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**INTERGOVERNMENTAL COMMITTEE FOR THE
CARTAGENA PROTOCOL ON BIOSAFETY**

Second meeting

Nairobi, 1-5 October 2001

Item 4.8.5 of the provisional agenda*

COMPLIANCE (ARTICLE 34)

Synthesis of views regarding elements and options for a compliance regime

Note by the Executive Secretary

I. INTRODUCTION

1. In line with its work plan, the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) addressed the issue of compliance at its first meeting, held in Montpellier, France, from 11 to 15 December 2000.
2. At that meeting, the Intergovernmental Committee considered a note by the Executive Secretary regarding the development of compliance procedures and mechanisms under the Cartagena Protocol on Biosafety (UNEP/CBD/ICCP/1/7).
3. ICCP invited Parties to the Convention and Governments to communicate their views in writing by 30 March 2001, regarding elements and options for a compliance regime under the Cartagena Protocol on Biosafety on the basis of the questionnaire attached to the note of the Executive Secretary on Compliance (UNEP/CBD/ICCP/1/7). It requested the Executive Secretary to compile the views submitted and prepare a synthesis report in consultation with the ICCP Bureau, and to organize an open-ended meeting of experts that reviews the synthesis report in a three-day session back-to-back with the second meeting of the ICCP. The Intergovernmental Committee also requested the Executive Secretary to submit the synthesis report for its consideration at its second meeting.
4. The Executive Secretary, therefore, submits this note, which contains the synthesis report of the views received from Parties and Governments regarding the elements and options for a compliance regime under the Cartagena Protocol on Biosafety for the consideration of the ICCP.

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II. SYNTHESIS OF VIEWS REGARDING ELEMENTS AND OPTIONS FOR A COMPLIANCE REGIME UNDER THE CARTAGENA PROTOCOL ON BIOSAFETY*

5. Following the request by the ICCP and the notifications issued by the Executive Secretary to Parties to the Convention and Governments, to communicate in writing their views regarding the elements and options for a compliance regime under the Cartagena Protocol on Biosafety, the Executive Secretary had received, as of 30 June 2001, submissions from Argentina, Australia, Belarus, Chile, Cuba, Ecuador, the European Community, India, Indonesia, Japan, the Republic of Korea, New Zealand, Norway, Slovenia, Switzerland, Turkey, and the United States of America.

6. The structure of all the submissions followed the questionnaire that had been developed by the Secretariat and submitted to ICCP at its first meeting. The following synthesis follows the structure of the questionnaire in discussing the elements and options for a compliance regime. The full text of the all the submissions has been compiled and made available as an information document (UNEP/CBD/BS/EM-COMP/1/INF/1).

A. *Objectives, nature and underlying principles*

7. There is as much convergence of views in the submissions as there was during the discussion of the same issues at the first meeting of the ICCP. Understandably, some views have not completely distinguished between the objectives and the nature of the regime, two elements that are so clearly interrelated and also dependent on the determination of the nature of the other major elements of the regime, in particular the determination of the consequences of non-compliance.

1. *Objectives*

8. As at the first meeting of the ICCP, the views on the objectives of the compliance regime turned out to be predominantly convergent. Most of the arguments are based on what has been already reflected in Article 34 of the Cartagena Protocol on Biosafety. Objectives for a compliance regime that have received considerable support are: to promote compliance with the provisions of the Protocol and to address cases of non-compliance through cooperation with and facilitation to those facing difficulties in achieving full compliance.

2. *Nature*

9. As is the case with the issue of objectives, most of the views favoured procedures and mechanisms for a compliance regime that are non-confrontational and non-judicial. Some have made it clear that the Protocol itself, by contemplating compliance procedures and mechanisms separate from, and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention, leaves no other option than to seek a simple and advisory mechanism that is non-confrontational in nature.

10. There is, however, an alternative approach submitted by one country that supports a differentiated approach with regard to LMO-exporting countries and LMO-importing countries. This approach favours procedures that are judicial and punitive in nature where non-compliance involves exporting countries, and facilitative and non-judicial in cases involving LMO-importing countries. During the first meeting of the ICCP, similar minority views were expressed in favour of procedures that treated developing and developed countries differently. According to this approach, failure to comply with the obligations of the Protocol by a developed country Party or an LMO-exporting Party should put in motion a judicial process

* The present section (paras. 5-29) reproduces section II of the note by the Executive Secretary on elements and options for a compliance regime under the Cartagena Protocol on Biosafety (UNEP/CBD/BS/EM-COMP/1/1) that was prepared for the Open-ended Meeting of Experts on a Compliance Regime under the Cartagena Protocol on Biosafety.

and entail sanction, whereas non-compliance by a developing Party or an importing Party should only trigger a non-judicial cooperative procedure.

3. Underlying principles

11. The principles of expedition, fairness, transparency, predictability and due process have generally received support for both the formulation and implementation of the compliance regime. It has been pointed out, however, that whereas transparency and fairness are key elements to a non-judicial regime on compliance, the principles of expedition, due process and predictability are often associated with judicial regimes. The suggestion has also been made that the principles of effectiveness and efficiency should be included along with those of transparency and fairness.

12. One suggestion has been made to include further general principles of international law, in particular the principle of “common but differentiated responsibility”. In one other case, it has been suggested that the principle of “extended exporter’s responsibility” also be included. This suggestion was made in line with the proposal in favour of adopting a differential treatment of exporters and importers in defining the nature of the regime and elaborating the procedures.

13. Overall, there is much convergence of views in favour of using the principles of expedition, fairness, transparency, predictability and due process, as suggested by the Secretariat in the questionnaire, to underpin the compliance regime, and to guarantee them through procedures adopted or measures taken during the design stage of the regime as well as in its implementation.

B. Institutional mechanism

14. With the exception of a few submissions favouring review of compliance through the Conference of the Parties serving as the meeting of the Parties, or addressing the issue relating to institutional mechanism at a later stage when agreement is reached on the issues of objectives and principles, all other views received support the establishment of some form of institutional mechanism, either as an ad hoc or permanent body. Such an institutional mechanism could be established right away or, according to some, once the possible functions have been identified. The majority of views favour the establishment of a standing compliance committee, a position also reflected in the outcome of the first meeting of the ICPC. It should also be noted that one country was in favour of constituting the body as a subsidiary body under paragraph 4 (b) of Article 29 of the Protocol.

1. Structure

15. There is wide support for the establishment of a compliance committee composed of a limited number of experts. Some suggested that membership should be limited to a particular number. In this regard, there are suggestions to limit the number of experts to between 8 and 10, between 10 and 15, between 10 and 20, and to only 10 experts. In case additional experts were needed, it is further suggested to draw them from the roster of experts on biosafety. Some, however, proposed that the size of the compliance body should be determined on the basis of availability of resources. Some of the proponents of an ad hoc body also suggest that size and composition should be decided on a case-by-case basis in accordance with the nature of the specific compliance problem under consideration.

16. There is no difference of views regarding the need for members of the committee to have some particular qualifications. It is widely accepted that the committee should contain a mixture of legal and other technical experts.

17. There is general agreement on the need to maintain regional balance in appointing the experts. Some suggested that there should be a further balance between exporting and importing countries, as well as between developed and developing countries. In this connection, there is also a proposal the chairmanship of the committee should be rotated between importing/developing countries and exporting/developed countries.

18. Views vary on the question whether experts should act on their individual capacity so that the committee would be an independent expert body, or should they be representing Governments. However, the issue of how members of the committee should be appointed seems not to cause any particular difficulty. It is generally considered acceptable to have the experts nominated by Parties. Here, however, further consideration needs to be given to whether Parties collectively, through the Conference of the Parties serving as the meeting of the Parties to the Protocol, should elect the individual experts from nominations made by countries or regions, or whether it would elect the Parties from which the experts are to be drawn.

2. *Functions and responsibilities*

19. There is almost complete agreement on the overall responsibility of the compliance body, when established. In line with the general agreement on the objectives of the regime, it is widely suggested that the body should generally be responsible for reviewing and promoting compliance with the provisions of the Protocol and addressing specific cases of non-compliance with a view to providing advice to the Party concerned or making recommendations for the consideration of the Conference of the Parties serving as the meeting of the Parties.

20. In particular, the following tasks have been proposed as possible functions of the compliance committee:

- (a) Receive, consider and report on submissions to it regarding non-compliance;
- (b) Monitor the implementation of and compliance with the Protocol in general;
- (c) Undertake, with the consent of the Party concerned, information gathering in the territory of that Party;
- (d) Give advice to Parties in order to help them comply with their obligations under the Protocol;
- (e) Make recommendations to Parties and to the Conference of the Parties serving as the meeting of Parties to the Protocol on the interpretation and application of the Protocol and on measures to be taken.

21. All respondents suggested that the compliance committee should be accountable to the Conference of the Parties serving as the meeting of the Parties to the Protocol and report to it periodically on its activities. With respect to the frequency of its meetings, opinions range from periodic meetings, as needed, to quarterly meetings. It was also suggested that the committee should develop its own rules of procedure and submit them to the Conference of the Parties serving as the meeting of the Parties to the Protocol for its consideration and adoption.

C. *Invocation of the procedures*

22. All the views communicated to the Executive Secretary are unanimously in favour of the invocation of the compliance procedures by Parties to the Protocol. Some have, in fact, indicated that only Parties should be able to invoke the procedures. In this respect, some have proposed that a Party may trigger the procedures with regard to its own compliance efforts or over the compliance efforts of another Party. There is also a proposal that the compliance committee itself should be able to invoke the procedures after assessing the information submitted to it or upon the request of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

23. Although a few countries have suggested that the procedures could also be triggered by the Secretariat, many believe that its role should be limited to bringing to the attention of the compliance committee information relating to compliance that it might gather from national reports. There was less support for the triggering of the mechanism by the private sector, non-governmental organizations and other civil-society organizations. Nevertheless, some respondents did support the involvement of the

private sector, NGOs and other civil society in making the compliance mechanism work through the provision of relevant information, including cases of non-compliance, to the committee through the Secretariat.

D. Consequences of non-compliance

24. The majority of views submitted favoured measures directed mainly towards the provision of appropriate advice and assistance to the Party failing to fully comply with its obligations under the Protocol. The imposition of sanctions or other punitive measures is generally not favoured. Incentive measures have received wide acceptance and are considered to be in tune with the non-judicial and non-confrontational nature of the procedures and the mechanism that that a large number of Parties support.

25. Some respondents emphasized the advantages of persuading the concerned Party or Parties to meet their obligations under the Protocol than to proceed to coerce them by punitive measures. Nevertheless, strong measures to signal the serious nature of a particular case were also been proposed. The overall view is to have a mix of hard and soft measures as outlined below. The order of the measures as proposed seems to indicate how progressively the Conference of the Parties serving as the meeting of the Parties to the Protocol should, based on proposals from the compliance committee, decide to impose the measures in a particular case. The proposed measures to follow as a consequence of non-compliance include:

- (a) Provision of appropriate advice and assistance, including financial and technical assistance, technology transfer, training and other capacity building measures, as appropriate;
- (b) Requiring the adoption of detailed action plans that help achieve full compliance;
- (c) Inviting the Party concerned to submit progress reports on its efforts to comply with its obligations under the Protocol;
- (d) Issuance of cautions;
- (e) Publication of the non-compliance cases; and
- (f) Suspension of specific rights and privileges under the Protocol.

26. There is a suggestion to impose punitive measures or sanctions, as a last resort, in cases involving LMO-exporting Parties. On the other hand, it has been suggested that Article 34 of the Protocol does not contemplate the imposition of sanctions. It was also suggested that, in the absence of such an enabling provision in the Protocol, Parties should observe Article 60 of the Vienna Convention on the Law of Treaties, which again leaves no room to impose binding consequences that would compel a non-compliant Party to take action or refrain from certain action. It should be noted, however, that the wording of Article 34 does not necessarily exclude the imposition of sanctions; it only provides that the procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate.

E. The role of the Secretariat and the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol

27. As implied in the foregoing discussion, the predominant view was that the role of the Secretariat should be mainly one of receiving and channelling information with regard to non-compliance to and from the compliance committee and Parties. It was also suggested that the Secretariat should provide administrative support to the compliance committee in the discharge of its functions. More specifically, it was pointed out that the Secretariat should arrange for and service the meetings of the compliance committee. At the same time, however, some respondents were of the view that a greater role should be envisaged for the Secretariat in identifying cases of non-compliance and drawing the attention of the committee to these cases. It was suggested that the Secretariat might trigger the compliance procedures when it became aware of possible non-compliance during the course of reviewing national reports.

28. Almost all of the submissions accept that the Conference of the Parties serving as the meeting of the Parties to the Protocol should be the final decision-making body on matters relevant to compliance on the basis of recommendations by the compliance committee, when established. A few respondents expressed reservations on the role of the Conference of the Parties serving as the meeting of the Parties to the Protocol as a decision making body with respect to individual cases of non-compliance. They proposed that such a role would be appropriate only to the extent the decision focused on encouraging and assisting Parties to implement the obligations of the Protocol, or so long as the measures included in the decision were consistent with international law.

F. Other issues

29. A number of issues have been suggested for consideration in parallel to or during the development of the Compliance regime under the Protocol. These issues include:

- (a) The Biosafety Clearing-House and its use in assisting in or promoting compliance;
- (b) The need for fast-track procedures that allow quick settlement of specific cases of non-compliance that may arise between an exporting and importing Party with respect to a specific transboundary movement of LMOs;
- (c) The link or the interface between the compliance procedures and mechanism and the liability and redress issue;
- (d) The need for taking into account socio-economic considerations and the different levels of Parties in technological development in addressing compliance issues;
- (e) The relationship between the compliance regime and the dispute-settlement process; and
- (f) The relationship between compliance procedures under the Biosafety Protocol and under other relevant international instruments such as the International Plant Protection Convention (IPPC) and the Sanitary and Phytosanitary Agreement (SPS) under the World Trade Organization (WTO).

III. RECOMMENDATIONS

30. The ICCP may wish to:

- (a) Review the synthesis report of the views of Parties and Governments regarding elements and options for a compliance regime under the Cartagena Protocol on Biosafety;
- (b) Consider the report and recommendations of the Open-ended Meeting of Experts on a Compliance Regime under the Cartagena Protocol on Biosafety, held in Nairobi, from 26 to 28 September 2001 (UNEP/CBD/ICCP/2/13/Add.1); and
- (c) Make appropriate recommendations, based on the synthesis report and the recommendations of the Open-ended Meeting of Experts, to the first meeting of the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Protocol.
