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COMPLIANCE COMMITTEE UNDER THE CARTAGENA PROTOCOL ON BIOSAFETY

Eighth meeting
Montreal, 5-7 October 2011

SOME CONSIDERATIONS ON POSSIBLE MODALITIES OF IMPLEMENTATION OF THE SUPPORTIVE ROLE OF THE COMPLIANCE COMMITTEE AS MODIFIED BY DECISION BS-V/1

Note by the Executive Secretary

I. INTRODUCTION

1. The fifth meeting of the Parties to the Cartagena Protocol on Biosafety was held in Nagoya, Japan, from 11 to 15 October 2010. Among the decisions adopted by the Parties was decision BS-V/1 on compliance,¹ which was taken on the basis of proposals submitted by Parties on how to improve the supportive role of the Compliance Committee under the Cartagena Protocol on Biosafety. The Committee itself had also submitted a recommendation in favour of the adoption of the proposals.

2. Decision BS-V/1 expands the grounds whereby the compliance procedures under the Protocol may be activated. According to section IV of the compliance procedures (decision BS-I/7) the Compliance Committee could receive submissions relating to compliance only from a Party with respect to itself or with respect to another Party. In light of decision BS-V/1, however, the Committee may now also consider cases concerning the compliance of a Party that fails to submit its national report, or where information received through a national report or the Biosafety Clearing-House (BCH) shows that a Party is faced with difficulties in complying with its obligations under the Protocol.²

3. While decision BS-V/1 has resulted in the expansion of the grounds that may be used to activate the compliance procedures, it has also restricted the measures that the Committee may consider taking in response to any difficulties in complying with obligations. Accordingly, except in the case of a situation where a Party makes a compliance submission against another Party, the measures the Committee may take are only those specified in paragraphs 1 (a) and 1 (b) of section VI of the annex to decision BS-I/7.³ These measures are: (a) providing advice or assistance to the Party concerned; and/or (b) making recommendations to the Parties to consider the provision of financial and technical assistance, technology

¹ The text of decision BS-V/1 is annexed below.

² Decision BS-V/1, para. 1 (b).

³ Decision BS-V/1, para. 1 (a).

/...

transfer, training and other capacity-building measures to such Party that faces difficulties in fulfilling its obligations under the Protocol.

4. In view of these changes in the scope and application of the compliance procedures, the Chair of the Compliance Committee had suggested, in his review of the outcomes of the fifth meeting of the Parties to the Protocol, that the Committee may wish to consider developing a strategy or guidelines on how to implement the changes introduced by decision BS-V/1.

5. The present document has been prepared by the Secretariat with a view to facilitating such consideration by the Committee. It outlines some ideas and information that the Committee may wish to consider in its efforts to understand the meaning, nature and practical application of decision BS-V/1. Section II of the document provides background information to assist in understanding the decision. Section III highlights some of the possible issues that may arise in the process of applying decision BS-V/1. The issues highlighted take into account relevant experiences, where available, under other multilateral environmental agreements. Section IV of the document presents some suggestions for the consideration of the Committee.

II. BACKGROUND TO DECISION BS-V/1

6. In one of its recommendations it submitted to the Parties to the Protocol at their fourth meeting, the Compliance Committee invited the meeting to request Parties to submit views and information on the lack of submissions relating to compliance in accordance with the procedures and mechanisms adopted under decision BS-I/7. There was a recognition that had become increasingly shared by the Committee and the Parties to the Protocol that the compliance procedures under BS-I/7 were not fully utilized by Parties facing difficulties in fulfilling their obligations under the Protocol. In that context, the Parties to the Protocol, in their decision BS-IV/1, invited Parties to submit their views on how to improve the supportive role of the Committee.

7. A number of Parties submitted views in response to the invitation in decision BS-IV/1 and these views were generally in favour of allowing the Committee to be able to play a more proactive role with a view to improving compliance by individual Parties. A compilation of the views was submitted, together with proposals, to the fifth meeting of the Parties to the Protocol, which then adopted decision BS-V/1. As summarized above, the decision broadens the scope of elements that trigger the compliance procedures under the Protocol⁴ but, except in the case of a compliance submission made by a Party against another Party, it narrows the range of measures that may be taken to promote compliance and address cases of non-compliance.

8. The table below summarizes the grounds by which the compliance procedures under the Biosafety Protocol could be triggered and the possible measures that may be taken by the Compliance Committee as specified under decisions BS-I/7 and BS-V/1. The combined compliance procedures and measures of the two decisions are further presented in the diagram that followed the table. The diagram tries also to relate these procedures and measures with the two major functions of the Compliance Committee, namely reviewing general issues of compliance, on the one hand and addressing cases of non-compliance, on the other.

⁴ This seems to be in line with the trend presently seen in other multilateral environmental agreements as well towards providing a more proactive role to secretariats and compliance mechanisms.

Table: Summary of the compliance procedures and measures as modified by decision BS-V/1

	Who invokes the compliance procedures	Possible measures by the Committee	What triggers the compliance procedures	
BS-I/7	<p>i. A Party with respect to itself - its own non-compliance due to some difficulties;</p> <p>ii. A Party with respect to another Party - a Party allegedly affected or likely to be affected by the non-compliance of another Party;</p>	<p>(a) Provide advice or assistance to the Party concerned;</p> <p>(b) Make recommendation to the COP-MOP regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures;</p> <p>(c) Request or assist, as appropriate, the Party concerned to develop a compliance action plan...</p> <p>(d) Invite the Party concerned to submit progress reports on its efforts to comply with...</p> <p>(e) Report to the COP-MOP on the efforts made by the concerned Party under (c) and (d).</p>	<p>iii. Failure to submit a national report;</p> <p>iv. Information from a national report showing that the Party concerned is having difficulties complying with its obligations;</p> <p>v. Information from the BCH showing that the Party concerned is having difficulties complying with its obligations.</p>	BS-V/1
<p>NOTE: - Measures (c) to (e) seem to have been suspended in the case of (i), where a Party makes a submission with respect to itself, and measures (a) to (e) are still applicable in the case of (ii), where a Party makes submission to the Committee with respect to another Party</p>				

FUNCTIONS, PROCEDURES AND MEASURES

General issues of compliance

Review

National reports

BCH

Recommendations to COP-MOP

Provide advice or assistance

Request or assist the Party concerned to develop a compliance action plan

Invite the party to submit progress reports

Report to COP-MOP on efforts made by Party

Cases of non-compliance

A Party with respect to itself

A Party with respect to another Party

Information showing difficulties

Failure to submit a National Report

III. APPLYING THE COMPLIANCE PROCEDURES, INCLUDING SOME EXPERIENCES FROM OTHER MULTILATERAL ENVIRONMENTAL AGREEMENTS

A. *Who invokes or what triggers the compliance procedures*

1. *Failure to submit a national report*

9. Failure to submit a national report has been a matter of a general issue of compliance under the compliance procedures and mechanisms adopted under decision BS-I/7 by the first meeting of the Parties to the Protocol. A number of Parties did not submit their first national report. The Committee reviewed the issue extensively and made several recommendations. Now, according to the expanded grounds for triggering the compliance procedures, the Committee may address individual Parties that fail to submit their national report.

10. There is a time limit set for Parties to submit their national report. The Secretariat issues notifications and subsequent reminders concerning the date of submission of national reports. It receives national reports. After the expiry of the deadline for the submission of national reports, the Secretariat communicates to the Committee the names of Parties that have failed to submit their national report on time. The Committee may, depending on the circumstances, such as the number of Parties concerned, decide to take the matter either as a general issue of compliance or a case of non-compliance, or both.

11. Under the compliance procedures of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, for example, the Secretariat may make submissions to the Committee if it becomes aware of possible difficulties of any Party in complying with its reporting obligations, provided that the matter has not been resolved within three months through consultation with the Party concerned.⁵ The Secretariat may become aware of a Party's difficulty to submit a report, either due to the lack of a timely submission or through any of its regular functions of coordination, assistance and compiling of information.⁶

12. Paragraph 7 of Article VIII of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requires Parties to submit national reports. The Secretariat provides the Standing Committee with a list of countries that have not submitted a report, without adequate justification⁷. The Standing Committee determines, on the basis of the reports presented by the Secretariat, which Parties have failed to submit a report for three consecutive years and may recommend measures be taken with respect to such Parties.⁸

13. Under the United Nations Framework Convention on Climate Change (UNFCCC), the Secretariat issues a general notification to Parties to the Kyoto Protocol that are included in Annex I of the Convention, reminding them of their various reporting obligations and the expected dates for submission. Parties that cannot submit reports by the deadline are expected to inform the Secretariat.⁹

14. In the event of a delay or failure to submit national communications, the Secretariat informs the Compliance Committee under the Kyoto Protocol of the situation. For instance, the Secretariat issued a note on 18 February 2010 that provided information on the delay in the submission of the fifth national

⁵ Paragraph 9 (c) of the Terms of Reference of the Mechanism for Promoting Implementation and Compliance under the Basel Convention.

⁶ Articles 13 and 16 of the Basel Convention.

⁷ CITES Resolution Conf. 11.3 (Rev. CoP 15).

⁸ CITES Resolution Conf. 11.17 (Rev. CoP 14).

⁹ Paragraph 10, Annex to the UNFCCC Message to Parties to the Kyoto Protocol, 2 November 2009 (Ref: EDM/RDA/KP/09).

communications from some Annex I Parties. The note makes reference to Guidelines for review under Article 8 of the Kyoto Protocol, as contained in the annex to decision 22/CMP.1, which stipulate that, “if a Party included in Annex I expects difficulties with the timeliness of its national communication submission, it should inform the secretariat before the due date of the submission. If the national communication is not submitted within six weeks after the due date, the delay shall be brought to the attention of the COP/MOP and the Compliance Committee and made public” (para. 139).¹⁰ The Secretariat’s note contains also a table with a list of countries that have not submitted their national communications, including a comment in each case indicating the dates when the national communication was due for each Party concerned.

2. *Information in a national report shows compliance difficulties*

15. According to decision BS-V/1, the Compliance Committee could also act on the basis of information that a Party provided in its national report. For example, question 90 of the second national report format states: “In the current reporting period, if your country has taken decisions regarding LMOs, how many risk assessments were conducted in the context of these decisions?” If the answer of a Party to this question is “none”, there might be a potential case of non-compliance with the Protocol, in particular if the Party has indicated that the decisions were taken in the context of intentional introduction of living modified organisms into the environment. Such implementation gap may justify intervention by the Committee with a view to helping the concerned Party fully comply with its obligations under the Protocol.

16. Under the Basel Convention, non-compliance cases that the Secretariat can bring up have so far been limited to a Party’s failure to submit reports. The Secretariat presents a list of Parties that have not submitted national reports to the Implementation and Compliance Committee. At its last session held from 21 to 23 March 2011, the Committee considered amending paragraph 9 (c) of the terms of reference of the Mechanism for Promoting Implementation and Compliance with a view to enabling the Secretariat to provide more information that have implications on the compliance of Parties with their obligations under the Convention. The Committee approved a text to be considered at the tenth meeting of the Conference of the Parties to the Convention (COP) to be held from 17 to 21 October 2011.¹¹ If the proposed changes are accepted by the COP, the Secretariat would be allowed to refer to the Committee not only difficulties in fulfilling reporting obligations, but also matters relating to Parties’ compliance with *all* parts of the Convention, “thus providing for a secretariat trigger similar to the ones under the Montreal Protocol and CITES”.¹²

17. The “Guide to CITES compliance procedures”¹³ explains that potential compliance matters are mainly identified through, but not exclusively, annual and biennial reports and legislative texts, as well as other special reports and responses to information requests, for example within the Review of Significant Trade¹⁴ or the National Legislation Project.

¹⁰ “Information on the delay in submission of fifth national communications from Parties included in Annex I to the Convention that are also Parties to the Kyoto Protocol” (Document CC/2010/1 of 18 February 2010).

¹¹ Annex II on Recommendations on ways to address the shortcomings and limitations in relation to the possibilities for making submissions to the Implementation and Compliance Committee, report prepared as an information document (Document UNEP/CHW.10/INF/11) in support of the Report of the eighth session of the Implementation and Compliance Committee to be considered at the COP-10 meeting in October 2011.

¹² *Ibid.* page 29.

¹³ “Guide to CITES compliance procedures” contained in the annex to Resolution Conf. 14.3 is a non-legally binding document describing existing procedures in order to facilitate consistent and effective handling of compliance matters relating to obligations under the Convention, taking into account relevant Resolutions and Decisions, in both specific and general compliance matters. Paragraph 15 describes how potential compliance matters are identified.

¹⁴ Initiated by a COP decision, the Review of Significant Trade process is the CITES mechanism for remedial action when there is reason to believe that certain listed species (in Appendix II to the Convention) are being traded at significant levels without

18. CITES Resolution Conf. 8.4, on national laws for implementation of the Convention, amended at the 14th and 15th meetings of the Conference of the Parties, established the National Legislation Project in 1992. The Secretariat has been directed to compile and analyse information provided by Parties on appropriate measures adopted by Parties for effective implementation of the Convention and to identify those Parties whose domestic law does not: (i) designate responsible authorities, (ii) prohibit trade in violation of the Convention, (iii) penalize such illegal trade and provide for confiscation of specimens that were illegally traded or possessed, all in accordance with the provisions of CITES. A list of countries identified as requiring attention as a priority under the National Legislation Project is submitted to the CITES Standing Committee.

19. At its fourth session, the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) adopted “Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance”.¹⁵ Under the procedures, submissions relating to issues of non-compliance may be received from the Governing Body, in addition to the Contracting Parties.¹⁶ They also contain an obligation to report on measures taken to implement the Treaty.¹⁷ Reports by Parties are submitted through the Secretary of the Treaty to the Compliance Committee for its consideration. The Committee then synthesizes and analyses the information and submits its report to the Governing Body with its recommendations. Technically, it is possible for the Governing Body, as one of the entities capable of triggering the compliance procedures under the Treaty, to re-submit to the Compliance Committee some of the analysis that it thinks shows potential cases of non-compliance. The Committee is expected to develop further, at the request of the Governing Body, the procedures on monitoring and reporting, and to submit its recommendations for consideration and approval.¹⁸

3. *Information in the Biosafety Clearing-House shows compliance difficulties*

20. Information-sharing is central to the Protocol and is considered to be essential for the achievement of its objective. The Protocol established the BCH to facilitate information-sharing. As it stands now, the BCH contains wide-ranging information related to biosafety in general and the implementation of the Protocol in particular. It should, however, be clear that not all information available in the BCH has significance to the issue of compliance.

21. The Protocol requires specific information to be made available to the BCH by each Party. Paragraph 3 of Article 20 of the Protocol and a number of other provisions identify different types of information that each Party has to make available to the BCH. Some types of information such as information on national focal point or competent national authorities are required to be made available by each Party as soon as the Protocol enters into force for it. Other types of information such as information on decisions concerning the release or import of living modified organisms or information on domestic laws relevant to the implementation of the Protocol need to be made available as soon as the decisions are taken or the laws are enacted. If the existence of a certain type of information is known from a review of a national report or other sources of information submitted by a Party, the absence of such information from the BCH may show difficulties faced by that Party in complying with its obligations under the Protocol. On the other hand, if the information already available in the BCH is found to be inconsistent with the obligations under the Protocol, that could also be an indication regarding the existence of difficulties in complying with obligations under the Protocol.

adequate implementation of CITES provisions. If implemented correctly, the process acts as a safety net for the Convention by ensuring that species are managed sustainably. The Animals and Plants Committees implement the mandate for this process.

¹⁵ Resolution 2/2011 on procedures and operational mechanisms to promote compliance and address issues of non-compliance contained in Appendix A.2 of the Report of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture on its fourth session in March 2011 (Document IT/GB-4/11/Report).

¹⁶ *Ibid.* Section VI, paragraph 1.

¹⁷ *Ibid.* Section V.

¹⁸ *Ibid.* Section V, paragraph 4.

22. The presence or absence of information in the BCH could, therefore, form a basis for initiating the compliance procedures as provided in decision BS-V/1. But the Compliance Committee is supposed to rely on information specifically required to be made available by the Protocol. In other words, only mandatory information that each Party submits or failed to submit directly to the BCH through its management centre, or communicates in writing to the Secretariat (e.g. submissions) needs to be taken into account for the purpose of initiating the compliance procedures under the Protocol. In practice, it is the national focal point and/or the BCH focal point of each Party that assume the responsibility for making such mandatory information available through the BCH.

B. What measures may be taken in response to information showing compliance difficulties

1. Providing advice or assistance

23. In the event a Party fails to submit its national report within the deadline or after some reasonable period of time or once information from a national report or the BCH shows that a Party is not fulfilling one or more of its obligations under the Protocol, compliance procedures could be initiated. The proceedings may follow the approach specified in paragraphs 2 and 3 of section IV of the annex to decision BS-I/7, or the Committee may adopt another process that it might think appropriate and more consistent with its supportive role.

24. The Secretariat may be entrusted with the task of approaching the Party concerned (except in a case where a Party has made a submission with respect to its own compliance) prior to any initiation before the Committee, with a view to gathering all relevant information on situations that caused or contributed to the Party's failure to fulfill its obligations and to exploring all possible steps or means to overcoming them. This seems to be consistent with the procedure under decision BS-I/7 involving a case brought by a Party against another Party. Submissions received by the Secretariat from Parties with respect to another Party are to be made available to the Party concerned, by the Secretariat, within fifteen days of receipt. The case is only transmitted to the Committee once a response and any necessary information have been received from the concerned Party or after six months have expired.

25. Once the necessary information has been gathered, and the efforts of the Secretariat are exhausted, the case may be referred to the Compliance Committee so that it proceeds with the best option to help the Party overcome its difficulties. The Committee may also choose to examine the information and the response, if any, gathered and to establish whether any failure to fulfill an obligation under the Protocol has existed, prior to proceeding any further. Such determination may be made by the Committee in consultation with the Party concerned. Upon the agreement of the Party concerned, the Committee may then proceed to extending its support by offering to provide advice or assistance to the Party. The nature of the advice or assistance may largely be dependent on the nature of the difficulties the Party is faced with.

26. The Compliance Committee may draw on past experience in identifying some possible items of advice or assistance that its members could offer to Parties that have difficulties to fulfill their reporting or other obligations under the Protocol. These include that members of the Committee provide information on how Parties may access other services and assistance available to them, in particular with regard to that provided by or obtained through the Secretariat and the Global Environment Facility (GEF), which may include, but is not limited to, assistance in completing and submitting national reports, accessing the roster of experts, participation in regional workshops, access to GEF funds for the preparation of national reports, such as the second national report which is almost due, and information as regards the availability of guidance material, such as the guidance on risk assessment and capacity-building guidance developed by the fifth coordination meeting, to assist in implementing the provisions of the Protocol.

27. Other multilateral environmental agreements also have relevant experience regarding measures taken by compliance bodies in response to failure to submit or delay in the submission of national reports.

28. The Secretariat of the Basel Convention presented, for the first time, submissions to the Implementation and Compliance Committee concerning Parties that had not complied with their reporting obligation in accordance with Article 13, paragraph 3, of the Convention and that had not been able to resolve their potential difficulties within three months, in spite of consultations initiated by the Secretariat. Nine such submissions were considered at the eighth session of the Committee in March 2011.¹⁹ The Committee decided to consider each submission individually on its own merit and invited each Party concerned to participate in the consideration of the submission either in person or by teleconference. Out of the nine Parties, two sent representatives to the meeting, two had a representative participate by teleconference and the remaining five did not participate at all.

29. Nine decisions were adopted by the Committee. The decision, in each case, concludes that the country is facing difficulties complying with its reporting obligations, declares commitment to assist the country concerned, decides to provide the country with information and guidance on national reporting, requests the Secretariat to invite the country to a forthcoming workshop on national reporting and decides to keep the matter under review. The Committee believed that the presence of each concerned Party assisted the Committee in determining the facts and root causes of the matter of concern. It welcomed the willingness of each Party to submit to the Secretariat a revised questionnaire on “transmission of information” and decides to elaborate, in cooperation with the Party and with the assistance of the Secretariat, before the next meeting of the Conference of the Parties, a voluntary compliance action plan to assist the concerned Party in resolving the matter.²⁰

30. The Implementation and Compliance Committee extended further invitations to those Parties that were not represented at the session. It invited each Party to communicate with the Committee through the Secretariat before the next meeting of the Conference of the Parties, and requests the Secretariat to continue its efforts to communicate with the concerned Parties.

31. Following the report of the Secretariat of the UNFCCC as referred to in paragraph 14 above, the Facilitative Branch of the Compliance Committee under the Kyoto Protocol noted, at its eighth meeting, the need to take proactive action with respect to Parties that have not yet submitted their fifth national communications and agreed that this matter should be put to the full membership of the branch.²¹ Taking into account the fact that the Plenary of the Committee had repeatedly sought guidance from the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) with regard to the actions the Committee could take in relation to delays in the submission of national communications, but that the CMP had not addressed its request,²² the Branch decided to develop its own practice based on its mandate in paragraph 4 of section IV of the “Procedures and mechanisms relating to compliance under the Kyoto Protocol” as set out in the annex to decision 27/CMP.1.²³

¹⁹ Paragraph 9 of the report of the eighth session of the Basel Convention Implementation and Compliance Committee held in Geneva, 21-23 March 2011 (UNEP/CHW/CC/8/25).

²⁰ *Ibid.* paragraphs 11-19.

²¹ Paragraph 8 of the report of the eighth meeting of the Facilitative Branch of the Compliance Committee (document CC/FB/8/2010/4 of 7 July 2010).

²² Report of the ninth meeting of the Facilitative Branch of the Compliance Committee held in Bonn, Germany on 16 September 2010 (Document CC/FB/9/2010/2).

²³ Paragraph 4 of section IV of the “Procedures and mechanisms relating to compliance under the Kyoto Protocol” as set out in the annex to decision 27/CMP.1 states that, “The facilitative branch shall be responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments under the Protocol, taking into account the principle of common but differentiated responsibilities and respective capabilities as contained in Article 3, paragraph 1, of the Convention. It shall also take into account the circumstances pertaining to the questions before it.”

32. Accordingly, in July 2010, a vote by Branch members and alternate members was taken electronically, pursuant to Rule 11, paragraph 2, of the “Rules of procedure of the Compliance Committee of the Kyoto Protocol” contained in the annex to decision 4/CMP.2²⁴ and a letter was sent to the concerned Party on 28 July 2010 by the Chairman of the Committee on behalf of the Committee.²⁵ In the letter, the branch expressed concern with the unexplained delay of submission and inquired whether it could provide advice and facilitation to the Party in order to help it implement its reporting obligations. The Party responded to the letter on 16 September 2010 informing the Chairperson that the report was under preparation and could be expected to be ready for submission by early November at the latest. It further explained the reasons for the late submission and promised to keep the UNFCCC informed of the progress.²⁶ The branch concluded that it would send a follow-up letter to the Party requesting information on the status of its submission and reiterating its offer of advice and facilitation if the report was not received by 15 November 2010.²⁷ The Party submitted its fifth national communication in March 2011.²⁸

2. *Making recommendations regarding the provision of financial and technical assistance, technology transfer and other capacity-building measures*

33. In a situation where the Committee considers it necessary to pursue measures to promote compliance or address a case of non-compliance of a Party, it may choose to submit a recommendation to the meeting of the Parties in accordance with paragraph 1 (b) of section VI of decision BS-I/7. A recommendation to the meeting of the Parties is also one of the two options of measures that the Committee may consider taking in response to the situations described under paragraph 1 (b) of decision BS-V/1.

34. The nature or purpose of the recommendations that the Committee may wish to submit to the meeting of the Parties has already been defined. It is to draw the attention of the Parties that the difficulties facing the non-complying Party may better be tackled through the provision of financial assistance and technical assistance, technology transfer and other capacity-building measures.

35. The recommendation may identify particular financial needs of a Party so as to enable it to comply with its obligations under the Protocol and may include a request for funds from the GEF or other bilateral cooperative arrangements. For example, one of the last recommendations of the Compliance Committee was to make funding available to eligible Parties to support their efforts to prepare and submit their second national reports in a timely manner. The recommendation was accepted by the Parties, and the GEF was urged to make the necessary funds available. The GEF has responded positively and announced, through the Secretariat, the specific procedures that it has set to expedite the financial assistance needed. The Secretariat issued a notification on 19 May 2011²⁹ informing all eligible Parties of the preparedness of the GEF to extend financial assistance for the preparation of the second national report on the implementation of the Protocol.

36. There is not much clarity about the nature and ultimate feasibility of recommendations to meeting of the Parties regarding the provision of technical assistance, technology transfer and other capacity-building measures. There is not enough information or practice that could give guidance on how these

²⁴ Rule 11, paragraph 2, of the “Rules of procedure of the Compliance Committee of the Kyoto Protocol” contained in the annex to decision 4/CMP.2 states that, “The Committee may elaborate and take decisions in a written procedure using electronic means, where possible.”

²⁵ Annex to the Facilitative Branch’s report on a vote by electronic means – Letter to the concerned Party (i.e. Monaco) concerning the late submission of its fifth national communication (document CC/FB/2010/2 of 30 July 2010).

²⁶ Letter from the concerned Party is included as an annex to the Report of the Facilitative branch’s ninth meeting (Doc. CC/FB/9/2010/2).

²⁷ Paragraph 6 in the report of the Facilitative Branch’s ninth meeting (Doc. CC/FB/9/2010/2).

²⁸ http://unfccc.int/resource/docs/natc/mco_nc5.pdf.

²⁹ <http://www.cbd.int/doc/notifications/2011/ntf-2011-101-bs-nr2-en.pdf>.

types of support, if recommended, could, in reality be secured and extended to the Party concerned. If the Committee intends to make such recommendations at some stage in the future to support and facilitate the compliance of a Party, it may need to look at the issues on a case-by-case basis and may draw some amount of experiences from capacity-building projects and action plans developed and carried out in the context of the Cartagena Protocol on Biosafety or other multilateral environmental agreements.

C. *What are the possible needs and modalities to effectively apply the compliance procedures*

1. *Analysis and tracking of information in national reports and the Biosafety Clearing-House*

37. The Compliance Committee is entrusted not only with the task of reviewing general issues of compliance on a regular basis but also addressing individual cases of non-compliance. The consideration of individual cases of compliance is no longer limited to being triggered only by a Party. Official information gleaned from a national report or the BCH could be used to initiate non-compliance procedures. This entails a heavy responsibility on the Compliance Committee to, first, carefully examine information with a view to identify and determine situations that show difficulties faced by a Party in complying with its obligations under the Protocol, and secondly, to consider and determine the appropriate steps or procedures that need to be followed once difficulties in complying with obligations under the Protocol have been observed or the existence of a potential case of non-compliance has been established.

38. The amount of information, the extent of analysis and verification needed, and the number of potential cases of non-compliance could be enormous and quite challenging. For example, if a large number of Parties have failed to submit their national report, the Committee may decide to take the matter as a “general issue of compliance” and thus no individual Parties may need to be approached. The smaller the number of Parties that failed to submit their national report, the simpler to address each Party with a view to provide support. But in all circumstances where Parties fail to submit their national report, there seems to be no alternative to contacting each concerned Party, understand the reason or the problem why that Party could not submit its national report and find out what support it might need to overcome such problem.

39. Currently, the Secretariat analyses information received through national reports using set criteria and produces certain generalized data disaggregated into the five regions of the United Nations. No data lends itself to showing the specific situation of an individual Party. There is not also a mechanism to verify or cross-check the information provided by each Party through its national report with the information that has been provided through the Biosafety Clearing-House or other submissions made by the same Party for some specific purposes. For example, Parties provide reports from time to time on their implementation of the Capacity-building Action Plan or the implementation of the requirements of the Protocol with respect to handling, transport, packaging and identification of living modified organisms.

40. Taking this huge task into account, the Secretariat may need, depending on the means available to it, to adopt a system of tracking and maintaining up-to-date information on the status of implementation of the Protocol by each Party. This may involve reviewing each and every national report and comparing and cross-checking information provided by each Party through the Biosafety Clearing-House and other submissions. For example, if a Party that submitted its national report in September 2011 indicates in the report that a new domestic law on the transboundary movement of living modified organisms has been enacted by its Government in 2009, and if the text of such law was yet not made available to the Biosafety Clearing-House, such information may be provided to the Committee as a possible basis to initiate compliance procedures in light of its expanded mandate or supportive role as specified in decision BS-V/1.

2. *Consultations with the Party concerned*

41. According to decision BS-I/7, a submission from a Party with respect to another Party is received by the Committee through the Secretariat. Within fifteen days of its receipt, the submission has to be made available, by the Secretariat, to the Party concerned. The Secretariat transmits the submission to the Compliance Committee only after the response and any other information has been received from the concerned Party or a maximum of a six-month period has expired.³⁰

42. The six-month limit allowed for a Party to respond to a submission, as contained in paragraph 3 of section IV of the procedures and mechanisms for compliance, may also be applied to cases that may, in the future, fall within the expanded mandates of the Committee or the Committee may choose to leave this issue open with a view to setting time limits depending on the circumstances of each case.

43. Submissions to the ITPGRFA Secretary follow the same procedure, allowing, however, thirty days to communicate any submission to the Party concerned.³¹ Subsequently, the Party concerned should respond within six months and the response is transmitted to the Committee.³²

44. The Secretariat of the Basel Convention consults with Parties directly, before referring submissions for the Implementation and Compliance Committee's consideration. This procedure is currently followed with regard to submissions triggered by the Secretariat itself concerning compliance with national reporting. The manner of consultation is not specified in the terms of reference or the reports of the Committee. After three months, the matter is handled as a "formal" submission to the Committee under paragraph 9 of the Terms of Reference on compliance by which the Secretariat shall send a copy of the submission to the Party whose compliance is in question and to the Committee for consideration at its next meeting.³³ If the Compliance Committee's recommendations from its eighth session are adopted by the upcoming Conference of the Parties, these procedures would also apply to cases where issues of non-compliance with other parts of the Convention are identified by the Secretariat or where the Committee, by its own initiative, becomes aware of possible cases of non-compliance.

45. With regard to handling of specific compliance matters, the CITES Secretariat provides a Party concerned with information it receives about that Party's compliance and communicates with the Party regarding this matter.³⁴ It is only if and when the Party fails to take sufficient remedial action within a reasonable time that the matter would be brought to the attention of the Standing Committee by the Secretariat.³⁵ If a compliance matter is otherwise brought to the attention of the Standing Committee, the latter may refer the matter to the Secretariat for action according to the procedures specified or may proceed, after consultation with the Party concerned, addressing the matter.³⁶

46. The issue of how to approach a concerned Party in applying decision BS-V/1 may be decided case-by-case. But, in general, the Committee may wish to consider the elements outlined under paragraph 50 (d) below.

³⁰ Paragraphs 2 and 3 of section IV on procedures, annex to decision BS-I/7.

³¹ ITPGRFA procedures and operational mechanisms to promote compliance and address issues of non-compliance, at section VI, paragraph 4.

³² *Ibid*, paragraphs 5 and 6.

³³ Paragraph 13 of the Terms of Reference of the Mechanism for Promoting Implementation and Compliance under the Basel Convention.

³⁴ Guide to CITES compliance procedures, annexed to resolution Conf. 14.3, paragraph 16.

³⁵ *Ibid*, paragraph 21.

³⁶ *Ibid*, paragraph 22.

IV. SUGGESTIONS FOR THE CONSIDERATION OF THE COMMITTEE

47. Decision BS-V/1 expands the procedures specified in paragraph 1, section IV, in the annex to decision BS-I/7 adopted at the first meeting of the Parties. The objective of the decision is to promote, facilitate and achieve compliance with obligations under the Biosafety Protocol by enabling the Compliance Committee to be more proactive in its support and assistance to Parties that are struggling to be compliant with their obligations under the Protocol.

48. Since its entry into force eight years ago, the implementation of the Cartagena Protocol on Biosafety seems to have been far from satisfactory. Only 60 per cent of the Parties that had the obligation to do so submitted their first national report, which was due in September 2007. A number of Parties still lack the basic legal and administrative framework necessary for the implementation of the Protocol. Domestic biosafety laws and regulations are not being submitted to the Biosafety Clearing-House which otherwise are known to exist. A number of domestic laws and regulations that Parties made available over the years to the Biosafety Clearing-House have found to be either entirely outdated or significantly amended as confirmed through reviews recently conducted by the Secretariat.³⁷

49. In that regard, decision BS-V/1 could open the floodgates for compliance cases. The number of cases that need the attention of the Compliance Committee could be overwhelming. It would, therefore, be appropriate for the Committee to tread carefully. Applying decision BS-V/1 should start with clarifying some relevant issues. Identifying some modalities on how: (i) information should be vetted before used as a basis for initiating compliance procedures; (ii) consultations should be handled or conducted with a concerned Party; and (iii) the provision of advice or assistance to the Party with difficulties in complying with its obligations, or making recommendations to the meeting of the Parties, should ultimately be delivered.

50. In that context, the Compliance Committee may wish to consider the following in its efforts to apply decision BS-V/1:

(a) *Failure to submit a national report:*

- (i) As implied in paragraph 38 above, if, at a certain reporting period, more than 20 percent of Parties fail to submit a national report, the matter should be addressed as a general issue of compliance;
- (ii) The Secretariat should communicate with the Parties that failed to submit a national report and seek the reason why they were not able to submit their report;
- (iii) In the event the Committee decides to address each Party that has failed to submit a national report, priority should be given to the Party which have not submitted a national report at all to date or the Party that has repeatedly failed;

(b) *Information in a national report shows compliance difficulties:*

- (i) If, in the event of reviewing a national report, the Secretariat observes a gap or inconsistency in the implementation of one or more of obligations under the Protocol,

³⁷ The Secretariat has recently reviewed domestic biosafety or environmental laws and regulations that have been made available to the Biosafety Clearing-House by Parties from the Central and Eastern Europe and African regions. The purpose of the review was to know whether and how these laws and regulations have addressed liability and redress. The outcomes of the review were submitted to the participants of the workshops held in the two regions, respectively. Participants from a number of Parties have confirmed that the laws that were available in the BCH have either undergone extensive changes or were replaced by new ones. The reports of the workshops are available at: http://bch.cbd.int/protocol/supplementary/NKL_workshops.shtml.

the Secretariat should seek more information from the Party concerned before referring the matter to the Compliance Committee;

- (ii) If the Party concerned does not respond to the Secretariat or if the observed gap or inconsistency still remains after consultations, the Secretariat should refer the matter to the Compliance Committee;
 - (iii) Priority should be given to difficulties observed from a national report in the implementation of those areas identified in the Annex to decision V/15 in relation to assessment and review i.e. domestic implementation of obligations under the Protocol concerning (i) the advance informed agreement procedure; (ii) the procedures applicable to living modified organisms intended for direct use as food, feed or for processing; (iii) risk assessment and risk management requirements; and (iv) requirements on handling transport, packaging and identification;
- (c) *Information in the Biosafety Clearing-House shows compliance difficulties:*
- (i) Since information-sharing through the Biosafety Clearing-House is a central obligation under the Protocol, the absence of the information that a Party is required to make available under paragraph 3 of Article 20 and other provisions of the Biosafety Protocol should normally be the basis for any consideration related to compliance;
 - (ii) The completeness and timeliness of information in the BCH may be checked against information that a Party might have provided in its national report or against information that might have been gathered from the Party concerned in relation to other activities or processes;
- (d) *Initiating consultations and compliance procedures:*
- (i) The Secretariat informally approaches the concerned Party first, with a view to further investigate the matter and to identify the possible difficulty hindering compliance and the kind of intervention or assistance that may be needed to achieve compliance;
 - (ii) The Committee itself may decide to handle particular cases informally by requesting its members from the region to contact the Party concerned and explain the situation and the findings, if any, and offer for assistance; and
 - (iii) The Committee may decide to consider a case in a more formal manner and request that the Chairperson contact the concerned Party on behalf of the Committee through a written communication inviting the Party concerned to respond and explain the reasons for its failure to comply with the obligation in question;
 - (iv) If no response is obtained from the Party concerned and the situation is still regarded as a matter of concern, the Committee may invite the concerned Party, to attend if it so wishes, the next meeting of the Committee for consultation;
 - (v) Without prejudice to paragraph 2 of decision BS-V/1, where the Committee has been requested to carry out its supportive role “in confidence and with the cooperation of the concerned Party”, and depending on the circumstances of each case, the Committee may decide to submit appropriate recommendations to the meeting of the Parties to the Cartagena Protocol.

51. The Committee may wish to assign two to three of its members to work during and/or after the present meeting on these suggestions and to further elaborate its preferred approach in the implementation of its broader role as provided in decision BS-V/1, and to report to its next meeting.

Annex

Decision BS-V/1- Report of the Compliance Committee

The Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety,

Taking note of the views submitted by Parties on how the supportive role of the Compliance Committee could be improved (UNEP/CBD/BS/COP-MOP/5/2/Add.1),

Taking note also of the recommendations of the Compliance Committee (UNEP/CBD/BS/COP-MOP/5/2, annex),

Recalling the objective, nature and underlying principles of the Procedures and Mechanisms on Compliance under the Cartagena Protocol on Biosafety as specified in section I of the annex to decision BS-I/7, which underline the promotion of compliance and addressing cases of non-compliance through the provision of advice and assistance, in a simple, facilitative, non-adversarial and cooperative manner, and by paying particular attention to the special needs of developing countries, taking into full consideration the difficulties they face in the implementation of the Protocol,

Recognizing the need for building further the confidence of Parties in the role of the Compliance Committee and the application of the compliance procedures and mechanisms of the Protocol by, among other things, emphasizing and strengthening the facilitative and supportive role of the Committee as well as mobilizing financial resources, technology transfer and capacity-building projects,

1. *Decides* that:

(a) In the event of a submission relating to compliance by any Party with respect to itself in the context of paragraph 1 (a) of section IV of the annex to decision BS-I/7, the Compliance Committee shall, in response, consider taking only those measures specified in paragraphs 1 (a) and (b) of section VI of the annex to decision BS-I/7, namely the provision of advice or assistance to the Party concerned and/or making recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures;

(b) The Compliance Committee may also consider taking the measures referred to in subparagraph (a) above in a situation where a Party fails to submit its national report, or information has been received through a national report or the Secretariat, based on information from the Biosafety Clearing-House, that shows that the Party concerned is faced with difficulties complying with its obligations under the Protocol;

2. *Requests* the Compliance Committee to carry out its supportive role in accordance with paragraph 1 above in confidence and with the cooperation of the concerned Party;

3. *Encourages* Parties that are facing difficulties complying with one or more of their obligations under the Protocol due to lack of capacity to make a submission to the Compliance Committee relating to their compliance so that the Committee or the Conference of the Parties serving as the meeting of the Parties to the Protocol could consider taking facilitative and supportive measures, as appropriate, with a view to helping the Party overcome the difficulties.
