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COMPLIANCE AND DISPUTE SETTLEMENT PROVISIONS IN THE WTO AND IN MULTILATERAL ENVIRONMENTAL AGREEMENTS

Note by the WTO and UNEP Secretariats

I. INTRODUCTION

1. This paper responds to the request of Members at the 13-14 February 2001 meeting of the Committee on Trade and Environment (CTE) to prepare a factual paper, in cooperation with UNEP and the MEA Secretariats, on compliance and dispute settlement provisions in the WTO and MEAs.[1] This paper is also provided as an input to the MEA Information Sessions and builds on the information on selected MEAs in WT/CTE/W/160/Rev.1 entitled "Matrix on Trade Measures pursuant to Selected MEAs".

2. The purpose of this paper is to provide an overview of relevant provisions in the WTO and MEAs as well as the processes involved in effective compliance and dispute settlement, and to contribute to the ongoing constructive dialogue concerning the relationship between the WTO and MEAs. The paper builds on discussions that have taken place within the Committee on Trade and Environment, and the UNEP-MEA sponsored meeting on Enhancing Synergies and Mutual Supportiveness of MEAs and the WTO held in Geneva on 23 October 2000.

3. The first section of the paper includes general comments on compliance mechanisms and dispute settlement procedures in selected MEAs.[2] The second section focuses on compliance and dispute settlement in the WTO. Finally, the third section presents general observations.

II. COMPLIANCE AND DISPUTE SETLEMENT PROVISIONS IN MULTILATERAL ENVIRONMENTAL AGREEMENTS

A. GENERAL COMMENTS

4. The obligations in MEAs have been tailored to reflect differing environmental, economic, social, institutional and technological factors. They may variously seek to regulate trade in a particular category of product (such as wildlife), to protect States from substances harmful to their domestic environment (such as hazardous waste), to protect global commons such as the ozone layer or the global climate system, or to address other environmental problems. From the point of view of MEAs, compliance and dispute settlement systems are determined primarily by the character of the

[1] The Secretariats of the WTO and UNEP have prepared this paper under their own responsibility, in close cooperation with the relevant MEA Secretariats.

[2] This paper focuses on the following Agreements: The International Commission for the Conservation of Atlantic Tunas; Convention on International Trade in Endangered Species of Wild Fauna and Flora; Convention for the Conservation of Antarctic Marine Living Resources; Montreal Protocol on Substances that Deplete the Ozone Layer; Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal; Convention on Biological Diversity; Cartagena Protocol on Biosafety; United Nations Framework Convention on Climate Change; Kyoto Protocol; UN Fish Stocks Agreement; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the Stockholm Convention on Persistent Organic Pollutants.

underlying problem that they each seek to address, as well as the conception, objective and approach of the particular MEA.

5. MEAs contain specific obligations, some of which are procedural, such as the requirement to report, and others that are substantive, such as to cease or control an activity. These specific obligations are placed in a broad normative framework by the preambles, objectives and principles embodied in these treaties.

6. Most MEAs contain elaborated and flexible procedures to promote compliance, and for the avoidance of disputes. This reflects the nature of international cooperation in the environmental field, which seeks to enhance cooperation between countries in view of scientific uncertainty and the nature of commitments directed at achieving broad environmental objectives.

7. The focus of the MEAs is on procedures and mechanisms to assist Parties to remain in compliance and to avoid disputes, not on the use of provisions for the settlement of disputes. To date, none of the formal dispute settlement provisions in the MEAs discussed below have been invoked. The conception in designing MEA compliance and dispute settlement systems is based on the fact that non-compliance with MEAs affects the environment or the global commons, and that Parties to MEAs are generally reluctant to challenge another Party when the evidence of direct injury is not apparent.

8. Instead of focusing on bilateral disputes, Parties to MEAs have explored innovative approaches to address the issue of compliance, with the objective of preventing non-compliance in advance, and of promoting compliance. It is recognized that in most cases, when a State is in non-compliance, this is not because of a wilful violation, but rather because of a lack of ability to comply. Therefore, the best way to address non-compliance is through the provision of assistance, rather than through punitive measures. This is particularly true when addressing compliance issues related to developing countries.

(a) Compliance

9. In the context of MEAs, compliance has several dimensions. First of all, compliance goes beyond implementation. Whereas implementation refers to measures that States take to make international treaties effective in their domestic law, compliance refers to whether States in fact adhere to the provisions of the treaties and to the implementing measures that they have instituted. Determining the extent of compliance is a matter of judgment that must be made on a case-by-case basis.

10. MEA procedures and mechanisms on compliance include a range of instruments, which can be divided into measures that serve to facilitate and assist Parties in complying with a Convention's provisions (for example, financial and technical assistance), and measures that address the situation in which the Parties are not in compliance with the provisions set out in the treaty, and which impose consequences as a last resort (for example, suspension of certain benefits).

11. MEA procedures and mechanisms on compliance are part of compliance systems that include both national and multilateral mechanisms. The examination of selected MEAs below (in Section II.B) demonstrates that MEAs contain a variety of compliance-related provisions. These include provisions that require Parties to report, notify and provide certain information; establish multilateral review mechanisms; provide financial and technical assistance; encourage the transfer of technology; establish differentiated responsibilities; and set up disincentives to address cases of non-compliance.

12. Obligations to report, notify and provide certain information are an important measure to encourage compliance with MEA obligations. They promote the effective identification of problems, assist in the assessment of compliance, and hence encourage transparency. Reporting also enables

Parties to assess the particular effects of their measures, and therefore helps to evaluate progress towards meeting the objective of the MEA.

13. MEAs often include provisions establishing multilateral mechanisms for the review, inspection, verification, and/or monitoring of efforts to implement and comply with treaty obligations. Some MEAs require their Conference of the Parties (COP), standing committees, or other subsidiary bodies to review and report on compliance-related issues. The Montreal Protocol on Substances that Deplete the Ozone Layer, for example, establishes an institutional mechanism for determining and responding to cases of alleged non-compliance. To promote compliance, these mechanisms may in some cases offer recommendations, or suggest other flexible and non-confrontational solutions, to help achieve the objectives of the MEA.

14. To help Parties to move towards compliance, MEAs may include provisions establishing incentives to comply, such as financial and technical assistance. Mechanisms such as the Global Environmental Facility and the Montreal Protocol Multilateral Fund, for example, have together disbursed over a billion dollars to assist developing countries in meeting their obligations under environmental agreements. Similarly, many MEAs establish mechanisms to provide Parties with technical assistance to prepare reports, develop national legislation, or identify and implement other measures to comply with treaty obligations.

15. Technology transfer has also been identified as a measure to help promote compliance with MEA obligations. The United Nations Framework Convention on Climate Change, for example, notes that the extent to which developing countries parties will effectively implement their commitments will depend on the effective implementation of commitments in the treaty related to transfer of technology.

16. Differentiated obligations for developing and least-developed countries, based on the notion of common but differentiated responsibility, are also included in many MEAs. These may include grace periods, differentiated reporting requirements, and other forms of flexibility allowing obligations to be implemented in accordance with national circumstances and development priorities and capabilities.

17. Some MEAs also include measures that operate as disincentives to respond to cases in which Parties are not in compliance with treaty obligations. These measures include suspension of certain rights and privileges under the agreement and, in some MEAs, the use of trade-related measures. These measures are, however, used only rarely and are usually complemented with other efforts to promote compliance.

18. An international mandate for the development of "mechanisms for promoting compliance" arose from the 1992 United Nations Conference on Environment and Development (UNCED), Agenda 21.[3] In February 2001, the 21st Governing Council of UNEP renewed and extended the organization's mandate to develop guidelines on compliance and enforcement in MEAs.[4]

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[3] *Agenda 21*, Chapter 8, Section (e), para. 8.21.

[4] Decision 21/27 on Compliance and Enforcement of MEAs requests the Executive Director of UNEP to continue to prepare draft Guidelines for consideration at the seventh special session of the Governing Council in February 2002. A definition of compliance suggested by the UNEP Working Group on Compliance and Enforcement of Environmental Conventions is that: "compliance is the position of a Party with regard to its obligations under a MEA. It refers to whether Parties fulfil their commitments under international agreements." The two draft Guidelines (*on Options for Enhancing Compliance with MEAs;* and *for Effective National Enforcement, International Cooperation, and Coordination in Combating Violations of MEAs)* were reviewed by an Advisory Group of Experts on Compliance and Enforcement (Nairobi, 13-15 November 2000), and have been submitted to Governments, Conventions Secretariats and other relevant bodies for further review; the draft Guidelines will be further revised for consideration in the Working Group on Compliance and Enforcement.

19. The approach adopted in MEAs towards compliance has been characterized as a flexible one, allowing Parties to find a suitable response and choose a variety of solutions. In some cases, MEAs provide a role for civil society in these processes.[5] Furthermore, it has been considered to be a collective approach, rather than building upon the bilateral relationship between the non-complying State and the directly injured other State.

(b) Dispute settlement

20. While MEAs generally focus on promoting compliance, they may also include provisions for settling disputes, should they arise. As with provisions relating to compliance, dispute settlement systems differ according to the varying conception, objectives and approaches of individual MEAs. Generally, MEAs emphasize flexible, cooperative, consensus-building mechanisms, such as negotiation and mediation, to promote fulfilment of treaty obligations, rather than the use of more formal methods of dispute settlement.

21. MEA dispute settlement provisions thus generally follow a progression including negotiation, good offices, mediation, conciliation, arbitration and judicial settlement. These different dispute settlement provisions can broadly be distinguished by their legal outcome: non-binding measures such as negotiation, consultation, mediation, enquiry and conciliation versus binding measures such as arbitration and judicial settlement.

22. Negotiation and consultation are the first measure to be taken in most environmental agreements in the event that disputes arise concerning the interpretation or application of an agreement. These mechanisms allow for the exchange of views between Parties to a disagreement with the objective of finding a solution. These measures do not involve third States or institutions, but focus on solving the dispute between the Parties concerned.

23. Some environmental agreements recommend mediation in order to facilitate cooperation between the Parties concerned. The role of the mediator is usually assigned to another Party to the agreement, the Secretariat or a specific Committee of the Convention. For example, the Montreal Protocol and the Convention on Biological Diversity state that if the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third Party. Rather than providing for mediation as a second step after negotiation has failed, some MEAs provide mediation as an alternative choice.[6]

24. Most MEAs contain provisions for conciliation. Conciliation often combines elements of fact-finding and mediation. The provisions regarding conciliation differ in their nature. While many MEAs only provide for voluntary conciliation, some of them include mandatory conciliation (e.g. the Vienna Convention and the Convention on Biodiversity). In addition, most MEAs provide for the establishment of a "Conciliation Commission" to settle disputes.[7] Commissions may make proposals for the resolution of the dispute, which the Parties concerned in the dispute shall consider in good faith. Conciliation procedures, whose main objectives are to establish the facts of the dispute, do not lead to binding decisions.

25. As a last resort, MEAs often include the possibility of resorting to arbitration and/or submission of the dispute to the International Court of Justice (ICJ). The circumstances under which

[5] In the context of CITES, for example, non-governmental organizations play an important role in providing technical and scientific support to the Secretariat, the Parties and the various CITES Committees to ensure that the Convention is implemented successfully. The Stockholm Convention recognizes the important contribution that the private sector and NGOs can make to the objectives of the Convention to eliminate emissions and discharges of persistent organic pollutants.

[6] See for example the Rotterdam and Stockholm Conventions.

[7] See for example, the Convention on Biological Diversity, the Montreal Protocol, the Cartagena Protocol, the UNFCCC, the Rotterdam Convention, and the Stockholm Convention.

a Party can resort to arbitration or to the ICJ vary between MEAs. Some MEAs entitle Parties to submit a declaration accepting compulsory dispute settlement through submission to the ICJ and/or arbitration. Other MEAs also explicitly mention the possibility that the Parties to a dispute can mutually agree on arbitration or submission to the ICJ.

26. As noted above, the use of formal dispute settlement mechanisms in MEAs to resolve disputes is rare. This reflects the nature of environmental problems, which are often multilateral rather than bilateral in nature. It also reflects the emphasis in MEAs on measures to assist Parties to remain in compliance, and to address cases of non-compliance through multilateral reviews, recommendations by various treaty bodies, technical and financial assistance, and other forms of international cooperation.

B. COMPLIANCE AND DISPUTE SETTLEMENT PROVISIONS IN SELECTED MULTILATERAL ENVIRONMENTAL AGREEMENTS

1. International Commission for the Conservation of Atlantic Tunas (ICCAT)

(a) Compliance provisions

27. The International Commission for the Conservation of Atlantic Tunas provides for various measures to ensure compliance. According to Article IX:1 of ICCAT, the Contracting Parties agree to submit periodic statements of action. Further, the Parties are required to collaborate with each other with a view to the adoption of suitable effective measures to ensure application of ICCAT provisions and, in particular, to set up a system of international enforcement to be applied to the Convention area in which a State is entitled under international law to exercise jurisdiction over fisheries.[8] Additionally, the Parties have adopted recommendations pursuant to the Bluefin Tuna Resolution[9] and the Swordfish Action Plan Resolution[10] for compliance measures.

(b) Dispute settlement provisions

28. The International Commission for the Conservation of Atlantic Tunas does not contain any provisions concerning dispute settlement.

2. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

(a) Compliance provisions

29. The compliance system of CITES is established in treaty text and subsequent Resolutions and Decisions of the COP, as well as by various notifications to the Parties, reports of the Secretariat and the activities of the Convention's subsidiary bodies. CITES was one of the first MEAs to include an extensive information system and reporting requirements. This system has been further developed in a CITES Resolution as well as in different guidelines.[11] CITES Parties are, for example, required to maintain trade records and to prepare periodic reports on their implementation.[12] Information provided for the Parties through annual reports is processed in a database maintained by UNEP and the World Conservation Monitoring Centre (WCMC). The CITES Secretariat also compiles a Report

[8] Article IX.3 of ICCAT.

[9] Resolution by ICCAT Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna, 2 October, 1995.

[10] Resolution by ICCAT Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Swordfish, June 22, 1996.

[11] See for example, Resolution 11.17.

[12] Article VIII.7 of CITES.

on Alleged Infractions for the COP to assist Parties in gathering information on certain violations or problems with compliance.[13]

30. The CITES also includes a number of multilateral processes to review and monitor compliance with the agreement. In practice, monitoring is carried out by the Animals and Plant Committee[14] and by the CITES Secretariat. Some NGOs have elaborated a trade monitoring programme such as TRAFFIC (the Trade Records Analysis of Flora and Fauna In Commerce), which provides technical and scientific support to the Secretariat, the Parties and the various CITES Committees to ensure that the Convention is implemented successfully.

31. This system is complemented by a Standing Committee that was established at the Sixth and Ninth COP.[15] It consists of Parties that are elected from each of the six geographic regions. The Committee assesses cases of lack of compliance or implementation that are reported to it by the Secretariat. Based upon these reports, the Committee makes non-binding recommendations to the Parties.[16] The Standing Committee meets regularly to discuss a range of issues related to the Convention, and sometimes the CITES Secretariat brings before it information on illicit trade problems. It is the COP, however, that takes decisions on infractions of CITES provisions.

32. When the CITES Secretariat receives information that a species listed in Appendix I or II is being adversely affected by trade, or that the provisions of the Convention are not being effectively implemented, it communicates this information to the designated management authority of the Party or Parties concerned.[17] When a Party to CITES receives this communication it shall inform the Secretariat of any relevant facts and, where appropriate, propose remedial action. An important tool for receiving information is also the possibility of in-country inspection. Where a Party considers an inquiry to be desirable, such inquiry shall be carried out by persons authorized by the Party. The information provided by the Party, or by the inquiry, shall be reviewed at the next COP, which may make any recommendation it deems appropriate.[18]

33. For the past 15 years, CITES decisions of the Parties and Standing Committee have been used to recommend in a non-binding way the suspension of trade with countries that fail to comply, after prior warning, with the provisions of the Convention.[19] The criteria for recommending a suspension of trade are the presence of significant trade and the absence of domestic measures to enforce the CITES provisions as required by Article VIII. According to information provided by the CITES Secretariat, the practice of recommending trade sanctions has worked well in obtaining the enactment of national legislation related to the Convention and the submission of required reports. The possibility of a recommendation to suspend trade often draws high-level political attention to CITES issues and results in action being taken quickly to enact legislation, develop work plans, control legal/illegal trade, or improve the basis for government decision-making.

34. Parties can request and receive assistance from the CITES Secretariat at any time to enact appropriate legislation or prepare required reports. Once compliance has been obtained, the relevant trade suspension recommendation is withdrawn. Generally, the practice of applying recommendations to suspend trade in order to bring about compliance with the Convention has never been challenged. A proposed decision by the Parties would extend trade suspension

[13] Decision 11.137.
[14] Resolution Conf. 11.1.
[15] *Ibid.*
[16] Establishment of the Standing Committee of the Conference of the Parties, Resolution of the Parties Conf 9.1., Annex I.
[17] Article XIII.1 of CITES.
[18] *Ibid*., Article XIII.2.
[19] General trade suspension recommendations have been made against El Salvador, Italy, Greece, Grenada, Guyana, Senegal and Thailand. Strict shipment controls have been recommended for Bolivia.

recommendations to those countries that fail to submit annual national reports, as required by Article VIII.7(a), for three consecutive years.

35. The CITES compliance review process is formal in that it stems from the Convention text itself (Articles VIII, XI and XIII) as well as from Resolutions and Decisions of the Parties. Article VIII.1 requires Parties to take appropriate measures to enforce the provisions of the Convention and to prohibit trade in violation thereof. This has been interpreted as a requirement for adequate legislation. Article VIII.7 requires the submission of annual and biennial reports. Pursuant to Article XI.3, the COP shall review the implementation of the Convention at its meetings and, where appropriate, make recommendations for improving the effectiveness of the Convention. Under Article XIII and based on information provided by the Secretariat that (a) an Appendix I or II species is being affected adversely by trade, or (b) the provisions of the Convention are not being effectively implemented, the Conference of the Parties or the Standing Committee may make whatever recommendations it deems appropriate (e.g. that trade in CITES-listed species should be suspended with a particular Party). The National Legislation Project (Resolution Conf. 8.4), Significant Trade Review process (Resolution Conf. 8.9), Infraction Report to COP (Decision 11.137) and, most recently, annual report requirement (Resolution Conf. 11.17 and Decision 11.37) have a link to decisions of the COP or Standing Committee to recommend the suspension of trade.

36. The Secretariat's principal reports on the National Legislation Project and Alleged Infractions and Other Problems of Implementation of the Convention are not submitted to the Standing Committee (although it will commonly receive reports of an interim nature on those subjects), but to meetings of the Conference of the Parties. The information contained within those reports may lead the COP to take a decision, usually by consensus and, in any case by a two-thirds majority, to recommend that Parties not trade with a particular country.

37. The above is a vital point; it is the Parties themselves who agree to such a recommendation. Such decisions by the COP are very often tempered with a period of grace, within which the Party potentially subject to a recommendation for cessation of trade will be expected to rectify the implementation problem. In the vast majority of cases, this will be a period of time during which the Party will be expected to enact new and stronger domestic legislation. The Standing Committee becomes involved in the process by being tasked with hearing from the Secretariat whether the relevant Party has complied or not. If it has not, the COP's recommendation for a cessation of trade will take effect. If it has complied, the Standing Committee will confirm such compliance and the cessation of trade recommendation is not put into effect. The legal basis for such measures is contained within Article XIII of the Convention. That article also makes clear the authority of, and the process by which, the Secretariat will conduct its work to identify species being adversely affected by trade and problems of implementation of the Convention.

38. It might also be worthy of note that CITES benefits from the Interpol Working Group on Wildlife Crime and the World Customs Organization/CITES Working Group, both of which act as semi-formal (in that they have not been allocated this task by the COP, although it has stressed the importance of liaison with ICPO and WCO) review bodies that spend considerable time in examining enforcement, compliance and implementation of the Convention. Parties to CITES also benefit from the capacity building activities of both groups. CITES has also made use of the work done by the National Police Agency of the Netherlands, described in Notification to the Parties No. 1999/13, which reviewed reports on Alleged Infractions and Other Problems of Implementation of the Convention. The report covered aspects of the reporting process, implementation review, compliance review and effectiveness review.

39. CITES foresees a Trust Fund and other measures to facilitate compliance. Capacity building has been financially strengthened at the last COP.

(b) Dispute settlement provisions

40. Any dispute which could arise between two or more Parties with respect to the interpretation or application of CITES provisions is subject to negotiation between the Parties involved in the dispute.[20] If the dispute cannot be resolved in this manner, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at the Hague.[21] In this case, the Parties submitting the dispute shall be bound by that arbitral decision.

3. Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)

(a) Compliance provisions

41. Under CCAMLR, Parties have to take appropriate measures within their competence to ensure compliance with the provisions of the Convention, and with conservation measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources (the "Commission"), to which the Party is bound in accordance with Article IX.[22] The Commission has been established in accordance with Article VII of the Convention and it draws the attention of all Parties to any activity which, in the opinion of the Commission, may affect the implementation by another Party or divert from the objectives of, or compliance with, the Convention.[23]

42. CCAMLR also sets up certain notification and reporting elements. Parties are required to report regularly to the Commission on measures that have been taken to ensure compliance with CCAMLR provisions, including the imposition of sanctions for any violation, as well as on steps taken to implement the conservation measures adopted by the Commission.[24] Parties undertake to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity contrary to the objective of the Convention, and have to inform the Commission of any such activity which comes to their attention.[25] The Commission publishes and maintains a record of all the measures reported to it.

43. In addition, compliance is also subject to a CCAMLR inspection process, which has been in place since 1989. To this end, the Commission has established the Standing Committee on Observation and Inspection (SCOI), which considers and prepares advice to the Commission on matters related to inspection and on compliance measures that are taken.

44. In order to prevent non-compliance, the Convention states that a non-Contracting Party vessel which has been sighted engaging in fishing activities in the Convention Area is presumed to be undermining the effectiveness of CCAMLR conservation measures. Information regarding such sightings shall be transmitted immediately to the Commission. Moreover, when a non-contracting party vessel enters a port of any Contracting Party, it shall be inspected by an authorized Contracting Party official who is knowledgeable about CCAMLR conservation measures, and shall not be allowed to land or tranship any fish until this inspection has taken place. [26]

45. To verify compliance with conservation measures, CCAMLR inspectors, designated by the Parties, regularly conduct inspections of fishing and research vessels of CCAMLR flag States in the Convention Area. The inspection reports are submitted to the Commission, which forwards them to the flag States of the vessels inspected. Flag States are required to report to the Commission on prosecutions and sanctions imposed as a consequence of the inspection of their vessels. The

[20] Article XVIII.1 of CITES.
[21] *Ibid.*, Article XIII.2.
[22] Article XXI.1 of CCAMLR.
[23] *Ibid.*, Article X.2
[24] *Ibid.*, Articles XX.3 and XXI.
[25] *Ibid.*, Article XXII.
[26] Conservation Measure 188/XVII.

Commission has established the SCOI, which considers and prepares advice to the Commission on all matters related to inspections undertaken and steps taken by Members to enforce compliance with the Convention's conservation measures.

46. In addition, a Contracting Party may only issue a licence to fish in the Convention Area to vessels flying its flag, if it is satisfied with its ability to exercise its responsibilities under the Convention and its conservation measures. Each Party shall verify, through inspections, compliance with the licence conditions. In the event that there is evidence that the vessel has not fished in accordance with the conditions of its licence, the Contracting Party shall investigate the infringement and, if necessary apply appropriate sanctions in accordance with its national legislation.[27]

(b) Dispute settlement provisions

47. Any dispute that could arise between two or more Contracting Parties concerning the interpretation or application of CCAMLR is subject to consultations among those Parties. The Parties can choose between negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means to resolve the dispute.[28] With the consent of all Parties to the dispute, an unresolved dispute can be referred to the ICJ or to arbitration for settlement; but failure to reach agreement on reference to the ICJ or arbitration shall not absolve Parties to the dispute from responsibility for continuing to seek to resolve it by other peaceful means. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex for an arbitral tribunal to CCAMLR.

4. The Montreal Protocol on Substances that Deplete the Ozone Layer

(a) Compliance provisions

48. The Montreal Protocol is an example of a long-standing and developed formal compliance mechanism. It foresees various reporting and review procedures, according to which the Parties are required to provide the Secretariat with certain data on their production, imports and exports of controlled substances.[29]

49. Article 8 of the Montreal Protocol requires the Parties to establish procedures and institutional mechanisms for determining non-compliance with the Protocol, and for treatment of Parties found to be in non-compliance. This led to the establishment of an Implementation Committee in 1990.[30] The Committee consists of ten Parties elected for two years and oversees compliance. Complaints brought before the Implementation Committee may be initiated by any Party to the Protocol that suspects another Party of non-compliance or by self-reporting by a Party defaulting on its obligations, as well as by the Secretariat. The functions of the Committee are to receive, consider and report on any submission made by one or more Parties and any information or observations forwarded by the Secretariat in connection with the preparation of the report referred to in Article 12 of the Montreal Protocol. The Implementation Committee may collect information relating to a Party's compliance in its territory, but only if the Party concerned has requested it to do so.[31] The Committee has no power to make direct recommendations to a Party, but it can make certain recommendations to the Meeting of the Parties to adopt a decision calling for steps to bring about full compliance with the Protocol, including measures to assist a Party's compliance and to further the Protocol's objectives.

[27] Conservation Measure 119/XVII.

[28] Article XXV of CCAMLR.

[29] Article 7 of the Montreal Protocol.

[30] In 1990, the Second Meeting of the Parties adopted non-compliance procedures in Annex III to the Protocol and established an Implementation Committee.

[31] Report on the work of the *ad hoc* Working Group of Legal and Technical Experts on Non-Compliance with the Montreal Protocol, Appendix 7(e), UNEP/OzL.Pro/WG.4/1/3 (1998), adopted in the Report of the Tenth Meeting of the Parties to the Montreal Protocol, UNEP/OzL.Pro1.10/9 (1998).

50. The Fourth Meeting of the Parties adopted an indicative list of measures that might be taken by the Meeting of the Parties in respect to non-compliance with the Protocol. The Implementation Committee has the competence to determine the facts and possible causes of non-compliance.[32] If a finding of non-compliance is entered against a Party, the Montreal Protocol provides a number of mechanisms that are available to bring the Party back into compliance. These mechanisms include appropriate assistance, including technical and financial assistance, issuing of cautions and suspensions in accordance with the applicable rules of international law concerning suspension of the operation of a treaty [33], of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade[34] and transfer of technology, financial mechanisms and institutional arrangements.[35]

51. In addition, there exists a Multilateral Fund, contributed to by developed country Parties, to meet the agreed incremental costs of developing countries in implementing the control measures of the Protocol. The Multilateral Fund operates under the authority of an Executive Committee and relies upon implementing agencies (e.g. UNEP, UNDP, UNIDO and the World Bank) to carry out the projects that it funds.[36] To date, this fund has disbursed US$1.25 billion in funds for projects aimed at phasing out the use of ozone-depleting technologies and substances in developing countries, while the Global Environment Facility (GEF) has disbursed about US$160 million for a similar purpose to the countries with economies in transition, mainly in Eastern Europe.

(b) Dispute settlement provisions

52. The dispute settlement procedures of the Montreal Protocol, which are found in the Vienna Convention for the Protection of the Ozone Layer, have become the prototype for the recent elaboration of provisions through which to resolve disputes in MEAs. The Protocol's flexible, multi-track hierarchy of procedures allows a Party to select the procedural or institutional mechanisms that best conform to its interests.

53. The procedures for dispute settlement under the Montreal Protocol are provided for in Article 11 of the Vienna Convention for the Protection of the Ozone Layer. In the event of a dispute between Parties concerning interpretation or application of the Protocol, the involved Parties are to seek solution by negotiation. If the Parties concerned cannot reach agreement by negotiation, they may jointly seek good offices of, or request mediation by, a third Party.[37] For those disputes not resolved in accordance with either Article 11.1 or Article 11.2 of the Vienna Convention, a Party may declare that it accepts one or both of the following means of dispute settlement as compulsory: (1) arbitration in accordance with procedures adopted by the Conference of the Parties at its first meeting; and/or (2) submission of the dispute to the ICJ. However, if the Parties have not accepted the same or any procedure, the dispute shall be submitted to a Conciliation Commission which is created at the request of one of the Parties to the dispute. The Commission shall be composed of an equal number appointed by each Party concerned and a Chair chosen jointly by the Members appointed by each Party. It shall render a final and recommendatory award, which the Parties shall consider in good faith.[38]

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[32] Report of the Tenth Meeting of the Parties to the Montreal Protocol, UNEP/OzLPro/10/9 (1998), Decision X/10.

[33] See Articles 60-64 of the Vienna Convention on the Law of Treaties.

[34] For example, Russia and the Ukraine have been subjected to trade measures.

[35] Report of the Fourth Meeting of the Parties to the Montreal Protocol, Annex V.

[36] Jacob Werksman, "Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime," W*eitschrift für Ausländisches Recht und Völkerrecht* (1996), p. 18.

[37] Article 11.2 of the Vienna Convention on the Law of Treaties.

[38] *Ibid*., Article 11.5.

5. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

(a) Compliance provisions

54. The Basel Convention provides for notification, reporting and verification. Parties have to transmit a report to the COP containing information on implementation measures and other relevant information.[39]

55. According to Article 19 of the Basel Convention, a Party that has reason to believe that another Party is acting or has acted in breach of its treaty obligations may inform the Secretariat thereof and shall simultaneously and immediately inform directly, or through the Secretariat, the Party against whom the allegations are made. The Secretariat has to submit all relevant information to the Parties. The Parties are required to employ appropriate means to cooperate in order to assist developing countries in the implementation of certain provisions.[40]

56. As there are not yet any provisions that specify what happens after such verification has been made, the Parties are working towards developing a compliance mechanism. In June 1998, the Sub-Group of Legal and Technical Experts identified some principles for a regime for monitoring implementation of and compliance with the Convention.[41] This led to the mandate of the Legal Working Group to constitute a compliance mechanism to be administered by a body to monitor implementation and compliance and that shall recommend effective ways to promote implementation and compliance. The mechanism shall be non-confrontational, transparent, cost-effective, preventative in nature, as well as flexible. Further, the conclusion was reached that the regime should be established through a decision of the Conference of the Parties rather than through an amendment of the Convention itself.[42]

(b) Dispute settlement provisions

57. Article 20 sets out the scope of dispute settlement under the Basel Convention, which apply to a dispute concerning interpretation, application, or compliance with the Basel Convention. Parties shall seek the settlement of the dispute through negotiation or any other peaceful means of their own choice. If this is not successful and if the Parties agree, the dispute is to be submitted to: (1) the ICJ; or (2) arbitration in accordance with the provisions outlined in Annex VI of the Convention. Upon ratification, or at any time thereafter, a State may declare that it recognizes as compulsory, and in relation to any Party accepting the same obligation, submission of the dispute to either the ICJ or arbitration. Failure to reach common agreement as to whether to submit the dispute to the ICJ or to arbitration does not absolve the Parties from the responsibility of continuing to seek resolution through negotiation.

58. The arbitration provisions of the Basel Convention are outlined in its Annex VI. The tribunal is to draw up its own rules of procedure and render its decision in accordance with international law and with the provisions of the Convention. It may take all appropriate measures to establish the facts of the dispute and shall render a decision within a specified time-limit. The award of the arbitral tribunal shall be accompanied by a statement of reason and be final and binding on the Parties to the dispute.

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[39] Article 13.3 of the Basel Convention.

[40] *Ibid*., Article 10.3.

[41] Report of the Consultative Sub-Group of Legal and Technical Experts on the Work of its Third Session, 24 June 1998, UNEP/CHW/LSG/3/5.

[42] *Ibid*.

6. Convention on Biological Diversity (CBD)

(a) Compliance provisions

59. The Convention on Biological Diversity does not have a formal compliance procedure; there is no formal assessment of the compliance of Parties or non-parties. Article 26 requires Parties to present to the COP reports on measures which they have taken to implement the Convention's provisions and their effectiveness in meeting its objectives. Financial assistance, including through a financial mechanism, is provided for in Articles 20, 21 and 39 of the Convention on Biological Diversity.

(b) Dispute settlement provisions

60. The dispute settlement provisions of the Convention on Biological Diversity are set out in Article 27. In the event of a dispute between contracting Parties concerning the interpretation or application of the Convention, the Parties shall seek solution by negotiation. If they are unable to reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third Party.[43] A Party can also make a written declaration to the depositary accepting a compulsory dispute resolution by arbitration, by the ICJ or both, when negotiation or mediation have failed. Either of these judicial procedures is intended to lead to a binding decision. The procedures for arbitration are set out in Part 1 of Annex II to the CBD.

61. In the event of a conflict between two Parties, the arbitral provisions provide for the standard three-member Panel, as described under the Montreal Protocol and the Basel Convention. If more Parties are involved, Parties having the same interest are to nominate a common arbitrator. If the dispute is taken to the ICJ, the Statutes of the ICJ apply to the procedures. If the dispute is not submitted to arbitration or the ICJ because either the Parties have not chosen a different procedure or have not submitted themselves to binding settlement through adequate declarations, the dispute must be submitted to conciliation. Conciliation does not lead to a binding decision, unless the Parties agree otherwise, but the proposals for resolution of the dispute must be considered in good faith. The procedures for the five-member Conciliation Commission are set out in Part 2 of Annex II to the CBD.

7. Cartagena Protocol on Biosafety

(a) Compliance provisions

62. The Cartagena Protocol foresees specific monitoring and reporting requirements for the Parties. The Parties are obliged to monitor the implementation of their treaty obligations and to report periodically to the COP on measures they have taken to implement the Protocol.[44]

63. These measures are complemented by a review that the COP has to undertake five years after the entry into force of the Protocol and at least five years thereafter, as well as an evaluation of the effectiveness of the Protocol's procedures and annexes.[45]

64. According to Article 34 of the Cartagena Protocol, the first COP has to consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Protocol and to address cases of non-compliance. The procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate. The provisions shall be separate from,

[43] Article 27.2 of the CBD.
[44] Article 33 of the Cartagena Protocol.
[45] *Ibid.*, Article 35.

and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention on Biological Diversity.

(b) Dispute settlement provisions

65. Pursuant to Article 27.5 of the Convention on Biological Diversity, the dispute settlement provisions of the CBD apply with respect to any Protocol developed under its auspices. Consequently, Article 32 of the Cartagena Protocol states that the provisions of the Convention on Biological Diversity relating to its Protocols shall apply to this Protocol.

8. United Nations Framework Convention on Climate Change (UNFCCC)

(a) Compliance provisions

66. The UNFCCC requires all Parties, taking into account their common but differentiated responsibilities and their specific development priorities, objectives and circumstances, to develop national inventories of greenhouse gases (developed countries are to report these annually) and implement measures to mitigate climate change and facilitate adaptation (Article 4.1), and to communicate to the COP a general description of steps they have undertaken or envisaged to implement the Convention (Article 12.1).

67. In addition, developed countries are to adopt policies and measures that would modify their longer-term trends in emissions of greenhouse gases (Article 4.2.a) and provide a detailed description to the COP (Art 12.2), along with details of assistance provided to developing countries (Article 12.3). Developed countries have the additional commitment to provide financial resources (Article 4.3), assist in meeting costs of adaptation to adverse effects of climate change (Article 4.4) and for technology transfer (Article 4.5). The extent to which developing country Parties effectively implement their commitments under the Convention will also depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology (Article 4.7).

68. A Subsidiary Body for Implementation (SBI) established under Article 10 of the Convention considers the reports received in order to assist the COP, which has to assess the overall effects of the measures taken by Parties pursuant to the Convention.[46] In addition, an in-depth review process has been established to provide a thorough technical assessment of the implementation of the Convention, and to ensure that the COP receives accurate and relevant information from developed countries.[47] The review is subject to the consent of the Party concerned and is conducted by multilateral teams. According to Article 11 of the UNFCCC, the GEF is the financial mechanism of the Convention for providing assistance.

69. Pursuant to Article 13 of the UNFCCC, the Fourth Conference of the Parties considered the adoption of a Multilateral Consultative Process (MCP) for the resolution of questions regarding implementation of the UNFCCC. The proposed MCP is to be facilitative, non-judicial, transparent, cooperative and timely in manner. The MCP includes the establishment of a Standing Multilateral Consultative Committee to provide assistance to Parties to overcome difficulties with implementation of the Convention and prevent disputes from arising.

(b) Dispute settlement provisions

70. The UNFCCC contains standard international dispute settlement provisions. It provides for the settlement of disputes in Article 14 and embodies procedures similar to the

[46] *Ibid.*, Articles 10.2 and 7.2.
[47] UNFCCC/CP/1995/7/Add.1.

Montreal Protocol/Vienna Convention. In the case of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice. As is the case under the Montreal Protocol and the Basel Convention, Parties may make a written submission at any time as to whether they recognize as compulsory the submission of the dispute to the ICJ, and/or arbitration in accordance with procedures to be adopted by the COP as soon as practicable in an annex on arbitration. If Parties are not able to settle their dispute through the above means, the dispute is to be submitted, at the request of any of the Parties concerned to conciliation.

71. As is the case in the Montreal Protocol and the Basel Convention, a Conciliation Commission is to be created at the request of one of the Parties to the dispute, composed of an equal number of Members appointed by each Party concerned, who in turn jointly choose a Chair. The Commission is to render a recommendatory award, which the Parties shall consider in good faith. Additional procedures relating to conciliation shall be adopted by the COP.

9. Kyoto Protocol

(a) Compliance provision

72. The Kyoto Protocol introduces quantified emission limitation or reduction commitments for developed countries; there are no new commitments for developing countries.

73. The Protocol provides for a comprehensive reporting mechanism. Each Party listed in Annex 1 will report annually the greenhouse gas inventory and any necessary supplementary information for the purpose of ensuring compliance with Article 3 (quantified emission limitation and reduction commitments).[48]

74. Further, the Kyoto Protocol calls for the establishment of expert review teams that are coordinated by the Secretariat and which are composed of experts selected from those nominated by Parties and, as appropriate, by intergovernmental organizations, in accordance with guidance provided for this purpose by the COP.[49] The teams provide for a thorough and comprehensive technical assessment of all aspects of the implementation of the Protocol and thus assess implementation processes of the commitment of the Parties and identify potential problems.

75. The COP also has to approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the Kyoto Protocol, including through the development of an indicative list of consequences, taking into account the cause, degree and frequency of non-compliance. Any such procedures and mechanisms entailing binding consequences are to be adopted by means of an amendment to the Protocol.[50] The text under negotiation provides for a Compliance Committee, with a facilitative and an enforcement branch, as well as binding consequences for the quantified targets. The enforcement branch is to cover only developed countries and be a quasi-judicial body, imposing binding consequences based on legally binding rules, provided binding consequences are agreed by the Parties.

(b) Dispute settlement provisions

76. The dispute settlement provisions set out in the UNFCCC also apply to the Kyoto Protocol and any other related legal instrument.[51]

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[48] Article 7.1 of the Kyoto Protocol.
[49] *Ibid.*, Article 8.
[50] *Ibid.*, Article 18.
[51] Article 14.8 of the UNFCCC.

10. The Agreement for the Implementation of the Provisions of the UN 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 (the UN Fish Stocks Agreement)

(a) Compliance provisions

77. In view of the importance of the role of the flag State in high seas fisheries conservation and management, the UN Fish Stocks Agreement requires all States to control the activities of their fishing vessels on the high seas by means of authorizations, permits and licences, record of authorized fishing vessels and to ensure transparency of the information contained in such record. The Agreement requires States also to provide for the recording and timely reporting of the position and activities of their fishing vessels, including verification of catches, the marking of such vessels and their gear in accordance with FAO specifications, and the adoption of a national monitoring, control and surveillance scheme (MCS) in order to ensure compliance with subregional, regional or global conservation and management measures.[52]

78. Parts V and VI of the Agreement include provisions that deal with compliance and enforcement of conservation and management measures for straddling fish stocks and highly migratory fish stocks by all States Parties, including flag States, non-flag States and port States Parties. Articles 18 to 23 set out the duties the flag State and the measures expected from port States to ensure compliance with and enforcement of subregional and regional fisheries conservation and management measures. They also provide for a cooperative enforcement scheme at the subregional or regional level to ensure compliance with such conservation and management measures. The scheme may involve non-flag State enforcement.

79. According to Article 18 a flag State whose vessels fish on the high seas is under obligation to ensure that its vessels comply with subregional and regional conservation and management measures and to authorize the use of these vessels for fishing on the high seas only where it can exercise effectively its responsibilities over these vessels.[53]

80. Article 19 points out that a flag State is under an obligation to enforce subregional and regional conservation and management measures wherever violations occur and investigate and report the State alleging the violation and to the relevant RFMO or arrangement any alleged violation thereto. The Agreement stresses that sanctions for such violations shall be adequate in severity to ensure compliance and to deprive the offenders of the benefits accruing from their illegal activities.

81. Article 21 sets out the mechanisms for a subregional and regional cooperative scheme for the purposes of carrying out enforcement of subregional or regional conservation and management measures, which by its innovative approach to high seas fisheries enforcement, constitutes one of the most important features of the Agreement.

82. According to the scheme, a State Party which is a member of a RFMO or arrangement may board and inspect in the high seas regulated area fishing vessels flying the flag of another State Party to the UN Fish Stocks Agreement, to ensure compliance with conservation and management measures for the two fish stocks established by such organization or arrangement, whether or not such State Party is also a member of the organization or arrangement concerned.[54] However, the Agreement

[52] Article 18 of the UN Fish Stocks Agreement.
[53] *Ibid*., Article 18, para.2.
[54] *Ibid*., Article 21, para.1.

points out that the decision of a State to fulfil its flag State's responsibilities supersedes any action taken by an inspecting State against a vessel alleged to have committed a violation. [55]

83. Article 23 provides for enforcement of subregional, regional and global conservation and management measures by a port State, whenever fishing vessels are voluntarily in its ports or offshore terminals. Such measures may include inspection of documents, fishing gear and catch on board fishing vessels, and prohibition of landings and transhipments.

84. In addition, the Agreement provides that States, which are members of RFMOs or arrangements, are required to exchange information with respect to the fishing activities of non-member States for the relevant stocks, and to take measures consistent international law to deter such activities.[56] Article 33 of the Agreement further requires States Parties to take measures consistent with international law to deter the activities of vessels flying the flag of non-parties, which undermine the effective implementation of the Agreement.

(b) Dispute settlement provisions

85. Part VIII of the Agreement contains provisions for the peaceful settlement of disputes arising out of the implementation of the UN Fish Stocks Agreement. Article 27 provides that all disputes shall be settled by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means chosen by the parties to such disputes. Article 28 mandates States to cooperate in order to prevent disputes. To this end, Parties are required to agree on efficient and expeditious decision-making procedures within RFMOs and arrangements and strengthen existing ones as necessary. Article 29 provides that disputes of a technical nature may be referred to an *ad hoc* expert panel established by the States concerned, without resorting to binding procedures for the settlement of disputes.

86. Article 30 stipulates that the procedures for the settlement of dispute set out in Part XV of UNCLOS applies *mutatis mutandis* to any dispute between State Parties to the UN Fish Stocks Agreement concerning the interpretation or application of the Agreement, whether or not they are also Parties to UNCLOS. Accordingly, States, which are not Parties to UNCLOS are entitled to choose one or more means for the settlement of disputes provided in article 287 of UNCLOS for the settlement of their disputes arising out of the interpretation or application of the Agreement.

87. Article 31 provides that pending the settlement of a dispute, the parties to the dispute shall make every effort to enter into provisional arrangements of a practical nature. In addition, the court or tribunal to which the dispute has been submitted may prescribe provisional measures in order to preserve the respective rights of the parties concerned or prevent damage to the stocks in question. However, the Agreement points out that a State Party to the Agreement, which is not a Party to UNCLOS is allowed to make a declaration indicating that the International Tribunal on the Law of the Sea (ITLOS) shall not be entitled to prescribe, modify or revoke provisional measures without its agreement.

88. Part XV of UNCLOS requires that States Parties to the Convention settle any dispute between them concerning the interpretation or application of the Convention by all peaceful means referred to in the Charter of the United Nations. Where no settlement has been reached by recourse to procedures entailing non-binding decisions under Part XV, Section 1, the dispute shall be submitted at the request of any party to the compulsory procedures entailing binding decisions provided for in section 2 of Part XV. Article 287 of the Convention lists the following courts or tribunals as means for the settlement of disputes under Section 2: (a) The International Tribunal for the Law of the Sea (ITLOS) (established in accordance with Annex VI of the Convention) including the Seabed Disputes

[55] *Ibid.*, Article 21, paras.12, 16 and 18.
[56] *Ibid.*, Article 17.

Chamber; (b) the ICJ; (c) an arbitral tribunal constituted in accordance with Annex VII of the Convention; and (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

89. The jurisdiction of ITLOS comprises all disputes and all applications submitted to it in accordance with UNCLOS and all matters specifically provided for in any other agreement, which confers jurisdiction on the Tribunal. The Tribunal has special jurisdiction in matters calling for provisional measures (Article 290) and in question of prompt release of vessels and crews (Article 292). However, Part XV, Section 3 on limitations and exceptions to applicability of Section 2 stipulates in Article 297, para.3 that disputes relating to the sovereign rights of the coastal State relating to the living resources in the exclusive economic zone (EEZ) or the exercise of such rights in that zone, are excluded from the compulsory procedures entailing binding decisions provided for in Part XV, Section 2.

90. Where no settlement has been reached by recourse to Part XV, Section 1, such disputes shall be submitted to the compulsory submission to conciliation procedure established under Annex V, Section 2 of UNCLOS. Under such a procedure, only the submission to the proceedings is compulsory, whereas the report of the commission of conciliation, including its conclusions or recommendations, remains non-binding upon the parties to the dispute.

11. Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

(a) Compliance provisions

91. The Rotterdam Convention requires Parties take the following actions in order to ensure compliance: nominate designated national authorities;[57] take measures necessary to establish and strengthen national infrastructure and institution, which may include adoption or amendment of respective national legislative measures; ensure access to information on chemical handling by the public; cooperate in the implementation of the Convention, if necessary through international organizations;[58] and cooperate in providing technical assistance.[59]

92. Article 17 of the Rotterdam Convention sets out that the COP shall develop and approve procedures and institutional mechanism for determining non-compliance with the provisions of the Convention and for treatment of Parties found to be in non-compliance. The COP shall keep under continuous review and evaluation the implementation of the Convention and adopt specified measures to this end.[60]

(b) Dispute settlement provisions

93. Article 20 provides that Parties shall settle disputes through negotiation or by other peaceful means. Upon ratification (or accession) to the Convention, a Party may declare in writing that it recognizes arbitration according to procedures to be adopted by the Conference of the Parties in an annex or the submission of the dispute to the ICJ or both, as compulsory in relation to any Party accepting the same obligation. If the Parties to a dispute have not accepted the same or any procedure and if they have not been able to settle their dispute within a set period of time, the dispute shall be submitted by request of any Party to a Conciliation Commission. The Conciliation Commission shall render a report with recommendations. Additional Conciliation Commission procedures are to be adopted in an annex no later than at the second COP.

[57] Article 4 of the Rotterdam Convention.
[58] *Ibid.*, Article 15.
[59] *Ibid.*, Article 16.
[60] *Ibid.*, Article 18

12. Stockholm Convention on Persistent Organic Pollutants (POPs)

(a) Compliance provisions

94. According to the Stockholm Convention, Parties shall develop and implement, in cooperation with international organizations and their national stakeholders, implementation plans;[61] ensure exchange of information relevant to the Convention;[62] and promote public information, awareness and education.[63] Parties shall establish arrangements and promote technical assistance;[64] provide financial resources for the implementation of the convention and develop mechanisms and arrangements for financial assistance to developing countries and countries with economies in transition.[65] Parties shall report to the COP on the measures taken to implement the Convention.[66] The COP shall evaluate periodically the effectiveness of the Convention.[67]

95. In addition, Article 17 asks the Conference of the Parties to develop a mechanism for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance. The COP shall keep under continuous review and evaluation the implementation of the Convention and adopt specified measures to this end.[68]

(b) Dispute settlement provisions

96. Article 18 provides that Parties shall settle disputes through negotiation or by other peaceful means. Upon ratification (or accession) to the Convention, a Party may declare in writing that it recognizes arbitration according to procedures to be adopted by the Conference of the Parties in an annex or the submission of the dispute to the ICJ or both, as compulsory in relation to any Party accepting the same obligation. If the Parties to a dispute have not accepted the same or any procedure and if they have not been able to settle their dispute within a set period of time, the dispute shall be submitted by request of any Party to a Conciliation Commission. The Conciliation Commission shall render a report with recommendations. Additional Conciliation Commission procedures are to be adopted in an annex no later than at the second COP.

III. COMPLIANCE AND DISPUTE SETTLEMENT PROVISIONS IN THE WTO

A. GENERAL COMMENTS

97. The role of the World Trade Organization (WTO) is to facilitate the implementation, administration and operation of the Multilateral Trade Agreements and to provide the framework for implementation, administration and operation of the Plurilateral Trade Agreements, as well as to administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[69]

98. The Preamble of the Marrakesh Agreement establishing the WTO recognizes the different levels of economic development of Members, as well as the respective needs and concerns resulting from their distinct situations. The preamble also recognizes the further need for positive efforts designed to secure that developing countries and particularly the least-developed countries, secure a

[61] Article 7 of the Stockholm Convention on Persistent Organic Pollutants.
[62] *Ibid*., Article 9.
[63] *Ibid*., Article 10.
[64] *Ibid*., Article 12.
[65] *Ibid.*, Article 13.
[66] *Ibid.*, Article 15.
[67] *Ibid*., Article 16.
[68] *Ibid*., Article 19.
[69] Article III of the WTO Agreement.

share in the growth in international trade commensurate with the needs of their economic development.

99. To that end, the WTO Agreement contains a number of special and differential treatment provisions that are intended to facilitate their effective participation in the multilateral trading system. These provisions can be grouped under five headings, namely: (i) provisions aimed at increasing trade opportunities for developing countries; (ii) provisions requiring WTO Members to safeguard the interests of developing countries; (iii) provisions permitting developing countries to assume lesser obligations; (iv) provisions giving developing countries longer time frames to comply with their obligations; and (v) provisions calling for technical assistance to be provided to developing countries.

100. The WTO agreements include various provisions that are intended to promote the effective implementation of the rules of the multilateral trading system. In this context, the dispute settlement system of the WTO is a "central element in providing security and predictability to the multilateral trading system".[70] The DSU provides an effective and dependable set of rules to settle disputes that may arise under any element of the WTO agreements. Improving on dispute settlement in the GATT, the new WTO dispute settlement mechanism is based on a two-tier system, with tight deadlines, approval procedures and an effective system for surveillance of the implementation of panel and Appellate Body reports, as adopted in the recommendations and rulings of the Dispute Settlement Body (DSB).

101. The WTO dispute settlement system is unique in character and has to deal with a high number of cases. The original aim of dispute settlement in the context of the multilateral trading system, as set out in Articles XXII and XXIII of the GATT, was the prompt and mutually acceptable resolution of disputes. In a similar manner, the WTO Dispute Settlement Understanding sets out that a solution mutually acceptable to the parties to a dispute and consistent with the WTO agreements is clearly to be preferred.[71]

B. COMPLIANCE PROVISIONS IN THE WTO

102. The WTO agreements that are intended to facilitate compliance can be compared to some of the elements of the compliance systems in MEAs. WTO agreements contain notification requirements, provide in some instances for counter-notifications, monitoring and transparency, set up committees or similar bodies to oversee the operation of the agreement, as well as provide for review of the agreements. These mechanisms can be found in the provisions governing the three pillars of the multilateral trading system: goods, services and intellectual property.

103. The following section refers to the Report of the WTO Working Group on Notification Obligations and Procedures and provides illustrative examples of transparency-related requirements in the WTO agreements.

104. Following the GATT experience with respect to the need for transparency, notification constitutes a fundamental tool of transparency in the implementation of the WTO agreements. The importance of transparency was recognized in the Ministerial Decision on Notification Procedures that was agreed at the conclusion of the Uruguay Round. In this Decision, Members expressed their desire to improve the operation of notification procedures in the WTO Agreement thereby contributing to the transparency of Members' trade policies and to the effectiveness of surveillance arrangements established to that end, and affirmed their commitment to obligations regarding publication and notification under the WTO agreements.

[70] DSU Article 3.2.
[71] *Ibid.*, Article 3.7.

105. The Decision calls for a central registry of notifications (CRN) to be set up under the responsibility of the Secretariat. The CRN shall inform each Member annually of the regular notification obligations to which that Members is expected to respond, and draw the attention of individual Members to regular notification requirements which remain unfulfilled.

106. The Ministerial Decision on Notification Procedures also instructed the Council for Trade in Goods of the WTO to review notification obligations and procedures under the agreements in Annex 1A of the WTO Agreement[72] with the following terms of reference:

- To undertake a thorough review of all existing notification obligations of Members established under the Agreements in Annex 1A of the WTO Agreement, with a view to simplifying, standardizing and consolidating these obligations to the greatest extent practicable, as well as to improving compliance with these obligations, bearing in mind the overall objective of improving the transparency of the trade policies of Members and the effectiveness of surveillance arrangements established to this end, and also bearing in mind the possible need of some developing country Members for assistance in meeting their notification obligations;

- to make recommendations to the Council for Trade in Goods not later than two years after the entry into force of the WTO Agreement.[73]

107. The Report of the Working Group on Notification Obligations and Procedures addressed aspects of notifications and counter-notifications[74] to improve compliance with WTO obligations, while seeking to rationalize requirements and avoid duplication. The Report recognized work was needed to improve compliance rates in all agreements to ensure the efficient their efficient operation, to ensure maximum transparency and to bring all Members fully into the functioning of the WTO system. It was also recognized that the key to improved rates of compliance, at least with respect to some developing country Members, was focused technical assistance.[75] The Report established that the listing of notification obligations and the compliance therewith should be maintained on an on-going basis and circulated semi-annually to all Members.[76]

108. Another outcome of the recommendations of the Working Group on Notifications is the WTO *Technical Cooperation Handbook on Notification Requirements*, which contains all the notification obligations under Annexes 1A (goods), 1B (services) and 1C (trade-related intellectual property rights) of the WTO Agreement.[77] Members have also agreed that notifications should be circulated as unrestricted and made available on the WTO website.[78]

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[72] The mandate included the GATT 1994 and the Agreements on Agriculture, SPS, Textiles and Clothing, TBT, Trade-Related Investment Measures, Implementation of Articles VI and VII of the GATT 1994, Preshipment Inspection, Rules of Origin, Import Licensing Procedures, Subsidies and Countervailing Measures and Safeguards. Not included were the Agreements on Services, TRIPs, DSU, TPRM or the Plurilateral Trade Agreements.

[73] The Ministerial Decision on Notification Procedures was adopted on 15 April 1994.

[74] Counter– notifications permits any Member which has reason to believe that another Member has not adequately met its notification obligation to raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter—notification to the Council for Trade in Goods or the relevant WTO body.

[75] G/L/112, 7 October 1996.

[76] The latest update is provided in G/L/223/Rev.6, 5 April 2001, and includes all notifications of a regular or periodic nature received up to 31 December 2000.

[77] WT/TC/NOTIF, 1996, and also available at: www.wto.org.

[78] At its meeting on 18 July 1996, the WTO General Council adopted a Decision on Procedures for the Circulation and Derestriction of WTO documents, WT/L/160, 22 July 1996.

109. One of the key goals of the **Agreement on the Application of Sanitary and Phytosanitary Measures** (SPS Agreement) is to increase the transparency of sanitary and phytosanitary measures. Governments are required to notify any new or revised SPS measure which could significantly affect trade. Members also have to set up offices, referred to as "enquiry points", to respond to requests for information on new or existing measures. The SPS Committee is the forum where WTO Members exchange information on all aspects related to the implementation of the SPS Agreement. The SPS Committee reviews compliance with the SPS Agreement, and discusses specific trade concerns and general matters related to notification and transparency. The transparency obligations of the SPS Agreement are contained in Articles 5.8 and 7, as well as Annex B. In addition, the SPS Committee has elaborated recommended notification procedures. These provisions clarify several provisions set out in Annex B, and give guidance on how to notify (including how to fill in the notification formats), how to handle comments on notifications, and how to provide documents related to a notification. In addition, the Secretariat has prepared a detailed handbook on *How to Apply the Transparency Provision of the SPS Agreement*.

110. Similarly, as set out in Article 18 of the **Agreement on Agriculture**, the Committee on Agriculture reviews implementation of the commitments undertaken by Members in that Agreement. The basis for this work has been, *inter alia*, notifications submitted by Members. Recommended notification procedures and formats for the Agriculture and SPS Agreements have been developed and adopted in the respective Committees, thereby providing Members with information on what they are required to notify, at what frequency, and in what manner. [79] Articles 18.6 and 18.7 of the Agriculture Agreement provide that any Member can raise questions or concerns regarding the compliance (or non-compliance) of another Member. Article 12 of the SPS Agreement likewise permits Members to raise any issues relating to the implementation of the SPS Agreement in the SPS Committee. In practice, complaints and questions regarding (non-) compliance are the major focus of regular meetings of both the Agriculture and SPS Committees.[80]

111. Transparency is particularly important in the **Agreement on Technical Barriers to Trade** (TBT) with respect to technical regulations, product standards, and conformity assessment procedures in order to ensure that Members are aware the measures in place in this regard in their trading partners and to minimize the potential for trade restrictions and distortions from arising. The main transparency obligations in the TBT Agreement are that each Member is required to ensure that a national enquiry point exists in order to respond to all reasonable enquiries from other Members on technical regulations, standards and conformity assessment procedures. Members are also required to notify proposed new or changed standards or regulations. If proposed technical regulations or conformity assessment procedures are not the same as international standards, or are not based substantially on these standards, and if they may have significant effect on the trade of other WTO Members, they must be notified at the earliest possible stage prior to adoption. Other Members are then permitted the opportunity to comment and to have those comments taken into account prior to the adoption of technical regulations, standards, or conformity assessment procedures.[81] The Code of Good Practice for the Preparation, Adoption and Application of Standards, set out in Annex III of the TBT Agreement, extends the coverage of the TBT Agreement to voluntary standards set by central and local Governmental, as well as non-governmental standardizing bodies, and includes the obligation to notify acceptance of the Code by the standardizing body. The operation and implementation of the TBT Agreement are reviewed by the TBT Committee every three years. Where appropriate, the Committee may propose amendments to the Agreement.[82]

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[79] By the SPS Committee in G/SPS/7/Rev.1, adopted as revised on 11 March 1999, and by the Agriculture Committee in G/AG/2, adopted on 8 June 1995.

[80] See for example SPS/GEN/204, 27 September 2000, summarizing the specific trade concerns that were brought to the attention of the SPS Committee.

[81] Article 10 of the TBT Agreement.

[82] I*bid.*, Article 15.

112. Article 24 of the **Agreement on Subsidies and Countervailing Measures** (SCM Agreement) establishes a Committee on Subsidies and Countervailing Measures (SCM Committee) and subsidiary bodies that give Members the opportunity to consult on any matter relating to the operation of the Agreement or the furtherance of its objectives.[83] One subsidiary body is the Permanent Group of Experts, which the Committee or individual Members can consult as to the existence and nature of any subsidy, and which can also be requested to assist dispute settlement panels in certain circumstances. The SCM Committee and its subsidiary bodies can consult with and seek information from any source they consider appropriate. Whenever such information is sought from a source within the jurisdiction of a Member, it shall inform the Member involved. The SCM Agreement also sets up certain notification procedures, as well as surveillance measures.[84] The content of notifications on subsidies has to be specific enough to enable other Members to evaluate the trade effects and to understand the operation of the subsidy programmes.[85] The Agreement allows any Member at any time to request information on the nature or extent of any subsidy granted or maintained by another Member, or on the reasons why a specific measure has been considered as not subject to the notification requirement. The Agreement also allows any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in an appropriate manner, to bring the matter to the attention of such other Member. In case the alleged subsidy is not subsequently notified promptly, the Member may itself bring the alleged subsidy to the notice of the Committee.[86] In respect of countervailing measures, the Agreement requires semi-annual as well as certain case-specific reporting to the Committee. The Agreement also provides for surveillance requirements, according to which the Committee has to examine notifications and reports in special sessions.[87]

113. Article XXIV of the **General Agreement on Trade in Services** (GATS) establishes the Council for Trade in Services, which carries out functions that are designed to facilitate the operation and further the objectives of the Agreement. Transparency provisions are set out in Article III of GATS. Members have to inform the Council for Trade in Services of the introduction of any new laws, regulations or administrative guidelines or of any changes that affect trade in services in sectors where they have made scheduled commitments. This information has at least to be submitted annually. Article III mandates the establishment of enquiry points by Members to provide information requested by other Members on specific measures. Whenever a Member considers that a measure taken by another Member affects the operation of GATS, it can bring this measures to the attention of the Council for Trade in Services.

114. Other provisions in the WTO agreements reflect the intention to promote compliance in a broad sense. Part V of the **Agreement on Trade-Related Aspects of Intellectual Property Rights** (TRIPs) deals with "Dispute Prevention and Settlement" and contains provisions for transparency in Article 63, including the obligation to notify laws and regulations and final judicial decisions and administrative rules made effective by a Member pertaining to the subject-matter of that Agreement in order to assist the Council for TRIPs in its review. In addition, a Member that assumes that a judicial decision, administrative ruling or bilateral agreement affects its rights may also request to be provided with access to relevant information.[88] Article 68 concerns monitoring compliance pursuant to which the Council for TRIPs reviews how Members have implemented their obligations. Members also have to supply such information in response to a written request from another Member.

115. The WTO Agreement provides for a review of trade policies through the **Trade Policy Review Mechanism** (TPRM). The purpose of the mechanism is to "contribute to improve adherence

[83] Article 24.1 of the SCM Agreement.
[84] *Ibid*., Articles 25 and 26.
[85] *Ibid*., Article 25.3.
[86] *Ibid*., Article 25.10.
[87] *Ibid*., Article 26.
[88] Article 63.3 of the TRIPs Agreement.

by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies of the Members."[89] The work of the Trade Policy Review Body (TPRB) is based on reports of both the Members under review and the Secretariat. An integral part of the information gathering is carried out through country visits conducted by the Secretariat. All Members are subject to frequent reviews, while exceptions may be made for least-developed countries. The TPRM is not intended to serve as a basis for the enforcement of specific obligations under the WTO Agreement, nor are its outcomes subject to dispute settlement. This mechanism is also not intended to impose new policy commitments on Members. However, it does serve as an effective and transparent fact-finding mechanism. The creation of transparency for, and the promotion of adherence to, the WTO agreements is also indirectly a step to promoting compliance; in this limited sense, therefore, the TPRM might be considered as a tool to promote compliance and avoid disputes.

C. DISPUTE SETTLEMENT PROVISIONS IN THE WTO

116. The WTO Dispute Settlement Understanding (DSU) constitutes a unique set of binding dispute settlement provisions based on clearly defined rules, including timetables for settling disputes.[90] The DSU is a central element in providing security and predictability to the multilateral trading system. Its aim is to secure prompt resolution of disputes. In this context, Members are encouraged to find mutually acceptable solutions which are consistent with the covered agreements.[91] In addition, it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[92]

117. Dispute settlement procedures can only be initiated by WTO Member Governments when they consider that any benefits accruing to them directly or indirectly under the covered agreements are being impaired by measures taken by another Member.[93] Third party rights can be invoked by interested Members having a substantial interest in a matter before a panel.[94]

118. The DSU emphasizes the prompt settlement of disputes to ensure the effective functioning of the system, as well as the reliable enforcement of the outcomes. This is illustrated by tight deadlines, the quasi-automatic adoption of panel reports and the possibility of undertaking retaliatory measures if the DSB rulings and recommendations are not complied with. Uniform treaty interpretation is promoted by the appeal mechanism. In addition, it has been noted that the DSU furthers the understanding that requests to consult and use the dispute settlement system should not be considered contentious acts.[95]

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[89] Annex 3 of the WTO Agreement.

[90] Appendix 1 includes the Agreements covered by the DSU: the Agreement Establishing the WTO (the "WTO Agreement"); the Multilateral Agreements on Trade in Goods (Annex 1A), Trade in Services (Annex 1B), Trade-Related Aspects of Intellectual Property Rights (Annex 1C), the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); and the Plurilateral Agreements (the Agreements on Trade in Civil Aircraft, Government Procurement, International Dairy, and International Bovine Meet). Appendix 2 lists all the special or additional rules and procedures contained in the covered agreements, i.e. the Agreements on SPS, Textiles and Clothing, TBT, Implementation of Articles VI (Antidumping and countervailing duties) and VII (customs valuation) of GATT 1994, Subsidies and Countervailing Measures, Trade in Services, and the Decision on Certain Dispute Settlement Procedures for the GATS.

[91] DSU Article 3.7.

[92] *Ibid.*, Article 3.2.

[93] *Ibid*., Article 1.1 and the applicable agreements. This is also reflected in DSU Article 3.3.

[94] *Ibid*., Article 10.2.

[95] John Croome (1999), *Guide to the Uruguay Round Agreements*, The Hague: Kluwer Law, p. 20.

119. Article 23 of the DSU provides that any disputes arising out of the WTO agreements has to be settled in accordance with the rules and procedures contained in the DSU.[96]

120. Upon agreement, the Parties to a dispute can also resort to arbitration and abide by the arbitration award pursuant to Article 25 of the DSU. The award is also subject to surveillance of implementation and compensation, and suspension of concessions as foreseen in Articles 21 and 22 of the DSU. To date, the Parties to a dispute have yet to make use of Article 25.

121. The WTO dispute settlement process can be divided into four basic phases: consultations; the panel process; the appellate process; and implementation.

(a) Consultations

122. Article 4.2 of the DSU requires that the Parties enter into consultations prior to requesting the establishment of a panel. If a request for consultation has been made, the Member to which the request is made, has, unless otherwise mutually agreed, to reply within 10 days after the date of its receipt. The Members are further requested to enter into consultations in good faith within a period of no more than 30 days, or a period mutually agreed on so as to attempt to resolve the dispute.[97] Consultations play an important role in the process, as it helps the parties to the dispute to clarify the facts and any misunderstandings. A significant number of disputes have been resolved at the consultation phase. Good offices, conciliation or mediation may be requested at any time by any Party to a dispute.[98]

(b) The panel process

123. If consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, a dispute settlement panel is established by the Dispute Settlement Body (DSB), unless the DSB decides by consensus not to establish a panel.[99] The DSB is composed of all WTO Members and was constituted to oversee the settlement of disputes in accordance with the DSU. The DSB has the authority to establish panels, to adopt panel and Appellate Body reports, monitor implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.

124. Panels are required to settle disputes in accordance with their terms of reference as set out in Article 7 of the DSU:

> "1. To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the Parties to the dispute) the matter referred to the DSB by (name of Party) in document […] and to take such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).
>
> 2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."

125. Article 11 of the DSU requires a panel to:

> "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the

[96] DSU Article 23.2 (a).
[97] *Ibid.*, Article 4.3.
[98] *Ibid.*, Article 5.3.
[99] *Ibid.*, Article 6.1.

> relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

126. According to Article 8 of the DSU, panels generally consist of three governmental and/or non-governmental individuals, who are suggested by the WTO Secretariat and agreed to by the Parties to a dispute. The selection of panelists is made from a roster of names put forward by Members and carried out with a view to ensuring the independence of the panel members, a diverse background and a wide spectrum of experience. Members may periodically suggest names to be added to this roster upon approval by the DSB. When a dispute between a developing country Member and a developed country Member arises, the developing country Member may request that the panel include at least one panellist from a developing country Member. If the Parties cannot agree on the panellists within 20 days after the date of the establishment of a panel, any Party to the dispute may request the WTO Director-General to appoint the Member of that panel.

127. Pursuant to Article 13 of the DSU, a panel has the right to seek information and technical advice from any individual or body which it deems appropriate. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter at issue. With respect to a factual issue concerning a scientific or other technical matter raised by a Party to a dispute, a panel may request an advisory report in writing from an expert review group.[100]

128. Complainant and respondent Members are the main Parties to the disputes. Third parties can also be heard by panels and make written submissions, provided that they have a substantial interest in the matter before the panel and have notified their interest within 10 days of the establishment of the panel (Article 10).

129. As set out in Article 15 of the DSU, following written submissions and oral arguments from the Parties, the panel issues a draft report, on which the Parties comment in writing. In accordance with the proposed timetable in Appendix 3 of the DSU, Parties are invited to comment on the draft. This is followed by an interim report which includes the panel's findings and conclusions. At the request of a Party, the panel has to hold a further meeting with the Parties on the issues identified in the written comments. If no comments are received from any Party to the dispute within the comment period, the interim report is finalized and submitted to the Parties, and then circulated later to all WTO Members.

130. After circulation to WTO Members, the final report is referred to the DSB for formal adoption, which should follow within 60 days, unless a Party to the dispute formally notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report.

(c) The appellate process

131. The introduction of a standing Appellate Body was one of the innovations that emerged from the Uruguay Round with the creation of the WTO. The Appellate Body consists of seven individuals, three of whom serve on any one case. Members of the Appellate Body serve four-year terms. The Appellate Body is composed of individuals with recognized standing in the field of law and international trade, not affiliated with any government.

132. According to Article 17 of the DSU, the Appellate Body may modify, reverse or uphold the legal findings and conclusions of the Panel within a sixty-day time-period, which can be exceeded to a maximum period of ninety days. The review is limited to issues of law covered in the Panel report and legal interpretations developed by the panel.

[100] Rules for the establishment of an expert group are set forth in Appendix 4 of the DSU.

133. The DSB has to accept or reject the appeals report within 30 days unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members (Article 17.1). As with panel decisions, the "negative or reversed consensus principle" indicates that the Appellate Body reports will be considered to have been adopted quasi-automatically, unless the dispute is settled otherwise, or all Members agree not to adopt the report.

(d) Implementation

134. When a panel or the Appellate Body has concluded that a measure is inconsistent with a covered agreement, it recommends that the Member concerned bring the measure into conformity with that agreement. Additionally, the panel or Appellate Body may suggest ways in which the Members concerned could implement the recommendations.

135. Within 30 days of the adoption of the decision, as set out in Article 21, the respondent Party must inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If immediate implementation is impractical, a Member is to be afforded a reasonable period of time for implementation. If there is no agreement concerning the implementation time-period, the period is determined by binding arbitration. As a general rule, the reasonable period should not exceed 15 months from the date of the adoption of the panel report.

136. Pursuant to Article 22 of the DSU, if a Party fails to implement the report within a reasonable period of time, that Party has to enter into negotiations with the complaining country in order to determine mutually acceptable compensation. If after 20 days, no satisfactory compensation is agreed on, the complaining Party may ask the DSB for permission to suspend equivalent concessions. The DSB must grant this authorization within 30 days of the expiry of a reasonable period of time unless there is a consensus against the request. Generally, the sanctions should be imposed in the same sector as the dispute. If this is not practical or is ineffective, the sanctions can be imposed in a different sector of the same agreement. If this is still not effective or impracticable and if the circumstances are serious, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors. The DSB monitors how adopted rulings are implemented.

IV. GENERAL OBSERVATIONS

137. This paper has examined the compliance and dispute settlement systems in selected MEAs and in the WTO to provide a basis for a preliminary analysis of similarities and differences. Importantly, as noted by the WTO Committee on Trade and Environment, the WTO Agreements and MEAs are representative of efforts of the international community to pursue shared goals in these respective areas, and in the development of a mutually supportive relationship between them due respect must be afforded to both.[101] While similarities exist, due consideration must also be given to the differing issues addressed in MEAs and in the WTO.

138. As a general comment, the two regimes emphasize different approaches to securing compliance with their respective agreements. The WTO Dispute Settlement Understanding is a central element in providing security and predictability to the multilateral trading system, with the main purpose of settling disputes in a timely and predictable manner. A breach of the WTO agreements may give rise to a formal dispute, the resolution of which could entail the suspension of equivalent trade concessions or the provision of compensation to the complaining party by the respondent party. In the context of most MEAs, failure by a State to comply with its treaty obligations will often harm the environment, as well as the interests of other States. As failure to comply is often due to a lack of capacity, and the nature and extent of harm to other States may be

[101] Report (1996) of the CTE to the WTO Singapore Ministerial Conference, WT/CTE/1, 12 November 1996, para. 171.

difficult to evaluate with precision, the emphasis of MEAs is on assisting Parties to remain in compliance, rather than on resolving conflicts once they arise.

139. As set out in detail in this paper, when comparing the compliance provisions of the MEAs discussed above with those of the WTO, it may be noted that each includes institutional arrangements for reporting and notification. Similarly, the WTO and many MEAs include formal mechanisms at the multilateral level to review efforts by Members and Parties to implement their obligations. Both the WTO and MEAs recognize the need for efforts designed to ensure that developing countries, particularly the least-developed, participate fully in the respective regimes. The WTO Agreement contains special and differential treatment provisions for developing countries, including longer time-frames for complying with their obligations. Similarly, MEAs provide obligations of common but differentiated responsibility, such as grace periods, differentiated reporting requirements, and other forms of flexibility for developing countries. In addition, in comparison with the WTO, MEAs place emphasis on mechanisms to enable compliance such as providing financial assistance and transferring technology.

140. When comparing the dispute settlement provisions of the WTO with those in the MEAs, it is apparent that the WTO system, while encouraging Members to resolve their disputes through consultations, focuses more on a legalistic approach to resolving conflicts. MEAs, on the other hand, have concentrated on developing measures to promote compliance with MEA obligations. The WTO relies on strict timetables and binding judicial settlement, while MEAs generally rely on a process of facilitation, not adjudication; judicial dispute settlement is not mandatory, and is possible only with the consent of the Parties. In the WTO, dispute settlement provisions are exclusive, requiring Members to settle any disputes arising out of the WTO agreements in accordance with the rules and procedures contained in the DSU;[102] MEAs do not have a similar rule. Distinct from the DSU, the dispute settlement provisions of MEAs do not contain timetables and specific schedules.[103]

141. The latest discussions in the context of MEAs have emphasized a strengthening of compliance with international environmental law. Developing more elaborated compliance systems is considered important to fully implement international legal instruments. This would be one way to enhance the effective implementation of MEAs, and to prevent MEA-related disputes from arising in the WTO dispute settlement system. Another way that has been suggested to reduce potential tension between the two regimes, and enhance implementation of WTO Agreements by less well resourced developing countries, would be to put less focus on judicial settlement of disputes, and more on mediation and conciliation combined with technical assistance and capacity building for implementation.[104] A considered combination of these options could help realize synergies and constitute an important source of enhanced mutual supportiveness between the trade and the environmental systems.

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[102] DSU Article 23.

[103] Timetables can only be found in some rules guiding the Conciliation Commission; see for example, the Rotterdam Convention.

[104] *Enforcement and Compliance of MEAs*, speech by Minister Siri Bjerke, Norway at the 21st Session of the UNEP Governing Council, 9 February 2001, Nairobi, Kenya, available at: http://odin.dep.no/md/engelsk/aktuelt/taler/022021-990051/index-dok000-b-f-a.html.