environmental agreements allow one party that is harmed by the actions of another to seek compensation from the responsible party. Only a few multilateral environmental agreements include such mechanisms. For those that do, liability is determined bilaterally through domestic courts, arbitration or some other form of binding dispute settlement. The existence of liability mechanisms may deter non-compliance by the parties to some multilateral environmental agreements; their bilateral, adversarial nature, however, places them beyond the scope of compliance systems. The parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, for example, adopted a detailed protocol on liability and compensation that is not part of that convention's compliance mechanism.[8] Similarly, the parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity have, since their first meeting, been developing liability and redress rules that are to be separate from the Protocol's compliance procedures.[9]

II. Compliance systems in multilateral environmental agreements

24. The present chapter discusses examples of three basic components that typically make up a compliance system under a multilateral environmental agreement. Not all multilateral environmental agreements use all three components; indeed, some have none of them. The three basic components include provisions for supplying information to enable a party's performance under a multilateral environmental agreement to be reviewed; procedures and mechanisms for evaluating a party's compliance with its obligations under the agreement; and response measures that might be employed when a party does not meet its commitments.

A. Information for performance review

25. Effective collective action under a multilateral environmental agreement is possible when parties share a clear understanding of their treaty commitments and when they are confident that their efforts are being complemented by appropriate efforts by other parties. Transparency is essential to building and sustaining such confidence. Transparency can serve as an important incentive for compliance, because most States care about their reputations at home and abroad and do not wish to be seen as failing to honour their international commitments. In addition, transparency can improve coordination among parties by allowing them to learn from one another about effective ways to implement their commitments and by facilitating the identification of gaps or other shortcomings in a multilateral environmental agreement.

26. Information that enables a review of a party's performance lays the foundation for transparency in most multilateral environmental agreements. An important source of such information is self-reporting by parties. Under some multilateral environmental agreements such information is also obtained or verified through monitoring by a third party, as further discussed below.

27. Not all information submitted or collected under a multilateral environmental agreement is used for performance review. Such information would include information that parties exchange pursuant to a treaty's information exchange provisions (although the extent to which a party has engaged in information exchange may be among the questions that it is asked to include in its performance reports) and data used to establish baselines against which progress may later be measured. Similarly, the information contained in export notifications required under the prior informed consent procedures of the Basel Convention and the Rotterdam Convention on the prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade is not used for the purposes of performance review.

1. Reporting for purposes of performance review

28. Most multilateral environmental agreements require parties to report periodically on their compliance with their treaty obligations. Required information may include a summary of laws, policies and other measures that a party has enacted to implement a multilateral environmental agreement, along with statistical data related to performance. Multilateral environmental agreements that deal with

8 The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal was adopted in 1999. To date, it has received 9 of the 20 ratifications required to enter into force.

9 See Convention on Biological Diversity website, "Liability and Redress," http://www.cbd.int/biosafety/issues/liability.shtml.

controlled substances such as persistent organic pollutants or ozone-depleting substances may require the reporting of data (or estimates where actual data are not available) covering the production, use, consumption, releases and recycling of such substances, along with data on the treatment of wastes containing them. They may also require information on trade in such substances with other countries, including both parties and non-parties. A multilateral environmental agreement may also contain provisions regarding the public availability of information and the treatment of confidential business information.

29. The text of a multilateral environmental agreement may establish the required frequency of reporting or the parties may decide after the agreement has entered into force. The parties to an agreement may also adopt a reporting template or guidelines.

30. A multilateral environmental agreement may specify in detail the information that parties must report. Article 7 of the Montreal Protocol, for example, lists the specific types of data that parties must submit; the reporting template that parties to the Protocol use asks only for those specific types of data.[10] In contrast to that approach, article 15 of the Stockholm Convention on Persistent Organic Pollutants imposes a broad and not sharply defined reporting requirement: "Each Party shall report to the Conference of the Parties on the measures it has taken to implement the provisions of this Convention and on the effectiveness of such measures in meeting the objectives of the Convention." The Stockholm Convention reporting form thus inquires about all aspects of a party's implementation, including the steps that it has taken to comply with the Convention's provisions on technical assistance and financial resources and mechanisms.[11]

2. Third-party verification

31. Some multilateral environmental agreements provide for non-parties, such as recognized experts or the secretariat, to verify the accuracy of the performance information that parties report. The secretariat of the Framework Convention on Climate Change, for example, conducts a technical check of the national communications of developed country parties. A group of experts, whose members are selected from a list of experts nominated by parties and intergovernmental organizations, then carries out an in-depth review, which may include an in-country visit conducted with the prior consent of the party being reviewed.[12] Unlike arms control treaties such as the Treaty on the Non-Proliferation of Nuclear Weapons and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, multilateral environmental agreements do not normally provide for mandatory on-site inspections to verify reported information.

3. Third-party monitoring

32. A few multilateral environmental agreements provide for the use of supplementary performance information supplied by non-parties. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), for example, relies heavily upon the monitoring and verification functions of two independent organizations, the Wildlife Trade Monitoring Unit and Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC). Both organizations monitor trade in flora and fauna and work with extensive networks of non-governmental organizations at the national level. When they identify potential trade irregularities in CITES-listed wildlife, they report them to the CITES secretariat, which may refer them to the CITES Standing Committee.[13]

10 See Ozone Secretariat website, "Data Reporting Tools," http://ozone.unep.org/Data_Reporting/Data_Reporting_Tools/index.shtml.

11 See Stockholm Convention website, "Format for reporting under Article 15," http://chm.pops.int/Countries/NationalReports/tabid/254/language/en-GB/Default.aspx.

12 Framework Convention on Climate Change, "Review of first communications from the Parties included in Annex I to the Convention," Dec. 2/CP.1, FCCC/CP/1995/7/Add.1.

13 See, for example, the memorandum of understanding concluded between TRAFFIC and the CITES secretariat (1999), http://www.cites.org/common/disc/sec/CITES-TRAFFIC.pdf; see also CITES resolution Conf. 14.3, annex, "Guide to CITES compliance procedures," http://www.cites.org/eng/res/14/14-03.shtml.

B. Multilateral compliance procedures

33. In the context of multilateral environmental agreements, multilateral compliance procedures are institutional mechanisms for evaluating party compliance and determining how to respond when a party is not meeting its treaty obligations. They are generally facilitative, non-adversarial and non-punitive; instead of seeking to punish parties that experience compliance challenges, they typically focus on assisting parties to avoid non-compliance and to return to compliance as soon as possible.

1. General approaches

34. The parties to most multilateral environmental agreements that deal with atmospheric and hazardous substance pollution have adopted, or are in the process of negotiating, formal compliance procedures. Such procedures include (or are proposed to include) permanent compliance committees governed by detailed rules regarding, among other things, the composition of the committees; who has the right to trigger operation of the compliance procedures; the sources of information that the committees may consider; how the committees may evaluate and decide questions of compliance, including the decision-making rule that the committee may use; and the respective roles that the committees and the governing bodies of the conventions play in making final determinations on compliance.

35. Other multilateral agreements employ ad hoc and less formal approaches. Such approaches may reflect a sense among States that the harm caused by non-compliance with some agreements may have a less direct impact on others than the transboundary harm that may be caused by atmospheric pollution and hazardous substances. The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), which is intended to "establish an effective system of collective protection of the cultural and natural heritage of outstanding universal value," does not have a formal compliance procedure. Instead, it uses what is termed "reactive monitoring," in which individual parties, the secretariat, the World Heritage Committee and other stakeholders collaborate to identify properties on the World Heritage List that are at risk or are deteriorating and then, working with the party concerned, agree on steps to address the problem.[14]

36. CITES compliance procedures have evolved over time from an ad hoc to a more formal approach. When Governments adopted it in 1973, CITES did not provide for the establishment of a formal compliance procedure. Instead, article XIII instructed the secretariat to enter into communications with a party when it received information that it believed indicated that the party was not complying with the Convention. The Conference of the Parties could then make recommendations based upon information derived from the communications. Under this ad hoc approach, the secretariat – with the approval of the parties– took on a large role in compliance matters. Over the years the Conference of the Parties has adopted many compliance decisions that gradually put in place a more structured approach, culminating in 2007 with the adoption of the non-legally binding guide to CITES compliance procedures.[15]

37. Unlike most multilateral environmental agreements, major agreements on the marine environment do not use formal compliance procedures but instead rely on adversarial dispute resolution and liability mechanisms, in addition to political pressure.[16] This may be due to the fact that they were founded under long-standing principles of maritime and trade law, both of which rely significantly on the traditional legal principle of reciprocity, and to a belief that illegal acts committed by ships at sea can be effectively prevented and remedied by holding their owners liable for damage that they may cause.

14 See "Operational Guidelines for the Implementation of the World Heritage Convention", available at http://whc.unesco.org/archive/opguide08-en.pdf, chap. IV, "Reactive Monitoring".

15 CITES resolution Conf. 14.3.

16 These agreements include the International Convention for the Regulation of Whaling, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, (MARPOL 73/78), the United Nations Convention on the Law of the Sea and the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

38. The remainder of the present section discusses the elements of the compliance procedures identified in paragraph 12 above. In most cases those elements have been established not by the multilateral environmental agreements under which they operate but rather by decision of the governing bodies of those agreements.

2. Compliance committee

39. The compliance committee (or "implementation committee", as it is sometimes known) is usually the primary body responsible for administering the compliance procedure of a multilateral environmental agreement. Most compliance committees have between 10 and 15 members. The Kyoto Protocol compliance committee has 20 members, grouped into facilitative and enforcement branches of 10 members each.

40. In most cases compliance committee members are elected by the governing bodies of the multilateral environmental agreements that they serve for fixed terms, on the basis of equitable geographic representation. Members may serve as experts in their personal capacities, or, as in the case of the Montreal Protocol implementation committee, as party representatives. Similarly, the CITES Standing Committee, which has a broad range of convention responsibilities in addition to dealing with non-compliance, consists of parties representing each of the six geographical regions designated under the Convention.

41. In addition to evaluating and deciding compliance questions in respect of specific parties, some compliance committees, such as the Basel Convention compliance committee, are also mandated periodically to review compliance and implementation at a more general, convention-wide, level.

3. Triggering non-compliance procedures

42. In most cases formal non-compliance procedures under a multilateral environmental agreement are triggered when an entity that is eligible to do so under rules adopted by the agreement's governing body notifies the secretariat that there is an issue in respect of a party's compliance. In most cases those entitled to trigger the procedures in this fashion include parties, both in respect of their own compliance (known as the "self trigger") and that of other parties (known as the "party-to-party trigger"). The value of the party-to-party trigger may owe less to its actual use (which is indeed infrequent) and more to the possibility that its mere existence may induce parties experiencing compliance difficulties to be proactive in seeking assistance through the compliance procedures. The procedures under several multilateral environmental agreements may also be triggered by the secretariat, especially regarding whether a party has met its reporting obligations. Under agreements that establish technical review bodies, such as the expert review teams of the Kyoto Protocol, the review bodies may also be entitled to trigger compliance mechanisms.

4. Compliance committee procedures

43. While specific procedures of the committees vary, most provide opportunities for the party whose compliance is in question to be informed of the compliance question that has been raised and to submit its own views and information on the matter. In examining a party's situation a committee may rely on a wide range of materials, including, in some cases, relevant factual and technical information submitted by competent intergovernmental and non-governmental organizations. The committee may consider compliance questions at meetings that often are held in conjunction with meetings of the governing body. The party whose compliance is in question is invited to attend, but not to participate in decision-making. Many committees take decisions by consensus or, where consensus is not possible, by a two-thirds majority vote.[17]

5. Relationship between the compliance committee and governing body

44. Under many compliance procedures, the compliance committee may make recommendations intended to assist a party to achieve compliance with its treaty commitments. For example, under the facilitation procedure of the Basel Convention's mechanism for promoting implementation and compliance, the compliance committee may provide advice, non-binding recommendations and

17 See, for example, Basel Convention, Mechanism for Promoting Implementation and Compliance terms of reference, para. 25, available at http://www.basel.int/legalmatters/compcommitee/index.html.

information in agreement with the party in question.[18] If the party's difficulties persist then the committee may recommend that the Conference of the Parties consider taking additional measures.

45. CITES and the Kyoto Protocol, on the other hand, vest their compliance committees with the authority to decide for themselves what measures should be taken in response to a party's non-compliance. The CITES Standing Committee may require a party to take a broad range of measures and then, with the assistance of the secretariat, monitor its implementation of those measures. In the case of the Kyoto Protocol, the party concerned may appeal to the Meeting of the Parties against a final decision of the compliance committee's enforcement branch. The Meeting of the Parties may override the enforcement branch decision by a three-fourths majority vote, upon which the matter that was appealed is referred back to the enforcement branch for its further consideration. If the Meeting of the Parties does not override the enforcement branch decision then the decision stands.

C. Response measures

46. Once a compliance committee determines that a party is failing to meet some of its treaty commitments, the committee or the governing body may take action to assist or induce the party to return to compliance. Most multilateral environmental agreements provide for facilitative response measures to assist a party and, in some cases, to help manage its non-compliance, often with the aim of building its capacity to comply. Some multilateral environmental agreements, especially those that involve international trade, may authorize stronger measures in cases of serious or repeated non-compliance.

1. Facilitative response measures

47. Facilitative response measures include recommendations and advice to help a party to address its compliance difficulties. They may entail, for example, recommendations on laws or policies that the party might adopt to implement the convention at issue, including appropriate customs or domestic enforcement arrangements, or technical advice on monitoring and reporting. Under some multilateral environmental agreements such as CITES and the Montreal Protocol, the secretariat or compliance committee may provide in-country assistance, technical assessment or verification at the invitation of the party concerned.

48. Facilitative response measures may also include advice and assistance in respect of access to technologies and financial resources that a party might need to achieve compliance. Such assistance may complement whatever resources the party might ordinarily be eligible to receive under an agreement's financial and technology assistance mechanisms.

49. An important component of many facilitative response measures is a request or suggestion that a party in non-compliance prepare a compliance action plan, which might include benchmarks, objectives, compliance indicators and a timeline for implementation. The non-compliance procedures of CITES, the Basel Convention and the Biosafety Protocol all include the possibility of compliance action plans and arrangements for a party to report on its progress in implementing such a plan.[19]

2. Disincentives and penalties

50. While most compliance procedures are facilitative and non-adversarial, some multilateral environmental agreements allow the use of stronger measures to address serious or repeated cases of non-compliance. Under CITES and the Kyoto Protocol, such measures may be applied by the Standing Committee or the enforcement branch, respectively. Under other agreements only the governing body may apply them.

51. These measures generally fall into two categories: publication of non-compliance and suspension of treaty privileges. Publication may entail a formal finding of non-compliance by the governing body, issuance of a formal caution to the concerned party or publication of a party's non-compliance in a special list or report. For example, the Biosafety Protocol's Executive Secretary may publish cases of non-compliance in the Protocol's Biosafety Clearing-House, while the CITES secretariat publishes a list of non-compliant parties on its website.

18 Ibid, para. 19.

19 Under the Kyoto Protocol compliance procedures and mechanisms, the compliance committee's enforcement branch may require the preparation of a compliance action plan.

52. Suspension of treaty privileges has been employed as a response to non-compliance by a range of multilateral organizations and instruments such as the International Monetary Fund, the International Labour Organization and the Chemical Weapons Convention. Some multilateral environmental agreements and related agreements also provide for it. Thus, a non-compliant party to the World Heritage Convention may be excluded from membership on the World Heritage Committee. The Montreal Protocol non-compliance procedure allows the suspension of specific rights and privileges under the Protocol, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, the financial mechanism and institutional arrangements.[20]

53. A more widely applied response measure is the suspension of treaty rights related to international trade in a substance or article controlled under the multilateral environmental agreement at issue. In essence, this results in a non-compliant party being treated as a non-party not entitled to engage in trade with other parties in the controlled substance or article. While this sanction is available under the Montreal Protocol (see above), it has been used most frequently in CITES, although there it takes the form of a non-binding recommendation by the Conference of the Parties and the Standing Committee that parties suspend trade with the non-compliant party. As at the end of 2009, 21 non-compliant parties were the subject of such a recommendation.[21]

III. Considerations to assist the intergovernmental negotiating committee

54. As the intergovernmental negotiating committee begins its work, Governments can lay the groundwork for an effective mercury agreement by considering how the instrument might promote – and parties might achieve – compliance with its provisions. The following considerations may assist the committee to develop a convention that is effective and supports a high level of compliance.

A. Clarity and precision

55. It is easier for parties to implement and comply with obligations under a multilateral environmental agreement when its objectives are clearly stated and understood and when the obligations that it imposes on parties are precisely worded, unambiguous, logical and internally consistent. Clearly stated commitments can assist in assessing compliance,[22] while the use of qualifying phrases in the text may render that task impossible. For example, the phrase “shall take measures to” (accomplish an objective) shifts the focus of the obligation away from achieving the objective and instead towards undertaking an activity that may or may not achieve the objective.

56. Similarly, a phrase such as “each party shall, within its capabilities” (do something) makes it difficult to determine whether any party has complied with its commitment, because a compliance determination must first start with a review of a party’s capabilities – a task that may be challenging, if not impossible, to complete. A commitment (and the convention) will be more precise if such qualifying phrases are avoided and other, more direct, means are employed to achieve flexibility for parties with different capacities.

57. Throughout the negotiations, the intergovernmental negotiating committee should take steps to ensure that the provisions being developed are internally consistent and compatible with one another. A legal group may be able to provide advice on the consistency of the text. Sufficient time should be allowed after substantive issues have been resolved to allow a review to determine such consistency.

B. Accommodating different capabilities

58. Negotiators often resort to qualifying phrases such as the example above to accommodate countries with various levels of development or technical capacity. Nevertheless, such phrases can have the undesirable effect of rendering a commitment indeterminate and thus making it impossible to evaluate compliance. Adoption of a treaty with rigid requirements, on the other hand, could result in many parties falling into non-compliance upon the treaty’s entry into force. Such a situation could foster

20 UNEP/OzL.Pro.4/15, annex V, available at http://ozone.unep.org/Meeting_Documents/mop/04mop/4mop-15.e.doc.

21 See the list of countries currently subject to a recommendation to suspend trade produced by the CITES secretariat, available at http://www.cites.org/eng/news/sundry/trade_suspension.shtml (visited 17 December 2009).

22 See UNEP compliance guidelines, para. 14 (a).

the idea that compliance is not feasible and that compliance procedures are therefore undesirable. Alternatively, negotiators might agree to a weakening of treaty obligations to facilitate immediate compliance. Rigidity could thus lessen a treaty's long-term effectiveness by undermining either compliance or ambition.

59. The principle of common but differentiated responsibilities acknowledges that States may sometimes need to implement their commitments under multilateral environmental agreements in different ways, depending on their individual technical and financial capacities. Negotiators can meet this need by ensuring that compliance is tied to the provision of financial and technical assistance; by allowing uses or practices that are controlled under the treaty to continue for a period of time under exemptions reviewed by the governing body; or by temporarily deferring some treaty obligations for certain sectors or categories of parties. Such approaches recognize the short-term challenges facing some parties, while allowing the treaty to retain its ambition and support a culture of compliance. In all cases, an important consideration is the need to build capacity in States during the negotiation of a treaty and after its adoption to help them prepare for its entry into force.

60. Flexibility in national action is thus important. The desire to achieve it, however, should not result in treaty language that is vague or ambiguous and therefore subject to varying interpretations. The Montreal Protocol implements the principle of common but differentiated responsibilities while maintaining precise language that allows compliance to be evaluated. Article 5 of the Protocol permits qualifying developing country parties to delay their implementation of many of the Protocol's control measures for 10 years. Nevertheless, the obligations of such parties are clear because differentiation is accommodated through their implementation schedules and not through the use of vague qualifying phrases in respect of the obligation itself. Thus, for example, paragraph 8 ter (g) (i) of article 5 provides as follows:

> As of 1 January 2002 each Party operating under paragraph 1 of this Article shall comply with the control measures set out in paragraph 1 of Article 2H and, as the basis for its compliance with these control measures, it shall use the average of its annual calculated level of consumption and production, respectively, for the period of 1995 to 1998 inclusive[.]

C. Compliance and performance indicators

61. In addition to avoiding the use of vague qualifying phrases, the Montreal Protocol example above uses performance indicators to achieve precision that, in turn, supports compliance assessment. By defining its commitments through precise outcomes, actions, deadlines and targets, a multilateral environmental agreement can establish clear standards against which compliance can be measured.

62. The compliance aspects of specific commitments can also be strengthened by including compliance-related provisions in the provisions that establish the commitments. For example, provisions establishing important commitments can set out specific reporting requirements, including deadlines. When accompanied by an overarching reporting requirement and financial assistance to facilitate compliance such requirements can support an increased level of reporting by parties and thereby facilitate the assessment of party compliance.

D. Financial mechanisms and compliance

63. A comprehensive discussion of financial mechanisms that might assist developing countries in their implementation of a mercury instrument is beyond the scope of the present note. The present section, however, briefly discusses some aspects of the relationship between financial mechanisms and compliance.

64. Some multilateral environmental agreements establish financial mechanisms, while others do not. Those that do may also contain provisions recognizing a relationship between the ability of developing countries to implement their treaty commitments effectively and the effective implementation by developed countries of their commitments relating to financial resources.[23]

23 See, for example, Stockholm Convention art. 13.4; Framework Convention on Climate Change art. 4.7; Montreal Protocol art. 10.

65. For those agreements that have them, financial mechanisms may be implemented either through a stand-alone or single-purpose entity such as the Multilateral Fund for the Implementation of the Montreal Protocol or through a multi-purpose entity such as the Global Environment Facility (GEF).

66. One advantage of a multi-purpose entity is that it facilitates the making of contributions by all major donors, including non-parties. Moreover, a multi-purpose entity may address a broad array of environmental issues in a relatively coordinated, synergistic way. A disadvantage, however, at least from the perspective of a given convention, is that such an entity is under the direct authority of its own governing body, not that of the convention. Direct compliance-related linkages between a convention and its financial mechanism may thus be difficult because of the implementing entity's autonomy and independent procedures.

67. A stand-alone implementing entity serves only the multilateral environmental agreement under which it is established and the financial mechanism that it operates is typically funded by developed country parties. Funding provided by the mechanism is usually intended to enable developing country parties to meet their specific obligations under the agreement's control measures rather than to support them more generally in any broader efforts to implement the agreement. Funds are thus unlikely to be directed towards general activities such as infrastructure building unless there is a clear link between such activities and compliance with specific control measures. A stand-alone financial mechanism and its implementing entity are under the direct authority of a multilateral environmental agreement's governing body. This relationship facilitates compliance linkages between the agreement's financial mechanism and a party's implementation of its commitments under the agreement.[24] Similarly, the direct link between the agreement's developed country parties and the financial mechanism's funding permits a ready assessment of whether developed country parties are adhering to their obligations under the agreement to contribute to the mechanism to enable developing country compliance.

68. Some multilateral environmental agreements do not have formally established financial mechanisms, but instead support implementation activities with voluntary funding approaches. Examples of these include the Basel and Rotterdam conventions, under which technical assistance is funded through a voluntary trust fund that allows donors to earmark funds for specific activities. Such an approach may not support direct links between an agreement's financial mechanism and its compliance procedures.

IV. Development and adoption of compliance procedures

69. Throughout its negotiations, the intergovernmental negotiating committee may wish to keep in mind the need for compliance with whatever instrument it may wish to adopt. A recurring challenge in developing and adopting compliance procedures for a multilateral environmental agreement is that States often prefer not to consider them until they know what the final content of the agreement will be; because the final content is rarely known until negotiations conclude, however, there is often no time left for negotiating and adopting compliance procedures.

70. To deal with this problem, many multilateral environmental agreements include what are known as "enabling clauses" that commit the governing bodies of those agreements to developing and adopting compliance procedures after the agreements enter into force. Because negotiations on compliance procedures for such agreements thus take place after the agreements have been adopted in respect of all other matters (including financing, where applicable), there may be less incentive to conclude the compliance negotiations in a timely manner. This has been the experience under several agreements, including the Rotterdam and Stockholm conventions, the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, and the International Treaty on Plant Genetic Resources for Food and Agriculture. The parties to those conventions have been unable to adopt compliance procedures, despite years of negotiations.

71. The present chapter discusses approaches that the intergovernmental negotiating committee may wish to consider as a means of ensuring that compliance provisions are adopted along with the rest of any instrument on mercury that it may adopt.

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24 For example, the Sixth Meeting of the Parties to the Montreal Protocol decided in 1994 to deny funding from the Multilateral Fund to developing countries that did not submit their initial baseline data. UNEP/OzL.Pro.6/7, decision VI/5, available at http://ozone.unep.org/Meeting_Documents/mop/06mop/6mop-7.e.pdf. The Fourteenth Meeting of the Parties has also determined that the Fund's Executive Committee "has a responsibility to consider both the current and forecasted compliance status of a country when it reviews submissions connected with funding proposals". UNEP/OzL.Pro.14/9, decision XIV/37.

A. Incorporating compliance provisions directly into the convention text

1. Reporting

72. The text of any instrument adopted could include requirements for parties to report periodically on the performance of their commitments. Where commitments relate to controlling the production, use, disposal, storage or trade of mercury and its compounds or mercury-containing products, the instrument could identify the specific types of data that parties must submit, in a manner similar to that established under article 7 of the Montreal Protocol. Because the mercury instrument might require the use of many types of policies and measures, the performance of some of which might not be quantifiable, the convention could also contain a broad qualitative reporting requirement similar to article 15 of the Stockholm Convention.

73. The intergovernmental negotiating committee could promote a relatively high level of useful reporting by including specific references to reporting in those treaty provisions that contain especially important measures. Stating specific compliance and performance indicators along with such measures could facilitate such reporting. In all cases, the instrument could instruct the secretariat to publish lists of the parties from which it has received reports, to make party reports publicly available and to consult parties that have not submitted their reports. As in article 12 of the Framework Convention on Climate Change, the mercury convention could specify deadlines by which the first reports of parties would be due.

2. Compliance procedure and response measures

74. As discussed above, party compliance with the instrument to be adopted should be a theme throughout the deliberations of the intergovernmental negotiating committee. It may not be possible in the time available, however, to include fully developed compliance procedures as part of the instrument as adopted, which might instead be limited to instructing the governing body to develop compliance procedures at some later time. In such a case, the committee has the option of either leaving the governing body to develop the procedures at its discretion or to include in the instrument guidance to the governing body, including guidance on those compliance elements that have proved difficult to resolve for other multilateral environmental agreements. Such elements might include the objective and nature of the procedure; the establishment and composition of a compliance committee; the ways in which the procedure might be triggered; the decision-making rule for the compliance committee; the committee's relationship to the governing body; and the nature and range of response measures that might be available.

75. If the committee decides to include such guidance in the instrument, it may further wish to include an enabling clause providing that the governing body may elaborate additional details of the compliance procedure within a specified time frame.

B. Enabling clauses

76. An enabling clause in a multilateral environmental agreement accomplishes two things: it unambiguously establishes that the governing body has the legal authority to adopt compliance procedures and it requires the governing body to exercise that authority. Most multilateral environmental agreements on atmospheric pollution or hazardous substances contain such an enabling clause. Those of the Rotterdam and Stockholm conventions are virtually identical. Article 17 of the Stockholm Convention states:

> The Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance.[25]

77. A notable aspect of this language is that it does not specify a time by which the Conference of the Parties must approve the procedures and institutional mechanisms. The conferences of the parties to both the Rotterdam and the Stockholm conventions have held four ordinary meetings. Although they have discussed compliance procedures at some length they have not yet been able to reach agreement on them.

25 See also Rotterdam Convention art. 17.

78. By contrast to those of the Rotterdam and Stockholm conventions, the enabling clauses of several other multilateral environmental agreements set forth specific deadlines by which the governing bodies of those agreements are to act. These deadlines typically require the governing bodies to approve compliance procedures at their inaugural sessions[26] but have not in all cases been entirely effective. The parties to the Biosafety Protocol and the Kyoto Protocol adopted compliance procedures at their first sessions, while the parties to the Montreal Protocol did so at their second meeting, and only on an interim basis. The Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture has been unable, after three meetings, to agree on its compliance procedures, despite a treaty requirement that it do so at its first meeting.[27]

C. Additional approaches

79. As the discussion above reveals, compliance procedures and mechanisms can be difficult to adopt after a multilateral environmental agreement enters into force. The experiences of the Montreal and Kyoto protocols may be instructive. The Montreal Protocol's success is often attributed to the combined effectiveness of its compliance procedure (which it refers to as a non-compliance procedure) and its financial mechanism, the Multilateral Fund. While the original 1987 Protocol contained an enabling clause, it did not include provisions for a financial mechanism. The need to develop and approve both of these critical mechanisms together became evident after the Protocol's entry into force, however, and at the Second Meeting of the Parties they were adopted as complementary parts of a package, the interim non-compliance procedures by a decision of the parties and the financial mechanism as an amendment to the Protocol.

80. The Kyoto Protocol followed a similar path. Adopted in 1997 by the parties to the Framework Convention on Climate Change, the Protocol text omitted key details on compliance, carbon accounting, emissions trading and finance that what are termed "Annex I" countries with binding emissions targets wished to finalize before ratifying the treaty. In lieu of detailed text on such matters the Protocol included several enabling clauses requiring its Meeting of the Parties to adopt the necessary rules at its first session. Following adoption of the Protocol the parties to the Framework Convention on Climate Change over the course of four years negotiated a package of provisions, including provisions on compliance procedures, known as the Marrakesh Accords. With the Marrakesh Accords in place developed countries ratified the Kyoto Protocol in sufficient numbers for it to enter into force, whereupon the parties to the Protocol adopted the Marrakesh Accords at their first session.

81. The situation of each protocol was unique. The intergovernmental negotiating committee may nevertheless wish to consider whether it might be possible to negotiate and agree upon compliance and financial provisions of the mercury instrument as a package rather than separately. That might entail adopting the basic elements of the compliance procedure as part of the convention text, as suggested in paragraphs 72–78 above. Alternatively, key details of compliance and financial provisions could be developed as a package by the committee after the adoption of a mercury instrument by a conference of plenipotentiaries. Countries could then ratify the instrument following the committee's agreement on the package, and following the instrument's entry into force the governing body could adopt the package at its first session.

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26 See, for example, Biosafety Protocol art. 34; Montreal Protocol art. 8; Kyoto Protocol art. 18; International Treaty on Plant Genetic Resources for Food and Agriculture art. 21.

27 Report of the third session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture; IT/GB3/09/Report, resolution 2/2009, "Procedures and Operational Mechanisms to Promote Compliance and to Address Issues of Non-compliance", available at ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3repe.pdf.