

Towards a better review mechanism under the post-2020 Biodiversity framework: legal options and possible institutional arrangements

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A considerable gap remains between the international goals to preserve biodiversity and their implementation. This can be explained by the fact that States are neither constrained by potential sanctions nor encouraged by procedures or mechanisms of transparency and accountability. In the international biodiversity governance framework, the monitoring and evaluation of implementation, as well as the procedures related to the respect of commitments, are so far very limited. On the road to the 15th Conference of the Parties to the Convention on Biological Diversity (CBD COP15), the development of a new transparency mechanism is a crucial issue to give credibility to and strengthen biodiversity policies, and an element that will be essential for the implementation of the "post-2020 global biodiversity framework" to be stronger than what has been observed for its predecessors so far.

This *Study* explores different legal and institutional options which could contribute to a reinforced transparency mechanism. By considering the context and weaknesses of existing mechanisms at the CBD, but also by drawing lessons from procedures established under other conventions, this report highlights a combination of realistic and flexible options, aimed at facilitating and strengthening the implementation perspectives.

KEY MESSAGES

The difficulties of implementing the CBD have long been known, even if several advances have been made in recent decades. While the functioning of the current arrangements remains fragile, they can form the basis of a strengthened transparency mechanism. This will however require establishing several types of innovation from COP15 onwards.

Five types of key improvements are needed: (i) Strengthening National Biodiversity Strategies and Action Plans (NBSAPs) as the main tool for implementing the CBD at the national level; (ii) Strengthening reporting mechanisms; (iii) Improving the individual review-verification; (iv) Setting up a global periodic review; (v) Establishing a compliance mechanism.

For some of these innovations, which were not initially present in the 1992 CBD text, the jurisprudence of international law allows to consider that a COP decision would be sufficient to consider them as new obligations for the Parties.

Without giving a legally binding value to NBSAPs in international law, a COP decision could Parties to adopt legislative or regulatory texts, with the effect of making the objectives and targets legally binding to all stakeholders, including and primarily to the State.

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INTRODUCTION

On the road to the 15th Conference of the Parties to the Convention on Biological Diversity (CBD COP15), the development of a new transparency mechanism is a crucial issue in order to give credibility to and strengthen biodiversity policies. This is one of the key elements, and a major innovation, expected for COP15. Indeed, a considerable gap remains between the international biodiversity conservation goals taken in recent decades and their implementation. This can be explained by the fact that States are neither constrained by potential sanctions nor encouraged by procedures or mechanisms of transparency and accountability: the monitoring and evaluation of implementation, as well as the procedures related to the respect of commitments are so far very limited. The post-2020 global biodiversity framework, which will succeed the 2011-2020 strategic plan, will necessarily have to take these failures into account.

Such a mechanism of enhanced transparency must be seen as a fundamental element in inventing a new "geopolitics of effort" for biodiversity, which will concern both States and other actors in society. Multilateralism, including in environmental matters, has been marked for some time by a strong trend: in a multipolar world, where the authority of hegemonic blocs is increasingly challenged, and where States are more and more reluctant to accept the legitimacy of international objectives as soon as they are perceived as being imposed and overly binding, there is a growing need to return to the basics of multilateralism and to understand that international instruments must above all help to strengthen cooperation in order to make better collective progress towards common goals. If what can be perceived as interference in goal-setting is increasingly difficult to tolerate, then the need to strengthen the monitoring of efforts to implement collective decisions becomes all the more necessary. The Paris Climate Agreement, in this sense, can be seen as a reflection of its time: a combination of top-down logic (an agreement on broad outcome targets that commit all its signatories), bottom-up logic (freedom for everyone to determine how they wish to contribute to the efforts) and provisions for organising a regular political cycle aimed at collectively assessing the sum of the efforts required and achieved. And, notably through peer pressure effects, but also thanks to pressure from civil society, encouraging a reassessment of individual efforts of States.

More or less relevant parallels between the Paris Agreement and what could be expected from COP15 have often

been drawn in recent years. But it is not because of a desire to emulate COP21 that matters of transparency and implementation are at the heart of discussions on the road to COP15. It is because the governance of biodiversity must too be renewed, and because we must rethink its effectiveness in the contemporary context. And it is, above all, because the monitoring of the implementation of the commitments made at the CBD, and the necessary political discussions surrounding it, have been sorely lacking in recent decades.

This is what is at stake in the transparency mechanism currently being developed. The draft post-2020 global biodiversity framework refers to "transparency and responsibility". Responsibility has been preferred to accountability, and it is interesting to explore three possible meanings of responsibility that can help us understand the issues involved.

First, responsibility can be understood as a *collective responsibility*: biodiversity governance needs better, more regular collective monitoring to be more credible. It is no longer possible to meet every ten years and, again, acknowledge failure in delivering the required results. Secondly, responsibility can then be understood as *individual responsibility*: until now, there have been very few consequences, even in terms of reputational risk, for making or not making the efforts that one has committed to undertake at the national level. If it is a question of doing one's part to achieve global goals, then a more regular review of actions taken (or not taken) at the national level, and the lessons to be learned from them, should allow for increased peer pressure and pressure from civil society to do better. And this is where, thirdly, it is fundamental to understand responsibility as a *mutual responsibility*, a principle of solidarity. The profound societal changes needed to curb the loss of biodiversity will in any case require the promotion of cooperation: collective learning through the sharing of experiences, better identification of needs in terms of capacities and means, or the creation of strengthened coalitions around certain subjects. It is this geopolitics of efforts for biodiversity, in all its mechanisms of emulation, competition, and cooperation, that we must lay the new foundations for at COP15.

This *Study* explores different legal and institutional options which could contribute to a reinforced transparency mechanism. By considering the context and weaknesses of existing mechanisms at the CBD, but also by drawing lessons from procedures established under other conventions, this report highlights a combination of realistic and flexible options, aimed at facilitating and strengthening the realization of implementation.

1. THE CURRENT CBD TRANSPARENCY MECHANISM

1.1. The provisions of the 1992 text

The text of the CBD does not for a detailed procedure for monitoring implementation and sanctioning non-compliance. The international monitoring of the implementation of Parties' obligations is thus a non-intrusive and non-binding form of political scrutiny. It relies heavily on the reporting system and is based on the COP.

Indeed, Article 26 of the Convention provides that "Each Contracting Party shall, at intervals to be determined by the Conference of the Parties, present to the Conference of the Parties, reports on measures which it has taken for the implementation of the provisions of this Convention and their effectiveness in meeting the objectives of this Convention".

This provision should be read in conjunction with Article 23(4) of the Convention, which provides for the COP to review the implementation of the Convention and, to this end, "Establish the form and the intervals for transmitting the information to be submitted in accordance with Article 26 and consider such information as well as reports submitted by any subsidiary body" (a).

It should also be read in conjunction with Article 25(2)(b) which states that the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) should "Prepare scientific and technical assessments of the effects of types of measures taken in accordance with the provisions" of the CBD. Indeed, this is the legal basis for the preparation of a summary report on national reports under Article 26. From this perspective, SBSTTA prepares COP decisions on the form and frequency of reporting required under Article 26. The Secretariat prepares a summary report of the national reports, which is then presented to the SBSTTA for discussion.

1.2. An obligation that was subsequently specified by the COP

The COP has gradually clarified the content of the reporting obligation provided by Article 26 by determining the reporting periodicity (every four years), and also by slowly establishing guidelines and a format to be followed.¹ In addition to the general report, there are a number of thematic reports, such as reports on protected areas², forest³ and mountain⁴ ecosystems, and on invasive species⁵, that were presented to the COP for consideration.

In 2006, the COP recognized the need "to align the national reporting process with the framework for evaluating implementation of the Convention and progress towards the 2010 target".⁶ In 2010, it decided to review the progress made in implementing the Strategic Plan and achieving the Aichi Biodiversity Targets.⁷ The Strategic Plan anticipates that subsidiary bodies will support the COP in carrying out this task.⁸ The COP therefore decided that the fifth national reports should "focus on the implementation of the Strategic Plan for Biodiversity 2011-2020, and

¹ See in particular the Annex to Decision II/17 (1995), Form and frequency of national reports to be submitted by Parties (Proposed guidelines for the preparation of national reports on the implementation of Article 6(1) of the Convention). See also Decision IV/14 (1998), National Reports by Parties; Decision V/19 (2000) National reporting; Decision VI/25 (2002), National reporting; Decision VII/25 (2004), National reporting; Decision X/10 (2010), National reporting: review of experience and proposals for the fifth national report; Decision XIII/27 (2013), National reporting; Decision XIV/27 (2018) Process for aligning national reporting, assessment and review.

² Decision VI/25 (2002), National reporting (abovementioned).

³ Decision IV/7 (1998), Forest biological diversity.

⁴ Decision VI/25 (2002), National reporting (abovementioned).

⁵ Decision IV/1 (1998), Report and recommendations of the third meeting of the Subsidiary Body on Scientific, Technical and Technological Advice, and instructions by the Conference of the Parties to the Subsidiary Body on Scientific, Technical and Technological Advice.

⁶ Decision VIII/14 (2006), National reporting and the next Global Biodiversity Outlook.

⁷ Decision X/2 (2010) abovementioned on the Strategic Plan 2011-2020.

⁸ See the updated multi-year programme of work of the Conference of the Parties up to 2020 (decision XII/3, annex).

progress toward the Aichi Biodiversity Targets (...)" and "include, as appropriate, information concerning contributions of the implementation of the Strategic Plan towards the achievement of relevant Millennium Development Goals".⁹

The last reports (sixth) were due by December 31, 2018 and had to follow quite specific guidelines,¹⁰ supplemented by a reference manual developed to guide and assist the Parties.¹¹ According to these guidelines, "The sixth national reports should provide a final review of progress in the implementation of the Strategic Plan for Biodiversity 2011-2020 and towards the Aichi Biodiversity Targets, including relevant national targets, based on information concerning the implementation of national biodiversity strategies and action plans and other actions taken to implement the Convention".¹² Indeed, the proposed framework makes it theoretically possible to determine the extent to which the Parties have or have not transcribed the Aichi Targets into their national legislation, and the way in which they implement them.

The Sixth National Report is expected to consist of seven parts, one of which describing national contributions towards the achievement of each Aichi Target.

1.3. A fragile implementation

The reporting system as a monitoring tool remains imperfect in principle since the monitor and the monitored are confounded. Moreover, States do not fulfil this obligation in practice, either due to the failure to submit reports, or to late submission, or by submitting inaccurate reports that are not particularly useful. This is a widespread phenomenon that affects all international environmental conventions. The CBD COP has regularly expressed concerns about delays in the fulfilment of reporting obligations by some Parties, noting the "difficulty this delay may pose for the assessment of the implementation of the Convention in the absence of an adequate number of reports".¹³ It asked for the Global Environment Facility to assist countries experiencing difficulties in this regard and for the Secretariat to facilitate capacity building, including through the organization of workshops. As illustrated by **Figure 1**, these delays have affected all generations of reports, with important delays, even if improvements can be observed. However, the Secretariat identified, on September 20, 2020, 21 months after the deadline, that only 16 Parties had not submitted their sixth national report.¹⁴

⁹ Decision X/10 (2010), National reporting: review of experience and proposals for the fifth national report.

¹⁰ See Decision XIII/27 (2013), National reporting.

¹¹ <https://www.cbd.int/nr6/resourcemanual>. See in particular section V of the handbook on the use of other relevant reporting processes and section VI on methods to assess progress (indicators, expert opinions, stakeholder consultation).

¹² See Decision XIII/27 (2013), National reporting.

¹³ See for example Decision VII/25 (2004), National reporting.

¹⁴ CBD, *National reporting under the Convention*, CBD/SBI/3/11/Add.1, 4 November 2020

The transmission of information regarding NBSAPs is also very insufficient, as shown in **Figure 2**. A minority (barely a third) of NBSAPs revised to reflect the 2011-2020 Strategic Plan and the Aichi Targets have been submitted in the deadlines (December 2015).

To support the efforts of States, the COP asked the Secretariat to synchronize reporting cycles and to adopt a common approach in terms of the format for reporting under the Convention and its two Protocols of Cartagena and Nagoya.¹⁵ In 2018, it thus decided that harmonization would be achieved from 2023 onwards.¹⁶

In addition, for several years now, under the aegis of the United Nations Environment Programme (UNEP), within the framework of the biodiversity cluster, discussions have been underway on the harmonization of reporting requirements in the various global conventions on biodiversity (international trade, biological diversity, wetlands, migratory species, world heritage, etc.).¹⁷ Proposals for standardization and harmonization have so far failed and are clearly facing resistance from Secretariats. The COP of the CBD has been calling for these processes to be introduced for more than a decade¹⁸ and is in favour of exploring options to increase synergies between conventions.¹⁹ It should also be noted that the InforMEA site, which goes beyond biodiversity, uses it as a laboratory for experimentation in other areas.²⁰

1.4. Reports evaluation

Since 2000, the COP has asked the Executive Secretary to prepare a review of the reports by drawing "appropriate conclusions from the analysis of the second national reports and of the experiences of Parties in preparing national reports that can serve to facilitate the implementation of the Convention by Parties".²¹ This review is then used as a basis for the Global Biodiversity Outlook. This is a first step in the evaluation of the national reports, but the review analyses the efforts collectively, and not individually. Examples are taken from the national reports, but any lack of progress by a particular Party is not discussed.²²

¹⁵ Decision XIII/27 (2013), National reporting.

¹⁶ Decision XIV/27 (2018) Process for aligning national reporting, assessment and review.

¹⁷ See *Report of the UNEP-WCMC Workshop Towards the Harmonization of National Reporting to Biodiversity-Related Treaties*, UNEP/CBD/WG-RI/1/INF/6, 2005.

¹⁸ Decision VIII/14 (2006), National reporting and the next Global Biodiversity Outlook.

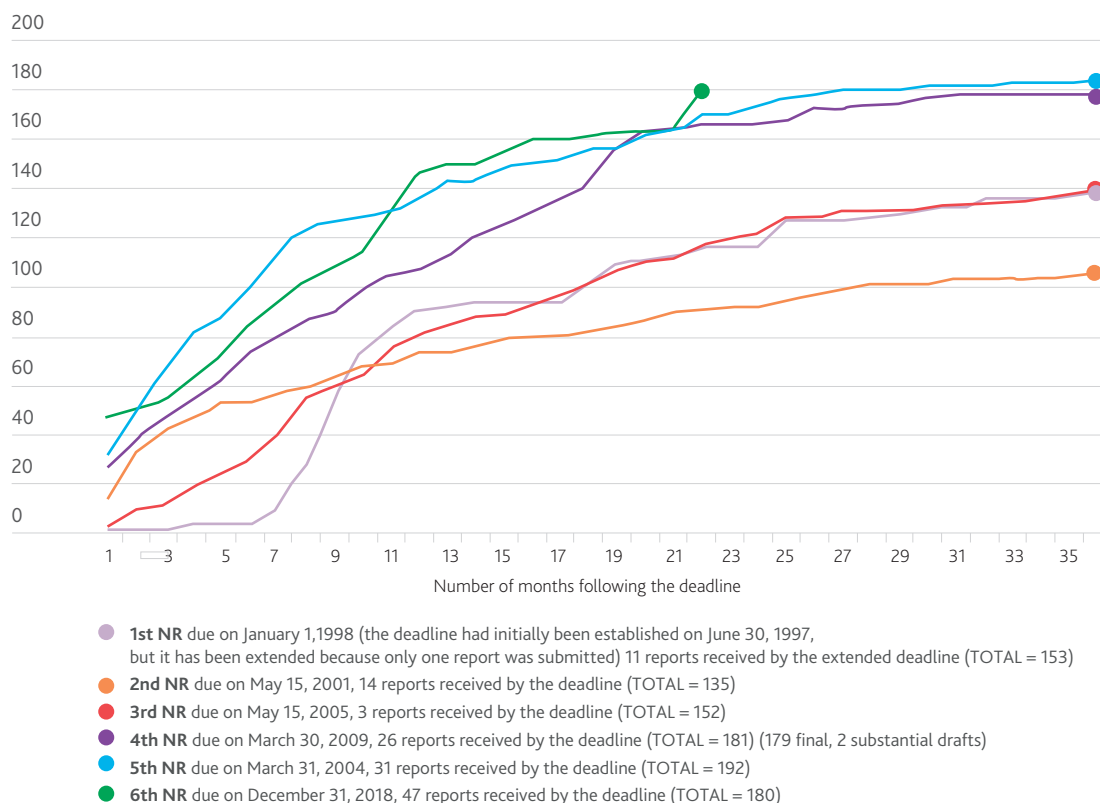
¹⁹ Decision XIII/27 (2013), National reporting; Decision 14/27 (2018), Process for aligning national reporting, assessment and review.

²⁰ See also the InforMEA Portal, The United Nations Information Portal on Multilateral Environmental Agreements, <https://www.informea.org/fr>. See Enhancing Access to Communications from Parties to Biodiversity Related MEAs (DART/TCT/Reports). A proposal by the MEA knowledge Management Initiative (InforMEA Phase II).

²¹ Decision V/19 (2000) National reporting; Decision VI/25 (2002), National reporting.

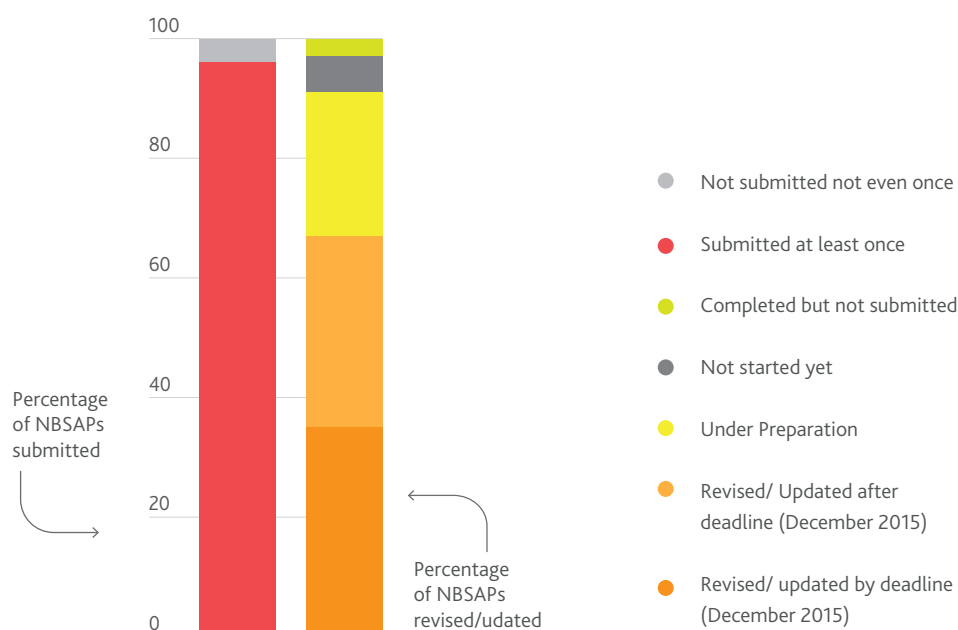
²² *Updated analysis of information in the Fourth National Reports*, Note by the Executive Secretary, UNEP/CBD/COP/10/INF/2 22 September 2010.

FIGURE 1. Submission timelines and rates for the six generations of CBD National Reports.



Sources: Extract from *CBD, National reporting under the Convention*, CBD/SBI/3/11/Add.1, November 4, 2020.

FIGURE 2. Percentage of submitted NBSAPs reflecting the 2011-2020 Strategic Plan, on 24 November 2016, almost six years after COP10.



Source : Ana María Ulloa, Kurt Jax, Sylvia I. Karlsson-Vinkhuyzen, "Enhancing implementation of the Convention on Biological Diversity: A novel peer-review mechanism aims to promote accountability and mutual learning", *Biological Conservation*, 217 (2018) p. 372.

Similarly, while the Secretariat produces and updates a table presenting the implementation of the Aichi Targets by States, objective by objective, State by State, it takes multiple precautions to explain that "the information presented in this document cannot be used to compare progress among countries. It is only suitable for generating a global picture of progress towards the Aichi Biodiversity Targets."²³ In fact, the report identifies the main implementation trends, but does not take stock of the difficulties encountered by individual Parties or of their needs in this area, and nor does it allow Parties to provide justification for their actions.

However, the COP has encouraged important developments. It established a Subsidiary Body for Implementation (SBI) in 2014,²⁴ replacing the Ad Hoc Open-ended Working Group on the Review of Implementation of the Convention (WGRI), which was established in 2004²⁵ to support the COP in implementation monitoring. However, the mandate of the SBI has evolved from that of the WGRI, and a peer-reviewed "review of progress in implementation" emerged under this new body, which was invited in 2016, by a COP decision to "establish an open-ended forum to further support the review of the implementation of the Convention and related strategic plans, with a view to facilitating the exchange of information and experience among Parties".²⁶ Inspired by the OECD Environmental Performance Reviews, the Universal Periodic Review of the UN Human Rights Council and the in-depth review of National Communications under the United Nations Framework Convention on Climate Change (UNFCCC), this voluntary peer review process, which focuses specifically on the review and implementation of NBSAPs, was first launched as a pilot approach and tested in India and Ethiopia. The COP considered the results to be positive and thus in 2018 decided to include voluntary peer review as part of the multi-dimensional review approach under the Convention.²⁷ The COP asked the Secretariat to prepare and organize the testing of a Party-driven review process in an open-ended forum at the third meeting of the Subsidiary Body for Implementation, including through the development of guidance for the voluntary submission of review reports at the open-ended forum. At this meeting, which was due to be held in Canada in May 2020 (before the COVID-19 crisis), Parties were to be invited to submit review reports, on a voluntary basis, for

assessment by the open-ended forum.²⁸ An online session took place on 16-17 September 2020²⁹.

2. PERSPECTIVES FOR A STRENGTHENED TRANSPARENCY MECHANISM

The need to strengthen the implementation of the CBD, as we have seen, is a recurring topic in the history of the Convention. In the context of the development of the post-2020 global biodiversity framework (Post-2020 Framework), which is to succeed the 2011-2020 Strategic Plan, the implementation of which has been largely insufficient, the need to strengthen the implementation became a central topic in the consultations and negotiations that have taken place since COP14.

In the latest version of the draft for the Post-2020 Framework³⁰ (July 5, 2021), which took into account the discussions and proposals that had taken place since the start of the Post-2020 Framework development process, a "skeleton" of the transparency mechanism has been proposed as a working basis (Box 1). Within the framework of the third meeting of the SBI, several documents were prepared by the Secretariat on this subject³¹. Many points are still being debated, both on the overall architecture and on its precise elements³².

BOX 1. "SKELETON" PROPOSALS FOR THE TRANSPARENCY MECHANISM IN DRAFT VERSIONS OF THE POST-2020 GLOBAL BIODIVERSITY FRAMEWORK (VERSION 5 JULY 2021)

J. Responsibility and transparency

18. The successful implementation of the framework requires responsibility and transparency, which will be supported by effective mechanisms for planning, monitoring, reporting and review. Countries, Parties to the Convention, have a responsibility to implement mechanisms for planning, monitoring, reporting and review.¹³ These mechanisms allow for transparent communication of progress to all, timely course correction and input in the preparation of

²³ <https://www.cbd.int/doc/nr/assessment-table-2018-09-21-en.pdf> accessed on 10 March 2020. Also presented as an interactive map: <https://chm.cbd.int/search/reporting-map?filter=AICHI-TARGET-11> and more broadly see the UN Biodiversity lab, <https://unbiodiversitylab.org>, accessed on 10 March 2020.

²⁴ Decision XII/26 (2014), Improving the efficiency of structures and processes of the Convention: Subsidiary Body on Implementation.

²⁵ Decision VII/30 (2004), Strategic Plan: future evaluation of progress.

²⁶ Decision XIII/25 (2016), Modus operandi of the Subsidiary Body on Implementation and mechanisms to support review of implementation. See CBD, *Voluntary peer-review process for the national biodiversity strategies and action plans: progress report and updated methodology*, UNEP/CBD/COP/13/19, 27 September 2016.

²⁷ Decision 14/29 (2018), Review mechanisms.

²⁸ Decision 14/29 (2018), Review mechanisms.

²⁹ <https://www.cbd.int/convention/mechanisms/trial-phase.shtml>

³⁰ See CBD, *Update of the zero draft of the post-2020 global biodiversity framework*, CBD/POST2020/PREP/2/1, 17 August 2020; First draft of the post-2020 global biodiversity framework, CBD/WG2020/3/3, 5 July 2021

³¹ See CBD, *Options to enhance planning, reporting, and review mechanisms with a view to strengthening the implementation of the Convention*, CBD/SBI/3/11, 19 October 2020. See also the three addenda: CBD/SBI/3/11/Add1, CBD/SBI/3/11/Add2, CBD/SBI/3/11/Add.3/Rev.1.

³² Rankovic, A., & Landry, J. (2021). A responsibility and transparency mechanism for biodiversity: assessing operational options. *Towards Post-2020 #25*, Project Post 2020 Biodiversity Framework – EU Support, Expertise France. <https://4post2020bd.net/resources/dialogue-with-25-transparency/>

the next global biodiversity framework, while minimizing the burden at the national and international levels, by:

(a) Establishing national targets as part of national strategies and action plans and as contributions towards the achievement of the global targets;

(b) Reporting national targets to enable the collation of national targets in relation to the global action targets, as needed, and their adjustment to match the global action targets;

(c) Enabling the evaluation of national and collective actions against targets.

19. These mechanisms are aligned with and, where appropriate, complimented by national reporting under the Protocols and integrated with other processes and other relevant multilateral conventions including the 2030 Agenda for Sustainable Development and the Sustainable Development Goals.

20. The development of additional and complementary approaches is encouraged to allow other actors to contribute to the implementation of the framework and report on commitments and actions.

Modalities and procedures that are worth considering to improve and strengthen the transparency mechanism should be based on its purpose and expected functions, taking into account the experience gained in the implementation of the Convention and its protocols, as well as lessons learned from other multilateral environmental agreements.³³

The aim is to improve the effectiveness of the implementation and the efficiency of the cooperation framework through greater transparency and accountability, which should strengthen the trust relationships between Parties. It should be a logical, coherent, and dynamic framework based on interactive and cyclical processes, taking into account country capabilities, regional particularities, and national circumstances. The "building blocks" of which could consist of the following elements:

- Strengthened NBSAPs and alignment with the 2030 (and 2040/2050) targets and goals with monitoring indicators (different levels depending on the targets, but also to take into account the variety of countries), recorded in a public register, with an obligation to review every five years;
- National Reports on measures taken and the evaluation of the achievement of targets and goals, particularly using the indicators defined for monitoring purposes;
- The monitoring and evaluation of policies and measures taken included in the National Reports to achieve the targets

³³ On the comparison between the CBD and the Paris Agreement from this point of view, A. María Ulloa, S. I. Karlsson-Vinkhuyzen, "Strengthening compliance under the Convention on Biological Diversity Comparing follow-up and review systems with the global climate regime", *The Implementation of the 2015 Paris Agreement on Climate Change*, V. Popovski (ed.), Routledge, 2018, pp. 79-103.

and goals, with a compliance procedure to help the Parties deal with the difficulties encountered;

- A global stocktake every five years (the first in 2024, second in 2030), informed in particular by verified national reports, making it possible to measure collective progress, and feeding into the five-year review of the NBSAPs (the first in 2025, second in 2030, to contribute to deliberations on the setting of 2040 objectives).
- Establishing (non-) compliance mechanisms.

2.1. Strengthening NBSAPs as the main tool to implement the CBD at the national level

One of the difficulties which explains the ineffectiveness of the implementation of the Convention is that the NBSAPs are often unclear and / or incentive, with objectives or targets that are difficult (if not impossible) to measure and compare. However, and in the opinion expressed by a large majority of delegations and observers, the NBSAPs should continue to play a central role in the post-2020 framework of the Convention, with a structure guided by the strategy (the S of SPANB) on the one hand and implementation through action planning (the PA of SPANB) on the other hand. This is also the meaning of the options recently proposed by the Subsidiary Body on Implementation. He sees NBSAPs as "the main planning tool for transposing the global frameworks adopted under the Convention at the national level", while agreeing that they "take different forms, and their scope and lines of intervention vary. according to national circumstances and priorities, as well as their degree of alignment with global frameworks".³⁴

Strengthening NBSAPs can take different directions and requires action at different levels, seeking: on the one hand, improving their alignment with the global framework (in terms of substance, form and timing) and comparability; on the other hand, increased national reach.

2.1.1. Improving the substantial alignment of NBSAPs with the global framework and their comparability

Strengthening the NBSAPs requires alignment of their strategic ambition with the 2050 goals and the planning of implementation measures with the action-oriented targets for 2030. If the post-2010 NBSAPs have on the whole reflected the orientations of the Strategic Project 2011-2020, the countries have declined the Aichi Targets in many national variants³⁵. If we understand the value of such flexibility to best match national dynamics, it severely hinders the ability to compare actions and keep balance sheets. In the draft post-2020 global framework, four

³⁴ See CBD, *Options to enhance planning, reporting, and review mechanisms with a view to strengthening the implementation of the Convention*, CBD/SBI/3/11, 19 October 2020, p. 3.

³⁵ UNEP, *Assessment of post-2010 National Biodiversity Strategies and Action Plans*, Nairobi, Kenya, 2018.

to five long-term goals have been proposed, with an expected intermediary outcome for 2030, and 21 action-oriented targets by 2030.³⁶ Each country should be able to set these objectives and targets at the national level, if necessary, on the basis of a disaggregation at the regional or national level. This variation and, where appropriate, this disaggregation should facilitate the comparison of actions and efforts or needs for implementation at the national level. But, in contrast to the Strategic Plan 2011-2020, a very large number of Parties support the formulation of goals and targets that are both quantifiable and measurable. This is one of the conditions for strengthening the reporting and monitoring-evaluation system in order to measure the effectiveness of the measures taken by the Parties to implement their NBSAPs, and possibly trigger a non-compliance procedure (infra). On a collective level, it is also the means of measuring the progress of the implementation with regard to the common concern of the loss of biodiversity, and of verifying the effectiveness of the international cooperation framework thanks to a periodic global review which will make it possible to discuss the achievements as well as the difficulties encountered to stimulate a mechanism of progression (called ratcheting). The use of so-called "SMART" goals, targets, and indicators (specific, measurable, acceptable, realistic and subject to a precise timetable) is an approach supported by a majority of Parties and observers³⁷.

So far the Convention's approach³⁸ has been based on the pressure–state–response framework, with the addition of "drivers", which are the underlying causes of environmental change (e.g. economic growth), "impacts" (e.g. species extinction) and, on the opposite side, "benefits" (benefits to people provided by ecosystem services). Despite initiatives such as the Global Partnership for Biodiversity Indicators (BIP), it has not been possible to precisely measure progress towards achieving the Aichi Targets due to the vague and unquantified wording for the most of them (14 out of 20). And the BIP noted that, despite the possibility of disaggregating 35 of the 98 indicators established by Decision XIII / 28, very few countries had adopted them, which is also explained by the fact that they do not have information to build reference scenarios as a measurement point for the targets concerned. This leads us to consider the advisability of having a set of headline indicators, already envisaged by SBSTTA in 2010, which would make it possible to compare the situation between countries, and which could be supplemented by more country-specific indicators.

Thus, the establishment of quantifiable and measurable objectives is now being proposed, to replace goals that are merely aspirational regarding an outcome that the community would like to achieve, such as the Aichi Targets. The preliminary draft

post-2020 global framework proposes quantified objectives aiming to improve the state of biodiversity, but also takes into account the resulting benefits expected from increased biodiversity. In this framework, flagship indicators for measuring biodiversity, and also pressures and responses, would allow progress made at the national level to be measured in relation to the global objectives and targets and their consistency with the Vision 2050 pathway. Such indicators would also enable needs to be specified in terms of financial support, technology transfer and capacity building, particularly during the global periodic review. These indicators should converge with the monitoring of SDG achievement at the national level, given that certain SDGs (particularly 14 and 15) are very directly inspired by some of the Aichi Targets.

Thus, in their NBSAPs, Parties may have to justify the choice of their commitments and targets with regard to their contribution to the global targets for 2030 on the basis of flagship indicators, but also other indicators that target factors and pressures specific to their situation, the responses at different levels (national to local) and the categories of actors affected by each of the proposed responses in order to meet the targets (private sector, categories of people with specific rights such as indigenous peoples, gender mainstreaming, etc.). In their NBSAPs, Parties are able to explain the rationale behind their choice of indicators in light of their national circumstances, and also for reasons of equity and the need to share certain natural resources in a fair way.

2.1.2. Aligning the calendar of NBSAPs and of the post-2020 global biodiversity framework

Given that some NBSAPs cover periods beyond 2020, they should be aligned in time with the post-2020 framework, targeting the 2030 deadlines and beyond Vision 2050, and, therefore, to provide for a common calendar of the objectives and targets of the NBSAPs, over 10 years, and an obligation to update (with alignment of national objectives and targets) every 5 years in the light of the results and lessons of the global periodic review (see below), as well as an obligation to submit a revised NBSAP every 10 years to align with the objectives and targets of the next cycle (2040). Updating should be guided by the principle of no backsliding, according to which the level of ambition of national goals and targets in a given cycle should be adjusted upwards from their quantified level when adopted. of the SPANB for the previous cycle. Ideally, the common schedule of NBSAPs and the frequency of their update / revision should coincide with that of Nationally Determined Contributions (NDCs) of the Paris Climate Agreement, in order to generate synergies in the implementation of the conventions, and benefit from the lessons and information from each of them to set the goals and targets for the next cycle. This would represent a major breakthrough as Parties have so far only been encouraged to revise and update "as appropriate" their NBSAPs in the light of internationally defined objectives.³⁹

³⁶ See CBD, *Update of the zero draft of the post-2020 global biodiversity framework*, CBD/POST2020/PREP/2/1, 17 August 2020; *First draft of the post-2020 global biodiversity framework*, CBD/WG2020/3/3, 5 July 2021

³⁷ See paragraphs 9 (h) and (j) CBD/Post2020/PREP/1/1, synthesis of submissions from 29 January 2019.

³⁸ Decision XIII/28 on indicators for the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets

³⁹ Decision COP CBD X/2, Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets, §3 c).

2.1.3. Strengthening the legal and political significance of NBSAPs

With regard to the legally binding nature of NBSAPs, it is not possible to provide for an obligation for the Parties to adopt "internal" measures to achieve the objectives and targets that they set in their NBSAPs, like Article 4.2 of the Paris Climate Agreement, without revising the Convention itself.⁴⁰ Without giving a legally binding value to NBSAPs in international law, a decision of the COP could recommend to the Parties to adopt texts of a legislative or regulatory nature at the national level, with the effect of making the objectives and targets legally binding on all stakeholders, including—and first and foremost—the State.

These post-2020 NBSAPs could appear in a new dedicated register⁴¹, maintained by the secretariat, which would strengthen the engaging character—at least politically this time—of NBSAPs. By giving the possibility to the public to access NBSAPs through a register based on quantifiable and measurable goals and targets, it would be possible to compare the commitments of the Parties to the reality of the implementation on the ground while comparing the level of ambition between the Parties. This could pave the way for a movement of (national) lawsuits on biodiversity, as states' national contributions to the Paris Agreement are at the heart of many climate lawsuits around the world.

2.1.4. National commitments as complements to NBSAPs?

The options recently presented in a preparatory document for the SBI discussions refer to "national commitments" that would be adopted by Parties in addition to NBSAPs. On the model of the Paris Agreement, Parties would be "required" to communicate within one year after COP15 their "national commitment" as "national contributions to the achievement of global goals and objectives". These commitments should "set out the contribution of each Party to the achievement of global goals and targets, and should be linked to effective national planning processes for biodiversity, to ensure that these commitments are met." Parties would have the opportunity to update their commitments in light of the "Gap Report" (see below) in 2023, and following the mid-term review of the post-2020 global biodiversity framework in 2025. The commitments would be sent to the Convention's Clearing-House Mechanism via a standard form. There would be added "commitments from non-state actors, indigenous peoples and local communities" which would be voluntary and would appear in an international register as an extension of the Sharm El-Sheikh to Kunming Action Agenda for Nature and People⁴².

The stated objective of these commitments is to allow States to be rapidly mobilized politically, in other words to take advantage of the post-COP momentum, while retaining a more flexible format than that of the NBSAPs. The SBI document clarifies that "Parties may wish to align the national cycle for reviewing and updating NBSAPs with the global cycle, but they will not be required to revise them after the adoption of the global biodiversity framework. for post-2020 if NBSAPs remain effective instruments to meet their national commitments and priorities, except to include their national commitments to facilitate the implementation of the new global biodiversity framework". But the articulation between commitments and NBSAPs probably needs to be thought through carefully, to avoid any dilution or inconsistency of efforts. Likewise, the experience of the Paris Agreement shows that the articulation of the commitments of States with the commitments of private actors must also be well thought out.

These elements considered as a whole and coherently prefigure the enhanced NBSAPs. Their formulation in the future post-2020 global framework should necessarily take into account their interaction with the provisions for enhanced reporting, verification and non-compliance, as well as the modalities of the global periodic review, which are discussed below. Their implementation by Parties should be facilitated by guidelines, the principles of which would be adopted at COP15, with a mandate for SBI-4 to agree on practical modalities for adoption at COP16.

2.2. Enhancing reporting

Different elements will determine the relevance and, more broadly, the usefulness of national reports within a new framework of enhanced transparency. The framework of the reporting system will thus determine the success of the transparency framework. The structure and content of the reports should enable both a better assessment of the reports during the review and verification phase, and the implementation of measures that are adapted to address any difficulties encountered.

2.2.1. Content

Following submission of the NBSAPs, Parties should be required to report periodically on the measures taken, the achievement of defined national targets, as well as the difficulties encountered in implementing the post-2020 framework. The content and formulation of the global objectives themselves, accompanied by flagship and specific indicators, will have a decisive impact on the formalization of the NBSAPs and, consequently, on the reports on the measures taken in this framework.

2.2.2. Periodicity

Reporting periodicity plays a key role in monitoring the progress of implementation towards achieving the objectives set by countries at the national level, but also in monitoring compliance with the Convention. Here again, it seems relevant to first draw on existing instruments. Within the CBD, the reporting system is based on the national report provided for in Article 26.

⁴⁰ According to this provision, "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".

⁴¹ See for example the register of NDCs for the Paris Agreement: <https://www4.unfccc.int/sites/NDCStaging/Pages/Home.aspx>

⁴² See CBD, *Options to enhance planning, reporting, and review mechanisms with a view to strengthening the implementation of the Convention*, CBD/SBI/3/11, 19 October 2020.

While the COP has set the periodicity of national reports at four years, Article 26 gives the COP full freedom to specify, if necessary, a different timetable. A four-year frequency for national reports seems to ensure a certain balance between international requirements and the need to avoid overburdening the reporting obligations of Parties. However, it is imperative to synchronize the national reporting schedule with the global stocktake, if the latter has been established, which will lead to the definition of a five-year periodicity. For example, if proposals to conduct global stocktakes in 2024 and 2029 are retained, national reports will have to be submitted no later than 31 December 2023 (which would allow synchronization with the Cartagena and Nagoya Protocol reports) and 2028. More general consideration must continue to be given to the issue of a possible synchronization with other conventions or processes (e.g. SDGs), with a view to ensuring coherence and efficiency.

It would then be possible to imagine several types of reports, at different frequencies, depending on the importance of the provisions concerned, in order to offer a certain flexibility, while ensuring the regular submission of the necessary data. For example, biennial reports, or ad hoc reports where corrective measures or clarification requests are needed, could be sought in the interim between the submission of national reports every four years. Many international conventions have thus diversified, or even multiplied, their reporting obligations.

BOX 2. SOPHISTICATED REPORTING REQUIREMENTS UNDER CITES

The multiple reporting system of the CITES Convention allows for closer monitoring of the international trade in endangered species. It consists of four report types (Article 8.7, Resolution 11.17): the general annual report, the annual report on illegal trade, the biennial report, and lastly ad hoc reports that are required by COP resolutions.

For its part, the annual report is an aspect of the non-compliance mechanism, the submission of which is mandatory and effective. This involves communicating the number and type of trade permits granted, the quantities and types of species traded, according to the species (Annexes 1, 2 and 3), and the States concerned by this trade. Since 2016, Parties have been required to submit an annual report, in table form, that shows several items of information on the possible detection of illegal trade. The biennial report concerns the implementation of the Convention: the legislative and administrative measures taken at the national level. The latter two report types, however, lack the support of non-compliance mechanisms. Finally, ad hoc reports may be requested by the COP, following the assessments and recommendations of expert groups, for example on the subject of the ivory market.

This range of reporting has the advantage of categorizing and clarifying data, and thus facilitating the deployment of action plans to strengthen the implementation of the Convention.

2.2.3. Format

The format of reports depends on the accuracy of the post-2020 framework and determines the accuracy and comparability of the information requested and thus the accuracy of assessments. The greater the harmony and clarity of the format and the associated reporting guidelines, the better the data comparability and the relevancy and magnitude of the available support. It should be noted that reporting has now become a discipline in itself, even though the capacities and resources of some Parties remain limited. The synchronization of reporting for the post-2020 framework and the CBD protocols is therefore strongly recommended. Similarly, synchronization and coordination of reporting between the CBD and other environmental conventions would reduce the workload of the focal points, while encouraging communication and cooperation.

Nevertheless, the content of the national reports, and the framework for the information to be provided by Parties, should be defined according to the material implementation obligations (design and application of NBSAPs, see above) and also according to the scope of the review/verification (see below).

An increase in reporting obligations will necessitate the enhancement of the available assistance to Parties in this regard. A prominent example is the framework of the Paris Agreement's transparency system. Having strengthened the reporting obligations of developing Parties, the Agreement creates a Capacity-building Initiative for Transparency "to build institutional and technical capacity, both pre- and post-2020" for developing Parties that request it, and in particular to "assist in the improvement of transparency over time" (UNFCCC 1.CP/21, § 84 and 85). This initiative will be funded by the Global Environment Facility (CCNUCC 1.CP/21, § 86).

BOX 3. REPORTING IN THE RAMSAR CONVENTION: A STRUCTURED BUT FLEXIBLE FORMAT

The Ramsar Convention on the Protection of Wetlands of International Importance has the highest reporting rate among the biodiversity-related conventions. Parties to the Convention are required to submit their National Reports nine months prior to the COP for analysis and synthesis, but also for correction and clarification, of the various reports within the Global Implementation Report, a work undertaken by the Secretariat. At COP 13 in 2019, 147 out of 170 Parties had submitted their national reports. The Convention does not, however, include a non-compliance mechanism to apply in cases where Parties fail to submit a report.

According to the Convention Secretariat, the reporting format and model provided to Parties would play a great incentive and facilitating role. The format, based on a set of indicators proposed by the Secretariat and Parties and adopted by the COP, is submitted to the Standing Committee before being communicated to the focal points. It is composed of two parts: the first section allows Parties to express themselves freely and openly on their context,

challenges and implementation needs, while the second section is much more structured. The responses requested take the form of checkboxes, which facilitates the work of the focal points, but also the systematic assessment and comparability of these reports. However, a certain amount of flexibility is permitted, because this format is composed of mandatory and optional questions.

However, unlike the Barcelona Convention (see above), which requires focal points to prioritize challenges and needs so that relevant and coherent support can be provided, the Ramsar Convention's reporting does not require Parties to undertake this prioritization of needs.

2.3. Reinforcement of individual review and verification

2.3.1. Lessons learnt from multilateral environmental agreements

It is interesting to study the ways in which other international cooperation frameworks have progressively introduced procedures for monitoring-evaluation and for the verification of the implementation of international obligations by States. In this regard, we can highlight investigations carried out by the CBD Secretariat to inform Parties as early as the first session of the Implementation of Multilateral Environmental Agreements,⁴³ including the monitoring-evaluation and verification mechanisms that have been progressively established in the additional protocols to the Convention and in other biodiversity-related conventions, such as CITES or Ramsar. Similarly, the procedures provided in the multilateral framework to tackle climate change, particularly those in the Paris Agreement, are of particular interest since they attempt to make a closer link between the effectiveness of national implementation measures, the fulfilment of commitments made by each of the Parties and the level of collective ambition to meet the common challenge of addressing climate change.

BOX 4. THE MONITORING-EVALUATION MECHANISMS IMPLEMENTED IN THE PARIS AGREEMENT AND ELSEWHERE IN THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC)

The **Paris Climate Agreement**, which was adopted in 2015, established a strengthened framework for transparency on action and support (financial, technological, capacity building), to build mutual confidence among Parties and promote the effective implementation of the commitments

⁴³ Note by the Executive Secretary, *Further options for mechanisms to support review of implementation*, UNEP/CBD/SBI/1/10/Add.3 of 2 March 2016. See also UNEP/CBD/BS/CC/13/INF/2.

of Parties under the Agreement.⁴⁴ These commitments are self-determined by Parties at the national level (NDCs), and are not subject to sanctions for non-implementation, as was the case in the Kyoto Protocol. The framework was designed as a keystone of the Agreement, to keep Parties accountable to each other, and to build confidence in collective action and thereby promote the progressive increase in the ambition of Parties' commitments.

The purpose of the framework is to "provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under Article 4, and Parties' adaptation actions under Article 7, including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14" (Article 13.5), as well as to "provide clarity on support provided and received by relevant individual Parties in the context of climate change actions" (Article 13.6). This transparency framework applies to all signatory Parties, while recognizing the need for flexibility in implementation for developing country Parties in accordance with their capabilities (Article 13.2). The elements of the framework set out in Article 13 of the Agreement have been detailed in the "Modalities, Procedures and Guidelines" negotiated between 2016 and 2018, with the guiding principles of "promoting transparency, accuracy, completeness, consistency and comparability".⁴⁵

The enhanced transparency framework involves three steps:

1. Reporting (Biannual Transparency Report)

Every two years each Party must submit a Biannual Transparency Report with an inventory of its greenhouse gas emissions (developed country Parties submit this information annually), as well as the "information necessary to track progress made in implementing and achieving" its NDC (Article 13.7). Developed country Parties are also required to include information on support provided to developing countries (developing countries are invited to do the same and state what their needs are; all Parties are also invited to include information on adaptation). All Parties are required to submit their first report by the end of 2024.⁴⁶

2. Technical expert review

A group of experts (1) reviews the information included in the Biannual Report on the implementation and achievement of each Party's NDC and the support provided, (2) identifies areas for improvement, and (3) assists developing

⁴⁴ Decision 1/CP.21, Paris Agreement, Article 13.

⁴⁵ Decision 18/CMA.1, Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, Paragraph 3.

⁴⁶ Ibid.

country Parties in identifying their capacity building needs.⁴⁷ The review must be “implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and will avoid placing undue burden on Parties”.⁴⁸ Experts should not “make political judgements”,⁴⁹ nor review the adequacy or appropriateness of NDCs, domestic implementation actions or support provided.⁵⁰ The examination “may be conducted as a centralized review, in-country review, desk review or simplified review”,⁵¹ after the Secretariat has made an initial assessment. With respect to the centralized review, least developed countries and small-island developing States may choose to participate in the same centralized review as a group. In this case, a single expert review team appraises several biennial reports.⁵² The importance of the choice of experts should be noted here because, in addition to requirements in terms of technical competence, a “balanced” representation⁵³ between developed and developing countries must be sought. The expert review team produces a technical review report which, after taking a Party’s comments into account, is made publicly available on the UNFCCC website.⁵⁴

3. Multilateral support-focused progress review

Following the technical review, Parties participate in a peer-to-peer political exchange on the implementation and achievement of their NDCs, and on the support provided (Article 13.12). The technical review covers the information submitted by Parties in their Biannual Transparency Reports, the technical review report, and any other information put forward by a Party.⁵⁵ This process consists of two phases: (1) an online question-and-answer exchange between Parties, which the Secretariat subsequently publishes on the UNFCCC website, (2) an informal workshop within the Subsidiary Body for Implementation, in the form of a presentation by each Party followed by a question-and-answer session, which is open to observers.

MRV processes under the Cancún Agreements

The enhanced transparency framework of the Paris Agreement was developed as a follow-up to the one defined at COP16 in Cancún in 2010, with a significant development. Instead of two separate MRV processes for developed

and developing countries (as was previously the case under the UNFCCC), the Paris Agreement established a universal framework for all Parties, within which more nuanced internal differentiation takes place, through the implementation flexibilities allowed to developing country Parties that would need them in light of their capacities. Indeed, after the failure of the Copenhagen Conference (2009), Parties carried out an initial strengthening of the transparency framework under the UNFCCC to improve the measurement (and comparison) of the level of effort by Parties, which was largely determined according to a “bottom-up” approach. This framework was structured around two procedures reflecting a binary differentiation between developed and developing countries, which were not previously subject to monitoring or evaluation mechanisms.⁵⁶ Two processes can be distinguished:

- for developed countries: the **International Assessment Review (IAR)** is a two-stage process: (i) a technical review of the biennial reports (on the greenhouse gas reduction commitments of countries up to 2020) and the annual greenhouse gas inventory, and (ii) a multi-lateral assessment of progress in implementation; and.
- for developing countries: the **International Consultation and Analysis (or ICA)** process on progress towards the implementation of Nationally Appropriate Mitigation Actions (“NAMAs”), which are voluntary and made possible by the support of developed countries. The ICA process consists of two stages: analysis by experts (in which they identify capacity-building needs) and dialogue (“facilitative sharing of views”) in which all Parties can participate.

Thus, the transparency framework was designed as a central element of the Paris Agreement’s architecture to promote the gradual increase in ambition over time. If Parties adhere to the rules of submitting relevant information on the implementation of their climate action, and on their progress towards achieving their NDCs, the reporting and review process of the transparency framework - the reports of which will provide critical input to the Paris Agreement’s “stocktake” (see below) - could play a fundamental role in promoting collective confidence among Parties, leading them to raise their ambition levels with each NDC renewal.⁵⁷ From the outset, some have highlighted the potential risks associated with this outlook, including (1) the fact that the manoeuvre room available to developing countries may lead to poorly comparable and incomplete information, (2) the difficulty of comparing progress between Parties due to

⁴⁷ Ibid., §146.

⁴⁸ Ibid., §148.

⁴⁹ Ibid., §149.

⁵⁰ Ibid.

⁵¹ Ibid., §151.

⁵² Ibid., §157.

⁵³ Ibid., §178.

⁵⁴ Decision 18/CMA.1, Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, §162, 188.

⁵⁵ Ibid., §190.

⁵⁶ Under Article 4.7 of the UNFCCC, developing countries comply with their obligation to submit a national communication and complete their national greenhouse gas emissions inventory on the basis of financial support provided by developed countries.

⁵⁷ A. Deprez, M. Colombier, T. Spencer, “Transparency and the Paris Agreement: driving ambitious action in the new climate regime”, IDDRI Working Paper, 2015

very diverse NDCs and heterogeneous indicators for monitoring each Party's progress in implementing its NDCs, (3) the difficulty of comparing progress between Parties due to the wide variety of NDCs and heterogeneous indicators for monitoring each Party's progress in NDC implementation.⁵⁸ However, it is too early to measure the effectiveness of the Paris Agreement's transparency framework. It is up to the Parties to capitalize on its potential to build confidence and to raise the ambition of climate policies.

Within the CBD framework, the strengthening of the transparency framework could be based on the introduction of monitoring and evaluation procedures involving the systematic review and expert verification of national reports under Article 26 of the Convention and data provided by Parties. In defining the modalities of these new procedures in the post-2020 framework, lessons should be drawn from pilot peer review experiences.⁵⁹

2.3.2. Expert verification and / or political dialogue between Parties

The current pilot review does not incorporate expert technical evaluation, but only a political and voluntary dialogue between Parties. A technical assessment would be very useful as it could ensure data veracity (which could then be used in the global stocktake), and furthermore, by ensuring transparency, it would support the building of mutual trust between Parties. Following the model of the Paris Agreement's transparency framework, an independent expert verification phase could thus be integrated, which would precede a facilitating dialogue between Parties, leading to exchanges of good practices and experiences. This political phase could be conducted within the Subsidiary Body for Implementation.

2.3.3. Frequency

While a mandatory review and verification mechanism would be desirable, the large number of Parties to the CBD means that carrying out systematic individual reviews is difficult. In this case, to enable adherence to a reasonable time frame and to allow for a thorough review, it would be necessary to review the implementation of Parties in small groups (either by selecting a sample of countries or by adopting a regional approach). A ten-year review cycle is mentioned under this heading, which is of interest in relation to the strategic time frame of the Global

Goals,⁶⁰ but a five-yearly review/verification could also be envisaged, if necessary with an easier time frame. Thematic reviews are another option.

2.3.4. Diversification of sources

The main information sources are by definition provided by Parties in their NBSAPs and their national reports. A site visit may be planned, but not necessarily in a systematic way, as is the case in the current pilot experiment. But one could also imagine an international consultation procedure that involved other non-Party stakeholders or observers. This would be particularly useful for reviewing data provided by Parties to be able to take information from other sources into account, and also to support the participation of the holders of traditional knowledge, or to identify the capacity-building needs of Parties that have agreed to participate, before, during and after the review. The involvement of observers in such procedures can take several forms and its benefits are generally recognized. This openness to other types of actors ensures broader participation and, as is the case with dialogues between Parties, mutual learning. It provides additional information to that provided by States and also increases constructive criticism. It has been tried and tested to everyone's satisfaction in the framework of several conventions.

The strengthening of "other sources" could involve NGOs, which could be given the option to submit reports. It should be noted that reviews under the convention already rely on "data from various sources, including spatially explicit time series information on ecosystem change from remote sensing. As the spatial and temporal resolution of this information continues to improve, it can be increasingly used by the Convention to support the monitoring of biodiversity change at the national level".⁶¹

BOX 5. INTEGRATION OF NON-STATE OBSERVERS: SOME PERSPECTIVES

A number of examples demonstrate the value of including non-state actors, including civil society, in the different monitoring and verification processes.

The **Ramsar Convention** benefits from privileged sources of information on the ecological status of sites. These sources are actors in the field, local populations and NGOs. Although resulting in a heavy workload for the Secretariat, which is overwhelmed by messages, this system makes it possible to cross-check or even complete the data, ensuring increased review and verification work: if civil society describe the ecological component of a site as threatened, the Secretariat can request that a Party answers a series of questions, or may even open an enquiry.

⁵⁸ R. Weikmans, H. van Asselt & J. T. Roberts "Transparency requirements under the Paris Agreement and their (un)likely impact on strengthening the ambition of nationally determined contributions (NDCs)," 2019, Climate Policy,

⁵⁹ See § 4 (d) of Recommendation 2/10 of the Subsidiary Body on Implementing, which requests the Executive Secretary to consult with "Parties and other stakeholders in order to explore possible modalities for applying approaches to enhancing the review of implementation in the process for the development of the post-2020 global biodiversity framework (...)"

⁶⁰ Note by the Executive Secretary, *Further options for mechanisms to support review of implementation*, UNEP/CBD/SBI/1/10/Ad.3, 2 March 2016, p. 13.

⁶¹ Note by the Executive Secretary, *Further options for mechanisms to support review of implementation*, UNEP/CBD/SBI/1/10/Ad.3, 2 March 2016, p. 9.

A few years ago, the Contracting Parties to the **Barcelona Convention** voted to include non-state observers in the Compliance Committee sessions, subject to the conditions previously provided for by the Parties. Civil society observers are given the opportunity to express their views and communicate with the Committee on the state of implementation of the Convention and its Protocols.

The **CITES** Secretariat relies on the work of several NGOs, including TRAFFIC (Trade Records Analysis of Flora and Fauna in Commerce), which form a federation of NGOs set up by WWF and IUCN specifically for this purpose, whose numerous offices form a global network for monitoring international wildlife trade in cooperation with the CITES Secretariat. TRAFFIC monitors trade flows and regularly reports its estimates in its publications. It provides the CITES Secretariat with information on illegal trade.

2.3.5. Consequences

Decisions must also be made on any follow-up that ensues from monitoring and auditing processes. If difficulties are encountered, the Parties concerned should be assisted. In the proposed sequenced model, which is largely inspired by the Paris Agreement, it is important that the non-compliance procedure can be activated. This can be done by the Secretariat if particular difficulties are raised in the expert team's report.

2.4. Towards a global periodic review?

This section considers the possible formalization within the CBD framework of a periodic "stocktake", based on the model provided by the Paris Agreement, the operational details of which were defined at UNFCCC COP 24 in Katowice.⁶²

BOX 6. THE "GLOBAL STOCKTAKE" OF THE PARIS AGREEMENT (ARTICLE 14)

As a complement to individual assessments, the global stocktake is intended to "assess the collective progress towards achieving the purpose of the Agreement and its long-term goals".⁶³ It is drawn up every five years, at the mid-point of each five-year cycle, with the assistance of the Subsidiary Body for Implementation and the Subsidiary Body for Scientific and Technological Advice, which "will establish a joint contact group on the matter". It is "facilitated by two co-facilitators, who will be responsible for conducting the dialogue and for preparing a factual synthesis report and other outputs of the technical assessment, with the assistance of the secretariat". The sources of information are varied since, in addition to reports and data provided by

⁶² Decision 19/CMA.1, Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21.

⁶³ *Ibid.*, §1.

Parties and the Secretariat - particularly the technical review reports of the enhanced transparency framework on implementation and Parties' progress in the implementation of their NDC - there may also be IPCC reports, reports from other UN institutions, and also "Submissions from non-Party stakeholders and UNFCCC observer organizations".⁶⁴ The global stocktake is organized around three phases, which lead to an overall assessment of a political nature:

- a phase of information gathering and preparation for the compilation and synthesis of data to conduct a technical assessment phase;
- a technical evaluation phase to assess the progress made collectively towards achieving the objectives of the Paris Agreement, as well as the opportunities for raising the level of ambition; and
- a phase of the evaluation of results from the technical evaluation phase, with the ultimate aim of informing Parties of the need to update or strengthen actions, determined at the national level by each country, as well as in the framework of multilateral cooperation.

Results from the stocktaking exercise reveal both shortcomings in implementation measures and gaps in the international cooperation framework, including in regard to financial support from developed countries, and should theoretically provide impetus to raise the level of ambition. The idea is to nudge Parties towards rethinking and strengthening their actions. Moreover, the Parties are obliged, for the purposes of the Paris Agreement, to communicate their nationally determined contributions every five years "informed by the outcomes of the global stocktake" (Article 4§3).

One can also cite the model of the Committee for the Review of the Implementation of the Convention (CRIC) on Desertification,⁶⁵ established in 2001, which makes a regular assessment of the implementation of the Convention and its strategic framework, but also of the functioning of the Convention's institutions. Made up of all Parties to the Convention, the Committee is guided by the Performance Review and Assessment of Implementation System (PRAIS) established in 2010. The CRIC must "undertake an assessment of implementation against performance indicators every two years and against

⁶⁴ *Ibid.*, §§36–37.

⁶⁵ UNCCD, COP Decision 11/COP.9, Annex, §I. UN Doc ICCD/COP(9)/18/Add.1 (2009); Decision 13/COP.13, Additional procedures or institutional mechanisms to assist the Conference of the Parties in regularly reviewing the implementation of the Convention – Terms of reference of the Committee for the Review of the Implementation of the Convention, UN Doc ICCD/COP(13)/21/Add.1 (2017).

impact indicators every four years".⁶⁶ It makes recommendations to the COP on the necessary elements to improve to facilitate the effective implementation of the Convention, indicating objectives, assigned responsibilities and the expected financial implications of their implementation, where appropriate. For example, at the seventeenth session of this Committee (CRIC 17), held in January 2019 in Georgetown, Guyana, the CRIC reviewed the first-ever global assessment of land degradation based on observational data submitted by governments. The assessment, which was conducted by reporting countries according to a harmonized approach, shows the trends in land degradation between 2000 and 2015, and is expected to serve as a basis for assessing progress in reducing or reversing land degradation worldwide. It will also contribute to the efforts of countries to achieve land degradation neutrality, in the framework of Sustainable Development Goal 15.3.

It is clear from these examples that the value of a global stocktake is to be able to evaluate the efforts of all Parties in relation to internationally agreed targets. In this regard, Decision X/2 has already provided "that the fourth edition of the Global Biodiversity Outlook [should] be prepared to provide a mid-term review of progress towards the Aichi Biodiversity Targets, including an analysis of how the implementation of the Convention and its Strategic Plan has contributed to the 2015 targets of the Millennium Development Goals". It also stated: "Recalling that the role of the Conference of the Parties is to keep the implementation of the Convention under review, decides that future meetings of the Conference of the Parties shall review progress in the implementation of the Strategic Plan for Biodiversity 2011-2020, share experiences relevant for implementation and provide guidance on means to address obstacles encountered".⁶⁷

The global stocktake would both institutionalize and deepen this initial process. Once again, it would be beneficial to have a diversity of types and sources of information, so that the global stocktake would be as open as possible. Scientific data are essential for measuring the ambition of aggregated individual efforts and for drawing comparisons with the overall objectives. From this perspective, the collective assessment of efforts must be based firstly on the Global Biodiversity Outlook report,⁶⁸

which already plays this role, and secondly on the results of the monitoring and assessment procedures of the NBSAPs (without explicitly targeting any particular Party). In addition, the IPBES has an important role to play here as a source of information on the state of biodiversity, but not as a facilitator of the stocktake, as this is a more political function that would affect its scientific credibility. The global stocktake could be structured around the political objectives defined under the Convention and the various factors of biodiversity loss identified by IPBES. It would also be useful to have the option to break down the global stocktake in terms of political objectives and factors by region and/or biogeographical area, as this would elucidate the situation according to "ecological units" and enable targeting of the necessary corrective measures.

Beyond the IPBES reports, the diversification of sources could include reports from other UN institutions, but also "Submissions from non-Party stakeholders and UNFCCC observer organizations", as in the Paris Agreement framework.⁶⁹ This would include data from NGOs, perhaps more directly structured around conventional objectives than the IPBES report, but also economic and social data, including on international funding.⁷⁰ Public participation will be key in determining who can get involved and how. The usefulness of data from indigenous and local communities and other stakeholders, and in particular the Group on Earth Observations Biodiversity Observation Network (GEO BON) has already been acknowledged.⁷¹ It will also be necessary to agree on the periodicity of the review. A five-yearly review, halfway through the cycle, might strike the ideal balance. It would be advisable to align the timing of IPBES global assessments with that of the CBD global reviews, so that the latter are systematically fed with the most up-to-date diagnostics from IPBES experts.

A technical phase to collect and assess all the information and positions needed to carry out the global stocktake, including at the level of regions and biogeographical areas, should be followed by a political phase for dialogue on the progress made and the level of ambition to be achieved. This technical phase could take place in 2023 to enable lessons to be drawn from the global stocktake of the Paris Agreement, which will take place in 2023, to prepare a political phase in 2024.

The political phase of the global stocktake would allow Parties to measure the effectiveness and efficiency of both the internationally agreed targets and the measures adopted by Parties to achieve these targets, based on the best scientific evidence and verified national reports. From this perspective, the first global stocktake in 2024 would allow for the preparation of adjustments to national targets and commitments in 2025 to achieve the objectives and targets of the Convention's post-2020 framework by 2030. The second global periodic stocktake would take place in 2029 to set the objectives and targets for the

⁶⁶ Decision 11/COP.9, Annex (CRICs ToR), Section III Stakeholders under review, para. 14.: "in sessions held between ordinary sessions of the COP the CRIC shall focus its work on the review of the implementation of the Convention by Parties through, inter alia: (a) Undertaking an assessment of implementation against performance indicators every two years and against impact indicators every four years; (b) Disseminating best practices on the implementation of the Convention; (c) Reviewing financial flows for the implementation of the Convention". For more details, UNCCD, *Evaluation of the Performance Review and Assessment of Implementation System*, 2016 https://www.unccd.int/sites/default/files/relevant-links/2017-01/PRAIS%20evaluation%20report%20final%20formatted_1_0.pdf.

⁶⁷ Decision COP CDB X/2, The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets, §§13-14.

⁶⁸ See for example Decision COP CDB XII/1 (2012), Mid-term review of progress in implementation of the Strategic Plan for Biodiversity 2011-2020 including the fourth edition of the Global Biodiversity Outlook, and actions to enhance implementation. §18.

⁶⁹ See box above.

⁷⁰ See for example the Natural Capital Initiative.

⁷¹ See Decision COP CDB XII/1 (2012) above-mentioned §16.

2040 deadline and allow a revision of the NBSAPs for the period 2030-2035, taking into account the state of biodiversity and the progress made. To serve as a ratchet mechanism along the same lines as the model provided by the Paris Agreement on Climate Change, it will be necessary to establish an obligation to adhere to a progressive principle for national measures in a context of the adjustment and revision of NBSAPs in light of the results of each global periodic stocktake (see point 4.1, a) above).

Prepared by the SBI with the support of the Secretariat, the political phase of the global periodic stocktake of the Convention would be a Party-driven process, chaired by a committee composed of the outgoing and incoming COP presidencies and the SBI Chair, and conducted in a transparent manner and with the participation of other stakeholders, making all the relevant data and information available. The political phase could take the form of a short (two-day) extraordinary meeting of the COP, convened in accordance with Article 23 §2 of the Convention.

2.5. Enhancing (non-) compliance mechanisms

The enhancement of non-compliance mechanisms could consist of the establishment of a non-compliance procedure under the Convention itself, complementing the procedures established under its two Protocols. Different modalities could be envisaged. The design of a non-compliance procedure varies from one text to another, depending on the needs and wishes of the Parties, taking into account the purpose of the treaty concerned, at the time of its adoption, its universal vocation or its regional character, etc.

The establishment of non-compliance procedures is often provided for in the treaty itself, as was the case for the Cartagena (Article 34) and Nagoya (Article 30) Protocols. This is not expressly provided for in the Convention on Biological Diversity, which was adopted before the development of non-compliance procedures⁷². It should be noted that this is not the practice in the case of framework conventions, where non-compliance procedures are reserved for various protocols because they contain the most precise obligations. Nevertheless, the adoption of the Aichi Targets changes the situation from this perspective. The adoption of the Aichi Targets ultimately brings the Convention on Biological Diversity closer to the Paris Agreement on Climate Change, for which a compliance procedure has been foreseen and adopted.⁷³ The adoption of such a procedure is now justified in that it can strengthen its implementation. Furthermore, although not initially anticipated, it falls within the competence of the Conference of the Parties which "shall establish such subsidiary bodies (...) as are deemed necessary for the

implementation of this Convention" (Article 23(4)(g)) and shall "Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation" (Article 23(4)(i)). Nevertheless, many options can be identified for the design of such a procedure, which have varying degrees of intrusiveness and obligation.

2.5.1. Objective, character and principles of the procedure

Non-compliance procedures are essentially intended to *promote the law*, although they should also be used to deal with cases of non-compliance. Thus, under the Cartagena Protocol, "The objective of compliance procedures and mechanisms is to *promote* compliance with the provisions of the Protocol, address cases of non-compliance by Parties and provide advice or assistance, where appropriate".⁷⁴ Similarly, with regard to the Nagoya Protocol, "The objective of the compliance procedures and mechanisms is to *promote* compliance with the provisions of the Protocol and address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate".⁷⁵ With regard to principles, under the Cartagena Protocol, "Compliance procedures and mechanisms shall be simple, facilitative, non-adversarial and cooperative". Under the Nagoya Protocol, the formula is different, but similar: "Compliance procedures and mechanisms shall be non-adversarial, cooperative, simple, expeditious, advisory, facilitative, flexible and cost-effective". Under CITES, "A supportive and non-adversarial approach is taken towards compliance matters, with the aim of ensuring long-term compliance. (...) Compliance matters are handled as quickly as possible. Such matters are considered and ensuing compliance measures are applied in a fair, consistent and transparent manner".⁷⁶

However, it is evident that the procedures of both Protocols refer to the treatment of cases of non-compliance. For the CBD, it might be more appropriate to follow the model provided by the Paris Agreement procedure, which has removed the non-compliance aspect to focus on promoting compliance with the Agreement. It simply aims to "facilitate implementation and promote compliance with the provisions referred to in the Agreement". All precautions have been taken by the Parties since it "shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive", and "shall neither function as an enforcement or dispute settlement mechanism, nor impose penalties or sanctions, and shall respect national sovereignty".⁷⁷ It is more a *compliance procedure* than a non-compliance procedure.

⁷² The first of these was adopted provisionally at the London Meeting of the Parties in 1990 (*Decision III/5*) and then formally adopted at the Fourth Meeting of the Parties (*Decision IV/5*).

⁷³ Paris Agreement, Article 15, Decision 20/CMA.1 Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement (2018).

⁷⁴ Emphasis added.

⁷⁵ Emphasis added.

⁷⁶ Resolution Conf.14.3, CITES compliance procedures (§§4)5).

⁷⁷ Decision 20/CMA.1 above-mentioned, annex, §1-4.

BOX 7. BETWEEN SUPPORT AND PRESSURE: THREE EXAMPLES OF NON-COMPLIANCE PROCEDURES

Non-compliance procedures come in different forms. Having started from the same model, namely the procedure defined under the Montreal Protocol on Substances that Deplete the Ozone Layer (1987), they have evolved and gradually adapted to the implementation of the conventions they support in various contexts.

1) **Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)**: CITES is surely the convention with the most reputable non-compliance measures that are widely recognized as effective. Thus, even if the procedure is part of a "supportive, not adversarial approach",⁷⁸ the Standing Committee can recommend measures to suspend trade in species if a Party fails to comply with some of its obligations. The suspension is lifted when the problem is resolved, or sufficient progress has been made. The Standing Committee has access to a wide range of other measures: advice, warnings, recommendations, assistance and support measures, etc. The Standing Committee may also use a variety of other measures. Trade suspension can be regarded as a sword of Damocles or a vehement assertion. However, the specific characteristics of this particular environmental convention should be noted: its trade dimension (which allows effective counter-measures), the many partnerships established for its implementation (with Interpol in particular) and its seniority (Pre-Rio Convention). Moreover, the procedures developed, although their effectiveness has been proven, can be weakened by the difficulties in detecting illegal wildlife trafficking. Lastly, failure to implement the Convention is frequently due to financial and administrative constraints, rather than to the unwillingness of Parties. In this regard, a lack of technical guidance from national authorities, who are best placed to implement the Convention's provisions, is often highlighted.

2) **The Basel Convention on the Control of Transboundary Movements of Hazardous Waste (1989)**: The Basel Convention is more in line with the Rio Conventions, including the CBD, in terms of the same logic of international governance and cooperation. The Committee administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention monitors the implementation of the Convention, but essentially acts as a facilitator. The Committee clarifies the obligations of Parties and promotes a common understanding of the rules, while analysing general implementation issues. It may also intervene in cases of suspected non-compliance, at the request of a Party experiencing difficulties, a Party "that has concerns or is affected by a failure to comply with and/or implement the Convention's obligations by another Party with whom it is directly involved

under the Convention", or the Secretariat. Ultimately, the Committee may issue a warning to a non-compliant Party, but only as a last resort. Instead, the Committee will propose the provision of support to the Party concerned, including technical assistance and capacity building as a priority, as well as providing access to financial resources through the Trust Fund, which is funded by voluntary contributions from Parties. To date, all situations of non-compliance have been resolved through these facilitative approaches.

3) **The Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean Sea against Pollution and its Protocols (1976, amended in 1995)**: This convention, adopted within the framework of the Regional Seas Programme coordinated by UNEP, also has a Compliance Committee. The Committee examines general compliance issues, such as non-compliance with reporting obligations under the Barcelona Convention and its Protocols. It can be seized by a Party in difficulty, or by one Party against another, or by the Secretariat, to examine specific situations of actual or potential non-compliance by a given party. Contracting Parties are requested to prioritize their implementation challenges and needs in their national reports, but also to provide contextual data that can support the Committee's analytical work. The Committee provides advice and facilitates assistance. It may, as appropriate, invite a Party to prepare a compliance plan, or assist a Party in doing so, to achieve compliance within a time frame agreed between the Committee and the Party concerned. It may also invite Parties to submit to the Committee progress reports on its efforts to comply with its obligations under the Barcelona Convention and its Protocols. Finally, it may make recommendations to the Meeting of the Contracting Parties regarding cases of non-compliance, if it considers that such cases should be dealt with at that level. The regional centres, each of which has a specific field of action, are proving to be very good platforms for capacity building. The more general recommendations are also reflected in the MAP Work Programme. Here, the measures translate into a concern for integration and the resolution of national and regional implementation issues.

2.5.2. Structure and function of the institutional mechanism

Parties could decide to use a pre-existing body (such as the recently established SBI, which seems very appropriate in this case) or create an ad hoc body. Using the SBI could be advantageous from a streamlining point of view and could deepen the implementation progress review mechanism that is currently being established. One drawback, however, is that this body is open to all Parties, which could make its operation more cumbersome. A choice exists between the representativeness and legitimacy of a plenary body and the effectiveness of a smaller body.

Should the compliance procedure complement the Enhanced Transparency Framework, then it would be more

⁷⁸ Resolution Conf.14.3, CITES compliance procedures.

appropriate to entrust it to a dedicated committee. This would facilitate a move towards a genuine formalized compliance procedure. Such committees have between 8 and 25 members, and are elected by the COP on the basis of equitable geographical representation. It should be noted that the Secretariat does not seem to favour the option of a dedicated committee, considering that "For the specific purpose of reviewing the progress of individual Parties in implementing the Strategic Plan for Biodiversity, the model of a formal compliance mechanism appears to be narrowly focused and may hinder candid exchange and mutual advice among Parties".⁷⁹

Another element to determine is whether this body would be composed of representatives of the Parties or of independent experts. Under the Paris Agreement, members serve in their personal capacity as experts,⁸⁰ but it is not a universal solution. Furthermore, the COP could seek to include representatives of indigenous and local communities (there are two such representatives in the Nagoya Protocol Compliance Committee).

The body's mandate will need clarification. It would be useful for it to focus on the difficulties encountered by the Parties in setting and achieving their national targets and measures. It could also focus on the non-compliance of Parties with their procedural obligations (timely submission of reports and national biodiversity strategies and action plans, payment of mandatory contributions to trust funds under the Convention and the Protocols, submission of national reports, designation of national focal points or authorities, etc.). It may or may not include the monitoring of support measures (financial or technical assistance, technology transfer, etc.).

Some committees provide advice to Parties on the establishment and strengthening of national regulations by accompanying and assisting individual Parties in their efforts to implement decisions, or make recommendations on monitoring and compliance issues in general (directly or by recommending their adoption by the COP). Other bodies are responsible for examining general so-called "systemic" issues. One such example can be found in the Nagoya Protocol procedure, the Minamata Convention on Mercury,⁸¹ and also the Paris Agreement.⁸² According to the latter, "The Committee may identify issues of a systemic nature with respect to the implementation

of and compliance with the provisions of the Paris Agreement faced by a number of Parties and bring such issues and, as appropriate, any recommendations to the attention of the CMA⁸³ for its consideration" The Cartagena Protocol Committee is responsible for considering general compliance issues concerning Parties and their obligations under the Protocol, taking into account information provided by the national reports published in accordance with Article 33 of the Protocol, and also through the Biosafety Clearing-House.

2.5.3. Initiation of the procedure

If the monitoring body was to be given responsibility for an individual review, it should at least be able to be activated by one or more Parties encountering difficulties. In this case, the procedure would be entirely voluntary.

However, it is possible to go a step further and provide an additional procedure that could be activated by the Secretariat (for example, in cases where an expert report has identified a difficulty following the monitoring and verification procedure described above) or by the monitoring body itself in certain specific and predetermined cases. The Paris Agreement has provided for such a procedure, where the Committee may be seized by a Party or may refer matters to itself in the event of a violation of certain procedural obligations (failure to communicate or update a contribution, failure to submit a report, failure to participate in the multilateral review, etc.).⁸⁴

On the other hand, in view of the highly incentivizing nature of the procedure, it may not be desirable to let one or more Parties seize the Committee for having "reservations" about compliance with the obligations of another Party, as is the case for certain procedures⁸⁵, nor for members of the public to do so, as in the case of other procedures which remain rare and have only been regionally, and not universally, tested.⁸⁶

⁷⁹ Note by the Executive Secretary, *Further options for mechanisms to support review of implementation*, UNEP/CBD/SBI/1/10/Ad.3, 2 March 2016, p. 10.

⁸⁰ Under the Paris Agreement, they are "12 members with recognized competence in relevant scientific, technical, socioeconomic or legal fields to be elected by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) on the basis of equitable geographical representation, with 2 members each from the five regional groups of the United Nations and 1 member each from the small island developing States and the least developed countries, taking into account the goal of gender balance".

⁸¹ Article 15§3, Convention on mercury: "The Committee shall examine both individual and systemic issues of implementation and compliance and make recommendations, as appropriate, to the Conference of the Parties" (emphasis added).

⁸² Decision 20/CMA.1, Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, §32 ss.

⁸³ Meeting of the Parties to the Paris Agreement.

⁸⁴ Decision 20/CMA.1, Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, §§ 19 et ss.

⁸⁵ For example, under the Montreal Protocol on Ozone.

⁸⁶ The procedure for non-compliance with the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is the best known from this point of view. But other procedures recognize the role of the public. In addition to the Protocol on Pollutant Release and Transfer Registers (Decision I/2, Conference of the Parties, point D, §51 ff.), the same applies to the procedure of the Alpine Convention, whose Verification Committee can be "seized by the Contracting Parties and observers of any request for verification of alleged non-compliance with the Convention and its Protocols" (Article 2. 2, Conference of the Parties, Decision VII/4 Compliance Mechanism of the Alpine Convention and its Implementation Protocols) or that of the Protocol on Water and Health, whose Compliance Committee may receive communications from members of the public (Point VI, § 15, Compliance Procedure, Conference of the Parties, Decision I/2).

2.5.4. Investigation powers

In the case of individual monitoring, the procedure should specify the sources of information,⁸⁷ the time limits within which the Parties must respond, and whether or not the supervisory body may organize an on-site visit. Several non-compliance procedures provide for this, but always with the agreement of the State concerned.

2.5.5. Possible actions

In terms of possible measures, the use of sanctions is rare in non-compliance procedures. Even when they are included in the range of possible measures, they are very rarely used. Making provisions for sanctions seems inappropriate given the objectives pursued, which are to encourage and assist the implementation of the Convention. Here again, Parties could draw inspiration from the Paris Agreement procedure (see box below, which also gives two other illustrations of possible measures).

BOX 8. BETWEEN THE CARROT AND THE STICK: THREE EXAMPLES OF POSSIBLE REACTIONS TO NON-COMPLIANCE

1) Under the **Paris Agreement**, the Conference of the Parties defined the measures that the Committee may take "With a view to facilitating implementation and promoting compliance". "Appropriate" measures may consist of:

"a) Engage in a dialogue with the Party concerned with the purpose of identifying challenges, making recommendations and sharing information, including in relation to accessing finance, technology and capacity-building support, as appropriate;

b) Assist the Party concerned in the engagement with the appropriate finance, technology and capacity-building bodies or arrangements under or serving the Paris Agreement in order to identify possible challenges and solutions;

c) Make recommendations to the Party concerned with regard to challenges and solutions (...) and communicate such recommendations, with the consent of the Party concerned, to the relevant bodies or arrangements, as appropriate;

d) Recommend the development of an action plan and, if so requested, assist the Party concerned in developing the plan;

e) Issue findings of fact in relation to matters of implementation and compliance (...).⁸⁸

⁸⁷ The Nagoya Protocol Committee may seek the advice of independent experts. It "may undertake, upon invitation of the Party concerned, information gathering in the territory of that Party". The Cartagena Protocol Committee may also "seek expert advice from the biosafety roster of experts". It may "seek or receive and consider relevant information from sources, such as: a) The Biosafety Clearing-House, the Conference of the Parties to the Convention, the Conference of the Parties serving as the meeting of the Parties to the Protocol, and subsidiary bodies of the Convention on Biological Diversity and the Protocol; b) Relevant international organizations" (emphasis added).

⁸⁸ Decision 20/CMA.1, Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, §§ 28 and ss.

This range of possible responses reflects an essentially facilitative and incentive-based approach. The Committee can use a variety of "carrots" and assistance measures, but its only "stick" is the ability to "draw factual conclusions" from instances of non-compliance.

2) Under **CITES**, the Standing Committee has a wide range of possible measures available with which it can respond to non-compliance. The "measures to achieve compliance" are as follows:⁸⁹

"a) provide advice, information and appropriate facilitation of assistance and other capacity-building support to the Party concerned;

b) request special reporting from the Party concerned;

c) issue a written caution, requesting a response and offering assistance;

d) recommend specific capacity-building actions to be undertaken by the Party concerned;

e) provide in-country assistance, technical assessment and a verification mission, upon the invitation of the Party concerned;

f) send a public notification of a compliance matter through the Secretariat to all Parties advising that compliance matters have been brought to the attention of a Party and that, up to that time, there has been no satisfactory response or action;

g) issue a warning to the Party concerned that it is in non-compliance, e.g. in relation to national reporting and/or the National Legislation Project; and

h) request a compliance action plan to be submitted to the Standing Committee by the Party concerned identifying appropriate steps, a timetable for when those steps should be completed and means to assess satisfactory completion."

There is a gradation in possible measures where the Party concerned does not show good will (g) (h)). For the most serious cases (e.g. persistent non-compliance or very bad will), the Committee may "recommend the suspension of commercial or all trade in specimens of one or more CITES-listed species, consistent with the Convention". In such decisions, the Committee shall take into account:

"a) the capacity of the Party concerned, especially developing countries, and in particular the least developed and small island developing States and Parties with economies in transition;

b) such factors as the cause, type, degree and frequency of the compliance matters;

c) the appropriateness of the measures so that they are commensurate with the gravity of the compliance matter; and

d) the possible impact on conservation and sustainable use with a view to avoiding negative results.

⁸⁹ Resolution Conf.14.3, CITES compliance procedures (§29 and ss.).

These considerations are clearly set out in the Standing Committees recommendations".

3) In its "reactive" monitoring of sites protected under the UNESCO **World Heritage Convention**, the World Heritage Committee may take the following measures:

"a) It may decide that the property has not seriously deteriorated, or its State of Conservation sufficiently improved, and that no further action should be taken;

b) when the Committee considers that the property has seriously deteriorated, but not to the extent that its restoration is impossible, it may decide that the property be maintained on the World Heritage List, provided that the State Party takes the necessary measures to restore the property within a reasonable period of time. The Committee may also decide that technical co-operation be provided under the World Heritage Fund for work connected with the restoration of the property, proposing to the State Party to request such assistance, if it has not already been done; in certain circumstances, States Parties may wish to invite an advisory mission of relevant Advisory Organization(s) or other organization(s) or expert(s) to seek advice on measures necessary to reverse deterioration and respond to threats;

c) when specific requirements and criteria described in Paragraphs 177-182 are met, the Committee may decide to inscribe the property on the List of World Heritage in Danger in accordance with the procedures described in paragraphs 183-189;

d) when there is evidence that the property has deteriorated to the point where it has irretrievably lost those characteristics which determined its inscription on the List, the Committee may decide to delete the property from the List. Before any such action is taken, the World Heritage Centre will inform the State Party concerned. Any comments which the State Party may make will be brought to the attention of the Committee;

e) when the information available is not sufficient to enable the Committee to take one of the measures described in (a), (b), (c) or (d) above, the Committee may decide that the World Heritage Centre be authorized to take the necessary action to ascertain, in consultation with the State Party concerned, the present condition of the property, the dangers to the property and the feasibility of adequately restoring the property, and to report to the Committee on the results of its action; such measures may include the sending of a fact-finding or the consultation of specialists. In case an emergency action is required, the Committee may authorize its financing from the World Heritage Fund through an emergency assistance request".⁹⁰

Here again, the Committee has a wide range of possible responses at its disposal, mainly aimed at encouragement and assistance, but which may also lead to sanctions as a last resort.

⁹⁰ UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, WHC.19/01 10 July 2019, §§ 175 ss.

If Parties endeavour to go further, it would be possible to add to the range of "serious measures" or even to adopt a naming and shaming approach by issuing written warnings or non-compliance declarations. Serious measures could include disciplinary sanctions such as the suspension of voting rights or even of all rights and privileges attained through the Party status. Ultimately, economic sanctions may be imposed, which would mainly consist of the withdrawal of the benefits granted to States for participating in the Convention: withdrawal of financial subsidies, suspension of technical assistance, etc. This would remain rather ad hoc and limited as such benefits are themselves granted in a very limited way.

An approach that is more carrot than stick is essential. This is demonstrated by the development of non-compliance procedures, as well as practices. There is less and less room for sanctions, while procedures are becoming increasingly facilitative and less "confrontational". In this perspective, having sufficient financial resources to accompany States in difficulty is a necessity. This could contribute to the acceptance by Parties of the strengthening of control mechanisms, as has been the case in the framework of the Convention on Mercury for example.⁹¹ This could then facilitate the proper functioning of the mechanism. From this point of view, insufficient funds have been highlighted as a significant weakness of the Cartagena Protocol.⁹² The creation of a Green Biodiversity Fund could be envisaged, along the lines of the Green Climate Fund, with the aim of mobilizing much larger funds from both public and private sources.

2.5.6. Relations with traditional dispute resolution mechanisms

Non-compliance proceedings are inherently non-judicial in nature. Moreover, it is partly because contentious procedures are considered as unsuitable in the environmental field, that non-contentious procedures have developed.

However, such mechanisms do not exclude traditional dispute settlement procedures. Indeed, it is clearly stated in the two Protocols that they shall be "separate from, and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention".⁹³ Although mechanisms are not used in this way at present, they could be linked with judicial review. In accordance with P-M. Dupuy, we can consider that the use of classic liability mechanisms is possible and will remain so, although they are less appropriate than ad hoc non-compliance procedures.⁹⁴ However, they remain subsidiary, if not in principle then at least in practice, due to the special procedure defined by the Parties.⁹⁵

⁹¹ J. Templeton and P. Kohler, "Implementation and Compliance under the Minamata Convention on Mercury", *RECIEL* 23 (2) 2014, p. 211.

⁹² V. Koester, "The Compliance Mechanism of the Cartagena Protocol on Biosafety: Development, Adoption, Content and First Years of Life", *RECIEL* 18 (1) 2009, p. 90.

⁹³ Article 34 of the Cartagena Protocol. In the same sense, Article 30 of the Nagoya Protocol.

⁹⁴ P-M. Dupuy, "Où en est le droit international de l'environnement à la fin du siècle ?", *RGDIP*, 1997, p. 897.

⁹⁵ M. Koskenniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", in *Yearbook of International Environmental Law*, 1992, p. 134.

2.5.7. Relations with relations for non-compliance with protocols

It is debatable whether the creation of a third non-compliance procedure under the auspices of the CBD would require streamlining. For example, would it be desirable to seize the opportunity to merge the existing procedures into the new one? Provided that the differences in participation in the three instruments are taken into account, along with their specificities, such a solution remains possible and is being piloted, for example, under the Convention on Long-Range Transboundary Air Pollution (1979). An Implementation Committee was set up in 1997 to monitor compliance with the Convention and its eight implementing protocols.

3. THE LEGAL BASIS FOR THE ENHANCED TRANSPARENCY FRAMEWORK

We assume that this new framework will be defined by a COP decision, rather than by the adoption of a new treaty or a revision of the Convention, options that do not have unanimous support among the Parties.⁹⁶ Although lacking the scope of a treaty, a decision of the Conference of the Parties is not devoid of legal scope, particularly in regard to "super" decisions, as is the case in this instance, as shown in the following box which examines the legal scope of COP decisions based on the example of the "super" decision X/2 defining the Aichi Targets, adopted in 2010.

BOX 9. THE LEGAL SCOPE OF COP DECISIONS: THE EXAMPLE OF THE "SUPER" DECISION X/2 DEFINING THE AICHI TARGETS (2010)

In decision X/2 the COP "Urges Parties and other Governments, with the support of intergovernmental and other organizations, as appropriate, to implement the Strategic Plan for Biodiversity 2011-2020 and in particular to (...) Develop national and regional targets, using the Strategic Plan and its Aichi Targets, as a flexible framework, (...) Review, and as appropriate update and revise, their national biodiversity strategies and action plans, in line with the Strategic Plan".

Despite the name, COP *decisions* are not clearly binding on State Parties. A case-by-case analysis, conducted on a provision-by-provision basis, is required to determine their scope.

The CBD provides that the COP shall "i) Consider and undertake any additional action that may be required for the

achievement of the purposes of this Convention in the light of experience gained in its operation" (Article 23§4 i)). The adoption of Decision X/2 falls precisely within this framework and is strongly anchored in the Convention (Articles 6, 10, 23§4). The adoption of the Strategic Plan was considered by the COP as an "action that may be required for the achievement of the purposes of the Convention in the light of experience gained in its operation". Through this decision, the COP considers that the implementation of Article 6 implies that the Aichi Targets are taken into account, particularly through the NBSAPs (Article 6§1), even if this is not expressly stated. The vocabulary used is strong ("urges") even if some attenuation is made ("as appropriate", "in accordance with national priorities and capacities", taking into account "the resources provided"). The Parties agreed to the establishment of a monitoring mechanism - albeit an undemanding one - for the national implementation of the Aichi Targets.⁹⁷ It was adopted by consensus and without opposition.

The decision, although not mandatory, creates a new legal situation. The International Court of Justice, in relation to the UN General Assembly resolutions, stated that "even if they are not binding, they may sometimes have normative value".⁹⁸ A COP decision is always a legal act which produces legal effects. Firstly, a State is obliged to consider it in good faith, to the extent that it reflects the majority opinion or, in this case, the opinion of all States in a treaty to which it has accepted to be a party. Secondly, the COP's decision may be relevant to the interpretation of the Convention. In the *Whaling in the Antarctic* (Australia v. Japan) case, in relation to the recommendations of the Whaling Convention, the International Court of Justice recently had occasion to clarify that "these recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule".⁹⁹ Subsequent practice will help to confirm the interpretation.

Thus, a COP decision provides guidance to Parties and can effectively influence the implementation of the Convention's objectives. Parties should, at the very least, make efforts to implement such a decision in good faith.

⁹⁶ For a presentation of these options and legal issues, see M. Wemaëre, S. Maljean-Dubois, A. Rankovic, Y. Laurans, *What legal options for the international agreement on biodiversity in 2020? A first look at the possibilities*, IDDRI, nov. 2018, <https://www.iddri.org/en/publications-and-events/issue-brief/what-legal-options-international-agreement-biodiversity-2020>.

⁹⁷ See §14 "Recalling that the role of the Conference of the Parties is to keep the implementation of the Convention under review, decides that future meetings of the Conference of the Parties shall review progress in the implementation of the Strategic Plan for Biodiversity 2011-2020, share experiences relevant for implementation and provide guidance on means to address obstacles encountered". See also decision X/10 "National reporting: review of experience and proposals for the fifth national report".

⁹⁸ Advisory Opinion of 8 July 1996, *ICJ Rec.*, 1996.

⁹⁹ Judgment of 31 March 2014, *ICJ Rec.* 2014, § 46.

CONCLUSION

The invention, continuous development and improvement of innovative monitoring, evaluation and response procedures to address non-compliance are considered as a major and yet largely unknown achievement of international environmental law over the last twenty years. These developments are based on a nuanced and gradual response to the normative and institutional deficits of this particular body of law.¹⁰⁰ However, the effectiveness of these procedures varies considerably and depends largely on their design. As is often the case, the devil is in the detail and careful attention must therefore be paid to the development of this enhanced transparency framework.

As a complement to the international framework, it is worth noting that one prospect for the future could be the development of national level trials. The increase in the number of climate change trials is a perfect illustration of the growing interest now being shown in national judges, who are ordinary judges in respect to international law, for ensuring that States implement their international commitments.¹⁰¹ Their rapid development, which seems to be an international trend, could in future lead to the appearance of national lawsuits to tackle other global issues, such as biodiversity. International provisions promoting broad access to justice for environmental issues could then support such developments,¹⁰² as could the establishment of an enhanced transparency framework for the post-2020 period as highlighted in the table below

¹⁰⁰ A. Cardesa-Salzmänn, "Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements", [2012] 24(1) *Journal of Environmental Law* pp. 103-132.

¹⁰¹ L. Wegener, "Can the Paris Agreement Help Climate Change Litigation and Vice Versa?", *Transnational Environmental Law*, 2020, pp. 1 ss. ; C. Cournil, L. Varison (dir.), *Les procès climatiques. Entre le national et l'international*, Pedone, Paris, 2018, 298 p. ; N. Castro Nino, "Le contentieux climatique et l'invocation de la responsabilité internationale en défense d'intérêts collectifs", *Annuaire français de droit international*, 2018, pp. 593 ss.

¹⁰² See for example the Aarhus Convention (1998) on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; Article XVI of the Maputo African Convention (2003) on the Conservation of Nature and Natural Resources; the Escazu Regional Agreement (2018) on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (2018).

| Stage | Pillars | Rationale |
|-----------------------------|---|--|
| Planning | Strengthening National Biodiversity Strategies and Action Plans (NBSAPs) as the main tool for implementing the CBD at the national level; | Both the effectiveness and efficiency of implementation measures must be assessed on the basis of accurate, consistent and verifiable data, which requires the improvement of the reporting system, which is based on biodiversity data monitoring prerequisites, which are mostly the responsibility of local and national authorities. The starting point of the assessment remains the content of the national reports, it being specified that the reports should focus on NBSAPs. NBSAPs could evolve in the post-2020 framework to include the requirement of a result at the domestic level to strengthen their effectiveness on the ground. In the context of the post-2020 discussions, Parties have early on referred to a possible strengthening of NBSAPs, as well as the consolidation of national reports, and stressed the need to increase the quality and comparability of these two instruments. What is aimed here is the joint improvement of i) the consistency between the planning (NBSAP) and the reporting (National Reports) tools at the national level, and ii) the coupling between these national tools and the implementation of global goals. |
| Reporting | Strengthening reporting mechanisms | |
| Review and verification | Improving the individual review-verification Setting up a global periodic review | To date, and although the framework is still evolving, it is the responsibility of the Conference of the Parties, in conjunction with the Secretariat, the SBSTTA and the SBI, to monitor the implementation of the Convention (and the Strategic Plan for Biological Diversity 2011-2020), based on the information provided by the Parties in their NBSAPs and National Reports. The current mechanism is neither intrusive nor binding, as it does not provide any procedures for the individual assessment of data provided by Parties, it does not assess their support needs, or verify compliance with treaty obligations, or allow Parties to initiate discussions on this issue. This is not the purpose of the "report on reports" (see 1.4 above) prepared by the Secretariat. As for the voluntary peer review mechanism, it is an initial response to the growing awareness of the need for enhanced review mechanisms under the Convention, but for now it remains a facilitative and optional procedure, relying entirely on the goodwill of the Parties, and is inherently limited in scope. Moreover, in the pilot phase it was not the reports of Parties that were directly discussed, but the guidance documents prepared for the occasion, with the national reports being only one element of context. Finally, observers, and more broadly non-state actors, have not been involved, even though the diversification of information sources plays an important role in the robustness of such processes. Reinforced monitoring and evaluation of progress made under the NBSAPs, and also of what Parties need in order to achieve these plans, would enable the creation of a new dynamic of continuous improvement, to stimulate ambition to achieve the 2030 objectives and to respond to the 2050 Vision. A global periodic review would be a necessary element to sustain this dynamic of political ambition. |
| (Non-) compliance mechanism | Establishing a compliance mechanism | From the 1990s onwards, mechanisms for monitoring compliance with international environmental law were systematized and strengthened in certain conventional areas, due to the development of so-called "non-compliance" procedures. These procedures are formalized, generally by one or more resolutions of a convention's plenary political body. Typically, a monitoring committee is set up, which adheres to specific guidelines regarding its composition, mandate, decision-making processes and relations with other bodies. Besides this formalization, these procedures differ, due to their global and coherent nature, from other implementation techniques and procedures that have been tried and tested in the environmental field. Ideally, these procedures should be able to prevent cases of non-compliance through cooperation, ensure compliance, provide assistance in the event of non-compliance, and provide a dispute settlement mechanism and even enforcement measures. Although theoretically distinguishable, in practice these different aspects are very closely linked: processes are dynamic and the same facts may give rise to the full range of measures over time. These types of procedures have proven to be effective (see Box 2, below). ¹⁰³ International organizations are encouraging their development, which is expected to continue in the coming years. ¹⁰⁴ In these circumstances, Parties could consider establishing a non-compliance procedure within the framework of the Convention itself, bearing in mind that different modalities and procedures could be envisaged, depending on the degree of constraint and institutionalization desired. |

¹⁰³ M. Koskeniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", in *Yearbook of International Environmental Law*, 1992, p. 134.

¹⁰⁴ See, for example, the Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, adopted by UNEP Governing Council decision SS.VII/4. See also the Guidelines for Strengthening Compliance with and Enforcement of Multilateral Environmental Agreements in the UNECE Region, ECE/CEP/107, Kiev, 21 May 2003.

Towards a better review mechanism under the post-2020 Biodiversity framework: legal options and possible institutional arrangements

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