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

Third meeting

The Hague, 22–26 April 2002

Item 4.1.2 of the provisional agenda\*

**COMPLIANCE (ARTICLE 34)**

*Compilation of views on compliance procedures and mechanisms under the Cartagena Protocol on  
Biosafety*

**CONTENTS**

<i>Submitting country</i>	<i>Page</i>
ARGENTINA .....	2
AUSTRALIA .....	2
CANADA .....	4
EUROPEAN UNION .....	9
REPUBLIC OF KOREA.....	12
SLOVENIA.....	15
UNITED STATES OF AMERICA .....	15

\* UNEP/CBD/ICCP/3/1.

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**ARGENTINA**

[18 February 2002]  
[SUBMISSION: ENGLISH]

Pursuant to ICCP recommendation 2/11 on Procedures and Mechanisms on compliance in the Cartagena Protocol on Biosafety we are pleased to submit preliminary considerations on the text contained between brackets which will be negotiated at ICCP-3.

Since, there are still key issues to decide (such as the facilitative or punitive nature of the regime) our opinion will be subject to further elaboration once these key issues are settled.

Regarding the general nature of the regime, Argentina considers that since the Convention on Biological Diversity has launched discussions on the topic of liability and has a system of dispute resolution, the compliance regime should be purely facilitative in nature.

Therefore the following considerations apply to the text currently under brackets:

*Section 1.2. A balanced representation between exporter and importer countries is favored.*

*Section IV.1b and Section IV.1.c should be deleted. Parties can have recourse to dispute settlement procedures if they have a specific dispute regarding activities performed by other parties.*

*Section VI 1.c We support the phrase between brackets since it would not be efficient to suggest a plan of action to a Party without taking into account its particular characteristics and capacity to comply with such Plan.*

*Section VI.2 We support the text in brackets for the reasons explained in the previous point.*

*Section VI.2.b, c, d. Should be deleted because they would impair the possibilities of Parties voluntarily applying to the compliance regime.*

**AUSTRALIA**

[15 January 2002]  
[ORIGINAL: ENGLISH]

**Views or understandings on the contents in brackets in the compliance text  
(para 2, recommendation 2/11)**

Noting paragraph 175 of the report of ICCP2, Australia reserves the right to discuss the whole of the draft compliance text at the next intergovernmental meeting. The comments offered below do not imply acceptance of the unbracketed text.

Australia's view remains that the Protocol's compliance procedures and mechanisms should be essentially facilitative, rather than judicial or adversarial in nature, designed to assist those Parties which, in spite of

best endeavours, are experiencing difficulty in meeting their obligations under the Protocol and to work constructively with these individual Parties to assist them in achieving compliance.

Australia would offer the following comments relevant to the draft compliance text in brackets:

#### Differentiated responsibilities

- Australia does not consider it acceptable, or consistent with the text of the Biosafety Protocol, that any group of countries receive differentiated treatment under compliance procedures and mechanisms. The special needs of developing countries are recognised and addressed in the Protocol through the provisions on capacity building and information exchange. The Protocol's compliance procedures and mechanisms should apply and be available in equal measure to all Parties.

#### Compliance committee

- Australia's view, should a compliance committee be formed, is that it should be a small committee appointed by the Meeting of Parties and drawn from a list of experts nominated by member governments.
- The Committee's role should be twofold: to assist a Party (or a group of Parties) concerned about their compliance to develop a voluntary compliance program to ensure compliance is maintained or restore compliance as soon as possible; and to consider general (non-Party specific) issues of compliance under the Protocol and provide recommendations to the COP/MOP on those matters.
- The Compliance Committee's program of work must be reviewed regularly by the COP/MOP to ensure that it can be evaluated in the context of the Protocol's overall resources and priorities.

#### Compliance trigger

- Australia's view is that the Party which is having difficulty in complying with Protocol procedures should be responsible for raising its problem, that is, self-trigger. The provision of assistance and advice by the Compliance Committee, if coupled with a genuinely non-adversarial no-blame compliance building procedure, should be sufficient to induce Party/Parties on their own volition to seek the assistance of the Compliance Committee when experiencing potential compliance difficulties.
- Australia does not consider it appropriate for compliance procedures and mechanisms to be invoked by non-State Parties, such as Non-Government Organisations or the Secretariat.
  - The Secretariat's work collating and overseeing information flow between parties and assisting Parties in implementation of the Protocol will be invaluable in helping a Compliance Committee in its work. However, the Secretariat should not be empowered to initiate any aspect of the compliance procedures and mechanisms or initiate work on general issues of non-compliance. Work by the Secretariat should be undertaken at the request of the Compliance Committee or the COP/MOP.
  - Non-State trigger options would be unnecessarily complicated and costly and could be potentially highly politicised, confrontational or adversarial, creating disincentives for

Parties experiencing compliance difficulties to be open about their difficulties and seek advice.

- Australia does not consider it appropriate at this stage to provide for one Party to invoke compliance procedures and mechanisms for another Party. It could be suggested that egregious and deliberate non-compliance would warrant an injured party being able to complain. However, Australia considers that any such complaint could be taken up through the dispute settlement mechanism. It must be remembered that the compliance procedures and mechanisms are “separate from, and without prejudice to, dispute settlement procedures and mechanisms”.

### Non-Compliance

- Australia does not support sanctions as part of the Protocol’s compliance mechanism. As stated above, Australia supports facilitative, non-confrontational procedures and mechanisms which would promote participation and transparency. Non-compliance sanctions are not consistent with this.
  - Furthermore, the nature of any sanctions envisaged is unclear. Denial of access to technical assistance/GEF support would be counterproductive to the compliance mechanism’s objective of assisting countries to meet their obligations. There are no other “rights” conferred by the Protocol that could be suspended.
  - Australia would appreciate clarification of what is envisaged by sanction supporters.

**CANADA**

[11 January 2002]  
[SUBMISSION: ENGLISH]

## **Canada’s Comments on the Draft Procedures and Mechanisms on Compliance under the Cartagena Protocol on Biosafety**

### **I. Objective, nature and underlying principles**

#### **Para. 3:**

*Approach:* Canada would end para. three after “predictability”<sup>1</sup>. However, we support the Compliance Committee and the COP/MOP taking lack of capacity into account when considering measures under Part VI of these procedures.

*Rationale:* Neither the expression “common but differentiated” nor a reference to Article 7 are included in the Biosafety Protocol. Further, the Protocol itself does not create any differentiated obligations. To include either reference in the compliance mechanism would mean that a new element, not in the Protocol, is being included. Finally, recognizing that there is a desire by a number of countries to reflect lack of

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<sup>1</sup> For grammatical reasons, we would add “and” before “predictability”.

capacity in Part VI (measures), we would be prepared to address their concerns in a more concrete manner in Part VI, as noted below in our comments.

## **Part II: Institutional mechanisms**

### **Para. 2:**

*Approach:* Canada would delete the sentence after “United Nations.”

*Rationale:* While conceptually we have no difficulty in trying to differentiate between importing and exporting Parties where relevant, it is our view that all of us either are currently, or will be, both importing and exporting countries, so this type of distinction is probably not helpful in Protocol discussions. Furthermore, it could lead countries to think that they have no obligation to implement export obligations, when these clearly apply to each Party. On balance, we therefore prefer not to make distinctions between importing and exporting countries.

### **Para. 3:**

*Approach:* we would retain the words currently in square brackets, “and they shall serve in their individual capacity” but add to them: “, objectively and in the best interests of the Protocol”.

*Rationale:* the debate here centers around whether members of the Committee should represent Governments or serve in their individual capacity. We believe that the necessary level of accountability is served through nomination by governments in para. 2. However, individuals who come forward have to act objectively and in the best interests of the Protocol, not on behalf of any other interest.

## **IV. Procedures**

### **Paragraph 1(b)**

*Approach:* Canada would remove the square brackets and retain the text of (b).

*Rationale:* Given the transactional nature of the Protocol, it is our view that to constitute a compliance mechanism, there must be a right for one Party to trigger the compliance procedure with respect to another Party.

### **Paragraph 1(c)**

*Approach:* Canada would remove the square brackets and retain the text of (c).

*Rationale:* Canada supports the retention of paragraph (c) as we are of the view that the COP/MOP, as the supreme authority of the Protocol, should be in a position to refer to the Committee any instance of non-compliance that it finds to be of sufficient concern to do so. This is a logical extension of the Party to Party trigger, enabling the Parties collectively to trigger the compliance procedure.

## **V. Information and Consultation**

### **Paragraph 1(b)**

*Approach:* Canada would remove the square brackets and retain the text of para. (b).

*Rationale:* The chapeau of para. 1 requires the Committee in its deliberations to consider information from the Party against whom the complaint is made (para. (a)). However, we think that it is equally important that in any case of a Party triggering the mechanism against another Party, information from the complaining Party must be considered.

### **Paragraph 2(a)**

*Approach:* Canada would remove the square brackets and retain the reference to other bodies of the CBD or Protocol.

*Rationale:* we consider it important, as has been proven for example in the Montreal Protocol, that other bodies with relevant information be able to provide it. We would note that the words “may” and “including” in the chapeau give discretion to the Committee about whether they pursue consideration of such information. The word “including” also means that the list that has been detailed here from (a) to (c) is not closed. Nevertheless, we do feel that appropriate emphasis should be given here to examples of what we think will be typical sources of information.

### **Paragraph 2(b)**

*Approach:* Canada would support removal of the square brackets and retention of the text.

*Rationale:* We consider that civil society may have relevant information for the Committee, and the Committee should be able to seek or receive it when it considers it to be appropriate.

### **Paragraph 2(c)**

*Approach:* we would delete the brackets and keep “The Secretariat”. We would also add after those words, “and any Party to the Protocol.”

*Rationale:* Although we think that it is not necessary to name the Secretariat as its administrative role is well understood, we would have no objection to doing so. However, we feel it is quite important to list “any Party” as a source of information, because even if they are not involved in the initial complaint, once they hear about it, they may have relevant information for the Committee.

## **VI. Measures to promote compliance and address cases of non-compliance**

### **Paragraph 1 (c):**

*Approach:* (i) Canada would delete the words in square brackets in para. (c), but would retain them in the chapeau of para. 1 along with the other factors currently mentioned in the chapeau to paragraph 2. (ii) We would also add at the beginning of the chapeau to para. 1: “Upon request of a Party who has

triggered the procedures with respect to itself in accordance with IV.1(a)". Therefore, the new chapeau to paragraph 1 would read:

*Upon request of a Party who has triggered the procedures with respect to itself in accordance with IV.1(a), the Committee may, taking into account such factors as the cause, type, degree and frequency of non-compliance, and the capacity of the Party concerned, in particular of developing country Parties in complying with the Protocol, take one or more of the following measures with a view to promoting compliance and addressing cases of non-compliance:*

*Rationale:* (i) Lack of capacity is not relevant to whether a Party is compliant or not. However, it is very relevant with respect to the types of measures that should be considered, whether by the Committee or the COP/MOP. It is our view that the capacity issue is relevant to both paragraphs 1 and 2 and should be repeated in the chapeau to both. (ii) The addition of "Upon request of a Party etc." in the chapeau to para. 1 would make it clear that the Committee is only allowed to make decisions on measures (rather than recommendations to the COP/MOP) where they have been requested to do so by a Party that has self-triggered, as decisions about action plans, for example, can be very costly for countries to implement. This would not preclude the Committee from also making recommendations of the nature listed in paragraph 2 in cases of self-triggering.

In our view, given the complexity of some of the issues we have flagged, the drafting of Part VI could benefit from some general improvement regarding the logic of its structure. We would be happy to assist in this at ICCP-3.

#### **Paragraph 2, chapeau:**

*Approach:* Canada can agree to removing the square brackets and retaining the reference to capacity.

*Rationale:* While lack of capacity is not relevant to whether a Party is compliant or not, it is a very relevant factor with respect to the types of measures that should be considered, whether by the Committee or the COP/MOP.

#### **Paragraph 2(b):**

*Approach:* Canada can agree to the deletion of the square brackets.

*Rationale:* for other compliance procedures, such as the Montreal Protocol, this has been included as one of the "measures" available. It is simply a written censure to the Party concerned.

#### **Paragraph 2(c):**

*Approach:* Canada supports retention of the concept of publication, but would phrase it differently: "Make reports of cases of non-compliance available to the public." In addition, we think that this is not a "measure" and would prefer to include it in a general provision after Part VI as "*The COP/MOP shall make reports of the meetings of the Compliance Committee and the COP/MOP available to the public.*"

*Rationale:* at the meeting of the Open-ended Group on Compliance, some countries did not like the “publish cases” approach in the context of “measures” in Part VI. Two possible fixes might help forge a compromise. Language closer to current practices in other fora might be acceptable. For example, other environmental agreements, like the Montreal Protocol, make available to the public on its web site copies of both the reports of the Implementation Committee and the Meeting of the Parties. Secondly, this is not really a measure, so it might be less of a concern if it was moved to its own paragraph.

#### **Paragraph 2(d):**

*Approach:* Canada cannot agree to consider removal of the square brackets around paragraph (d) until specific rights and privileges under the Protocol have been identified and their legal implications discussed. Only at this point would we be in a position to determine whether we could agree to suspension of treaty rights and privileges. Finally we could not agree to this without retention of a reference to consistency with international law governing such matters.

*Rationale:* as mentioned at the first meeting of the Open-ended Group on Compliance, Canada must have some clarification about what this paragraph means before we could consider its inclusion. Among the questions we would like to discuss are: (1) what specific rights under the Protocol are we referring to? (2) what specific privileges under the Protocol are we referring to?

Once these are discussed and listed, one could consider whether they should be the subject of suspension.

#### **Items not covered in the procedures**

As was noted in paragraph 175 of the ICCP-2 meeting report, all elements of the draft procedures remain subject to further discussion. While we would not want to prolong discussions too much, we see some small gaps that should be filled.

##### **(i) The Committee may hold open meetings**

*Approach:* Canada would like to suggest an additional paragraph, as follows:

*The Committee may make its meetings open to all Parties where it considers it appropriate for*

*(a) discussions of general issues of compliance*

*(b) individual cases, where the Party concerned and the Party making the submission so request.*

*Rationale:* As we noted at the meeting of the Open-ended Group on Compliance, it is our view that there should be an opportunity for the Committee to open meetings to all Parties where it considers it appropriate in order to enhance transparency, and in individual cases, where the Party concerned and the Party making the submission so request. We would prefer this to be clear in these procedures and not left to the rules of procedure of the Committee. We are flexible as to where it should be located in the procedures, but Part II or Part IV may be appropriate.

##### **(ii) Committee may initiate review of general issues of compliance**

*Approach:* In Part IV, Procedures, Canada would add an additional trigger through a new paragraph 1bis:

*The Committee may initiate a review of general issues of compliance referred to in paragraph III.1(d).*

*Rationale:* The additional trigger in IV.1*bis* is to enable the Committee itself to initiate an examination of general/systemic issues of non-compliance that become evident as a result of the review of national reports.

**(iii) Committee to monitor progress on all cases**

*Approach:* We would suggest in a new Part “VIII. General Provisions” that we add, in addition to what was suggested above regarding publication of reports, another provision that would require the Committee to follow up on COP/MOP decisions on compliance.

It could read as follows:

*The Committee will monitor efforts by a Party to return to compliance and maintain this as an agenda item until adequately resolved.<sup>2</sup> \**

*Rationale:* Currently, there is provision in VI.1(d) for the Committee to invite the Party concerned to submit compliance progress reports to the Committee, but para. 1 deals only with matters that stay with the Committee and are not recommended to the COP/MOP for decision. In our view there is a need for a broader provision for all cases. We are flexible as to its location in a new VIII or in existing III on Functions.

**EUROPEAN UNION**

[21 January 2002]  
[SUBMISSION: ENGLISH]

**Submission of view or understandings on the contents  
in brackets in the compliance text  
(para. 2, recommendation 2/11)**

**Para. I. 3**

**[and common but differentiated responsibilities] [and take into account principle 7 of the Rio Declaration on Environment and Development, that States have common but differentiated responsibilities]**

The EU wants to point out that the Biosafety Protocol does not provide for common but differentiated responsibilities. Introducing the principle of common but differentiated responsibilities in this general section thus deviates from the legal structure of the Protocol. Such deviation may undermine the fundamental notion that compliance should be measured against the content of the obligations that a Party has taken upon itself. Also the envisaged UNEP Guidelines on Compliance with and Enforcement of

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<sup>2</sup> The Montreal Protocol takes a slightly different approach, which is to say in para. 12 that: “The Parties involved in a matter...shall inform, through the Secretariat, the Meeting of the Parties...about implementation of any decision of the parties pursuant to paragraph 9.” We could be flexible on the type of approach used.

Multilateral Environmental Agreements (MEAs) only refer to common but differentiated responsibility as an approach to encourage participation in MEAs negotiations and not as one of the underlying principles of compliance regimes. Specific circumstances of individual cases of non-compliance should indeed be taken into account, but not in this section through a general reference to the principle of common but differentiated responsibilities. This should be done in the specific section VI on 'measures', via the formula referring to "cause, type, degree and frequency" of non-compliance. The EU supports the deletion of the bracketed wording.

**Para. II. 2**

**[ensuring a balance between importing and exporting countries]**

The Biosafety Protocol provides no justification to differentiate between importing and exporting countries. Moreover, and as a practical matter, the criterion of importing/exporting cannot be made operational, as a country can be both an importing and exporting country or a country can be an importing country at a given time and become an exporting country later on or vice versa. The EU supports the deletion of the bracketed text.

**Para. II. 3.**

**[and they shall serve in their individual capacity].**

To promote addressing compliance issues outside a political context and in an impartial and independent manner, the members of the Committee should serve in their personal capacity. Hence, the EU supports the bracketed text.

**Para. IV. 1. b.**

**[Any Party with respect to another Party; or]**

The EU supports the Party-to-Party trigger. A Party-to-Party trigger of the compliance mechanism may help preventing confrontations by identifying and dealing with compliance problems at a very early stage. This trigger however, should be complemented by a procedural safeguard: a submission from a Party with respect to non-compliance of another Party should be supported by corroborating information. The EU supports deletion of the brackets. As a logic consequence of the EU position on the Party to Party trigger, the EU supports the bracketed text of Para V. 1. b.

**Para. IV. 1. c.**

**[The Conference of the Parties serving as the meeting of the Parties to the Protocol].**

The EU doubts whether the Conference of the Parties serving as the meeting of the Parties to the Protocol as a trigger, adds anything to the compliance procedure. It might even be odd that the COP/MOP is also a trigger since it normally takes decisions upon recommendations of the compliance committee. The EU does not have strong feelings on the possibility for the COP/MOP to trigger the procedure and can support the deletion of the bracketed wording.

**Para. V. 1. b.**

**[The Party that has made a submission with respect to another Party.]**

The EU supports the bracketed text, given our position on Para IV.1.b.

**Para. V. 2. a. [and other bodies of the Convention on Biological Diversity and the Protocol];**

**Para. V. 2. b. [Non-governmental organizations, the private sector and other civil-society organizations and relevant intergovernmental organizations;] and**

**Para. V. 2.c. [The Secretariat.]**

In relation to all three sections, the EU considers it very important to keep the list of sources of information non-exhaustive (see the words "including from"). We cannot understand how the Committee could accomplish its task if it were to disregard available compliance-related information, and why the Secretariat, other Bodies or NGOs should be prevented from transmitting such information to the Committee. This would clearly put in question the very reason for the existence of the Committee. The Compliance Committee should be able to use the information it considers relevant. The EU prefers here to keep the wording as open-ended as possible. Therefore, the EU would prefer to replace the existing paragraphs V. 2. a-c with the words: *"The Committee may seek or receive and consider relevant information from other sources."*

**Para. VI. 1.c.**

**[taking into account its existing capacity to comply];**

The text can be deleted once the chapeau is changed as suggested under Para VI.2. in the following point.

**Para VI. 2. chapeau**

**[and the capacity of the Party concerned, in particular of developing country Parties in complying with the Protocol]**

The need to take into account all relevant circumstances before taking compliance-related measures applies to both the Compliance Committee (under subparagraph 1) and the COP/MOP (under subparagraph 2). Moreover, reference should also be made to parties with economies in transition. Hence, both the Chapeau of subparagraph 1 and 2 should include the following wording: *"Taking into*

*account such factors as the cause, type, degree and frequency of non-compliance, including the capacity of the Party concerned, in particular of developing country Parties and Parties with economies in transition, to comply."*

**Para. VI. 2. b.**

**[Issue a caution to the concerned Party;]**

The EU supports retaining this measure.

**Para. VI. 2. c.**

**[Publish cases of non-compliance; or]**

Having in mind that the reports of the COP/MOP are adopted by the Conference of the Parties and fall into the public domain, save to the extent that confidential information is involved, a publication of non-compliance as a particular measure seems to have no added value. This wording should be changed to “*publish a declaration of non-compliance*”. Furthermore, it should be moved to Para. VI.1, to be included in the list of measures to be taken by the Compliance Committee.

**Para. VI. 2. d.**

**[Suspend the specific rights and privileges of the concerned Party under the Protocol [consistent with international law].]**

The EU wants to keep the possibility to take strong measures to 'suspend rights and privileges'. Therefore the EU supports to keep the bracketed text. The EU however does not consider it necessary to specify that suspension of rights and privileges must be "consistent with international law". Consequently the EU supports to delete the last four words of this bracketed text.

The EU is willing to elaborate and/or specify which measures may fall within the scope of this category, as well as the conditions for their application. The following list of examples and other measures which the Compliance Mechanism could adopt, may contribute to the discussion on the issue:

- To decide that a Party shall be regarded as an observer, by suspending specific procedural rights and benefits under the Protocol, whether or not subject to time limits, concerned with the right to vote, nominate and elect, or be nominated and elected;
- As regards flagrant, repeated or continued non-compliance with Article 8 of the Protocol, to decide to permit Parties of import to suspend imports from the Party of export concerned until that Party has demonstrated to the satisfaction of the Compliance Committee that it will comply with Article 8 in the future;
- As regards flagrant, repeated or continued non-compliance with Article 10, paragraph 3 of the Protocol, to decide to permit Parties of export to also address notifications referred to in Article 8 of the Protocol to the Compliance Committee, which will then be authorised to contact the Party of import concerned on behalf of the COP/MOP, and to require that Party to apply paragraph 6 of decision --/CMP.1 (decision-making under Article 10, paragraph 7, of the Protocol);
- As regards flagrant, repeated or continued non-compliance with Article 10, to decide that the costs of a particular risk assessment referred to in Article 15, paragraph 3, of the Protocol, shall be borne, or repaid, by the Party of import;
- To decide to authorise the undertaking of a verification mission in the territory of the Party concerned;
- As regards flagrant, repeated or continued non-compliance with Article 24 of the Protocol, to decide that future agreements and arrangements referred to in Article 24 of the Protocol, will have to be reviewed by the Compliance Committee, before these agreements and arrangements come into effect;
- In case a flagrant, repeated or continued non-compliance with Article 8, paragraph 1, of the Protocol finds its cause in the conduct of the same company, to decide to “grey-list” the exporter, including through the Biosafety Clearing-house.

**REPUBLIC OF KOREA**

[17 January 2002]  
[SUBMISSION : ENGLISH]

**Comments on the Brackets Parts of the Draft Procedures  
and Mechanisms on Compliance under the Cartagena  
Protocol on Biosafety**

**I. Objective, Nature and Underlying Principles**

**A. Brackets Part**

3. The operation of the compliance procedures and mechanisms .....and [common but differentiated responsibilities] and [and take into account principle 7 of the Rio Declaration on Environment and Development, that states have common but differentiated responsibilities.]

**B. Comment**

The Republic of Korea is of the view that there should be a consideration for the capacity of developing countries and different treatments with regard to the compliance issues to promote the effectiveness of the compliance procedures. In this context, the Republic of Korea believes that the first bracket phrase better reflects the Korea's view.

**II. Institutional mechanisms**

**A. Brackets Part**

2. The Committee shall ..., and, .... [ensuring a balance between importing and exporting countries.]

**B. Comment**

Considering the fact that the Protocol aims to ensure the safety with regard to the international trade of LMOs among Parties, the Republic of Korea believes that the Committee shall take into full account the voices of all Parties. In this regard, it is more pertinent to compose the Committee on a geographically balanced representation. A balance between importing and exporting countries is not necessarily required in the composition of the Committee.

**C. Brackets Part**

3. Members of the Committee shall ..., and [they shall serve in their individual capacity.]

**D. Comment**

When we set up the Committee on a geographically balanced representation, it has been already assumed that the Committee members shall take into account and consider the position of the regional countries. Therefore, the Republic of Korea prefer deleting this brackets phrase.

### **III. Procedures**

#### **A. Brackets Parts**

1. The Committee shall receive, through the Secretariat, any submissions relating to compliance from:

- a) .....
- b) [Any Party with respect to another Party]
- c) [The Conference of the Parties serving as the meeting of the Parties to the Protocol]

#### **B. Comment**

The compliance regime is one of the most important elements of the Protocol. In order for the Committee to make its decision-making process be more trans-parent and each Party be more responsible, the information submitted by Parties directly should play a leading role. In consequence, we prefer deleting the brackets phrase of b). In particular, it is desirable, as a complementary step, to review the information provided by the COP/MOP, as the COP/MOP is considered a objective and well balanced organization body which is objective and well balanced.

### **IV. Information and Consultation**

#### **A. Brackets Parts**

1. The Committee may seek or receive and consider relevant information, including from :

- a) The Biosafety Clearing-House and [the bodies of the Convention on Biological Diversity and the Protocol)
- b) [Non-governmental Organizations, ....]
- c) [The Secretariat]

#### **B. Comment**

The Republic of Korea is of the view that all information relating to compliance and non-compliance shall be provided through official diplomatic channels. The information provided by from NGOs, and other civil society organizations can be made available only through the Parties directly concerned, or through the secretariat and other official bodies in accordance with the Convention or the Protocol. Therefore, We find that the bracket phrase b) should be deleted.

### **V. Measures to promote compliance and address cases of non-compliance**

#### **A. Brackets Parts**

1. c) Request or assist, as appropriate, ...[taking into account its existing capacity to comply] ;
2. ....[and the capacity of the Party concerned, in particular of developing Parties .....]

### **B. Comment**

In order for the Protocol to be a reliable tool in ensuring human and environmental safety, it is essential that the capacities of all Parties concerned be taken into account in developing an action plan. In light of the Article 22 of the Protocol stipulating that developed countries shall provide assistance to developing countries to enhance their compliance capacity, the Republic of Korea believes that those brackets phrases should be kept as they are.

### **C. Brackets Part**

2. The Conference of the Parties serving as the meeting of the Parties may, ....., and the capacity of the party concerned, in particular of developing country Parties in complying with the Protocol, also decide upon ....

- a) .....
- b) [Issue a caution to the concerned Party;]
- c) [Publish cases of non-compliance ; or]
- d) [Suspend the specific rights and privileges of the concerned Party under the Protocol [consistent with international law]]

### **D. Comment**

In order for the compliance regime to become effective, the Republic of Korea believes that the compliance regime requires a set of enforcement mechanisms, including issuing a caution (b), publishing cases of non-compliance (c) and suspending the specific rights and privileges (d).

**SLOVENIA**

[18 January 2002]  
[SUBMISSION: ENGLISH]

### ***Understandings on the contents in the compliance text (para2, recomm.2/11)***

Art. 34 of the Protocol takes the form of so called enabling provisions, and it does not establish a compliance mechanism, but provides a basis framework for its establishment by the COP/MOP. Indeed, this is a common way of approaching the issue of compliance in recent multilateral environmental agreements, such as the Montreal Protocol, PIC Convention, Kyoto Protocol, etc..

Having considered the provisions of the Protocol, the core of the compliance work and mechanisms shall be a body to which questions and problems regarding individual compliance can be referred. Therewith, self monitoring and regularly reporting to COP/MOP on countries progress in implementing their obligations under the Protocol, are likely to provide an essential and valuable basis for the work of a future compliance mechanisms.

/...

Taking together mentioned two mechanisms should support the effective implementation of the Protocol and also provide basis for amendments and additions to the Protocol in the future.

## UNITED STATES OF AMERICA

[25 January 2002]  
[SUBMISSION: ENGLISH]

Submission of the United States of America:  
Comments on UNEP/CBD/ICCP/2/L.4  
"Draft Procedures and Mechanism on Compliance  
Under the Cartagena Protocol on Biosafety"

Pursuant to UNEP/CBD/ICCP/2/15 Item 41.5, paragraph 175, <sup>1</sup> the United States hereby submits its comments on all elements of UNEP/CBD/ICCP/2/L.4 "Draft Procedures and Mechanisms on Compliance Under the Cartagena Protocol on Biosafety" (Annex 1, item 2/11 of UNEP/CBD/ICCP/2/15).

An overarching comment concerns the nature of the compliance committee. The committee does not have the authority to make the determination that a party is in non-compliance. Therefore it would be more accurate to insert "possible" before non-compliance throughout these draft procedures. See Section I; Section III, paragraph 1. 1 (a) and 1 (b); Section VI, paragraph 1, 2 and 2(c).

### **Section I. Objective, nature and underlying principles**

1. The language of paragraphs two and three seems misplaced in the operative text of these procedures and mechanisms and would be more appropriately placed in a preamble. Therefore we recommend moving paragraphs two and three to the preamble, with edits listed below. Once these paragraphs are moved out of Section 1, "nature and underlying principles" must be deleted from the title of Section I to reflect the substantive change to this section.

2. It seems more accurate to delete "shall" and replace with "have been designed to."

3. The U.S. supports deleting the bracketed items as it is inappropriate to insert a differentiated approach here, when such language is not found in the text of the Biosafety Protocol. Also, we propose changing "principles" to "considerations."

### **Section II. Institutional mechanisms**

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<sup>1</sup> UNEP/CBD/ICCP/2/15 Item 4.8.5, paragraph 175 states "The Working Group approved the Chair's text as amended, for transmission to plenary as draft recommendation UNEP/CBD/ICCP/2/L.4. It was understood that all elements of the draft procedures and mechanisms on compliance annexed to the draft recommendation would be subject to further discussion."

1. The creation of a standing compliance committee goes beyond what was contemplated in Article 34 of the Protocol. Therefore we propose the insertion of "on an ad hoc basis," after "is hereby established." See also paragraph five.
2. We support the bracketed text and consequently support deletion of "on the basis of three members from each of the five regional groups of the United Nations."
3. We oppose the bracketed text. Members should not serve in their individual capacity and instead should represent their governments.
4. Consistent with our comment on paragraph two, we oppose regional distribution and therefore support deletion of "one from each region."
5. Consistent with our comment on paragraph one, the creation of a standing compliance committee with regular meeting times goes beyond what was contemplated in Article 34 of the Protocol. Therefore we propose deleting "twice a year, unless it decides otherwise," and inserting "on an ad hoc basis."

### **Section III. Functions of the Committee**

1. Consistent with our comment on Section I, Paragraph 1, we propose the insertion of "possible" before "non-compliance" in paragraph 1, 1 (a) and 1 (b). The committee would not make a determination of non-compliance.
  - l(d). Delete "general" before "issues of compliance" and replace with "specific." We believe the submissions and the committee should focus on specific factual allegations of possible non-compliance.
  - l(e). Insert ", consistent with Section VI" after "Take measures, as appropriate" to clarify which measures the Committee may take. As it is written it is too vague.
  - l(f). Insert "consistent with the Protocol" between "may" and "be assigned" to clarify that the functions will be limited to matters concerning the Protocol.

### **Section IV. Procedures**

- l(b). We believe that the submitting party should have some standing to report on the other party (i.e., the submitting party is directly involved with or affected by the alleged non-compliance of the party on which it is reporting). Therefore we propose inserting ", if directly involved," between "Any Party," and "with respect to another Party: or"

### **Section V. Information and consultation**

2. Insert "as appropriate" between "may" and "seek." As a point of clarification, we would be interested in understanding how the committee will determine what is relevant?
  - 2(b). Consistent with our comment in paragraph IV l(b), we believe that the submitting entity should be directly involved with or affected by the alleged non-compliance of the party on which it is reporting. Therefore we propose inserting ", if directly involved;" after "relevant international organizations".

new 2(d). Consistent with paragraph one, it seems that we should also add a new 2(d) clearly adding Parties to the list of entities that may send the Committee information.

## **Section VI. Measures to promote compliance and address cases of non-compliance**

1. Consistent with our comment on Section I, paragraph 1, we propose the insertion of "possible" before "non-compliance." in both the section heading and in paragraph one.

1 (b). Insert "consistent with Articles 22 and 28 of the Protocol" between "provision" and "of financial and technical assistance..." This language is needed to clarify that such recommendations will be considered consistent with existing Protocol provisions. See also the commensurate change to paragraph 2(a.) below.

1 (c). Delete from bracketed text: "its existing capacity to comply" and replace with "any other compliance assistance being provided to the Party through the committee or the Conference of the Parties serving as the meeting of the Parties".

2. We oppose the bracketed text and suggest instead: "and the efforts of the Party concerned to comply either on its own or, where capacity is lacking, with assistance from the Committee." We also propose replacing "non-compliance" with "the conduct in question".

2(a). Consistent with our comment to paragraph 1 (b), insert "Consistent with Articles 22 and 28 of the Protocol" before "Provide financial and technical assistance..."

2(c). Consistent with our comment on Section I, paragraph 1, insert "possible" before "non-compliance"

2(d) Delete bracketed text as there is no authority for this in international law. Replace with: "In appropriate cases, take additional measures consistent with international law as reflected in Article 60 of the Vienna Convention on the Law of Treaties."

**DRAFT PROCEDURES AND MECHANISMS ON COMPLIANCE****UNDER THE CARTAGENA PROTOCOL ON BIOSAFETY****PREAMBLE**

The following procedures and mechanisms are developed in accordance with Article 34 of the Cartagena Protocol on Biosafety and are separate from, and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention on Biological Diversity.

~~÷ The compliance procedures and mechanisms have been designed to shall be simple, facilitative, non-adversarial and cooperative in nature.~~

~~The operation of the compliance procedures and mechanisms shall be guided by considerations of transparency, fairness, expedition, and predictability.~~

***I. Objective, nature and underlying principles***

1. The objective of the compliance procedures and mechanisms shall be to promote compliance with the provisions of the Protocol, to address cases of possible non-compliance by Parties, and to provide advice or assistance, where appropriate.

~~2. The compliance procedures and mechanisms shall be simple, facilitative, non-adversarial and cooperative in nature.~~

~~3. The operation of the compliance procedures and mechanisms shall be guided by the principles of transparency, fairness, expedition, predictability, [and common but differentiated responsibilities] [and take into account principle 7 of the Rio Declaration on Environment and Development, that States have common but differentiated responsibilities].~~

***II. Institutional mechanisms***

1. A Compliance Committee, hereinafter referred to as "the Committee", is hereby established on an ad hoc basis pursuant to Article 34 of the Protocol to carry out the functions specified herein.

2. The Committee shall consist of 15 members nominated by Parties and elected by the Conference of Parties serving as the meeting of the Parties to the Protocol ~~on the basis of three members from each of the five regional groups of the United Nations~~, and ensuring a balance between importing and exporting countries].

3. Members of the Committee shall have recognized competence in the field of biosafety or other relevant fields, including legal or technical expertise, ~~[and they shall serve in their individual capacity].~~

4. Members shall be elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol for a period of four years, this being a full term. At its first meeting, the

Conference of the Parties serving as the meeting of the Parties to the Protocol shall elect five members, ~~one from each region~~, for half a term, and ten members for a full term. Each time thereafter, the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol shall elect for a full term, new members to replace those whose term has expired. Members shall not serve for more than two consecutive terms.

5. The Committee shall meet ~~twice a year, unless it decides otherwise~~ on an *ad hoc* basis. The Secretariat shall service the meetings of the Committee.

6. The Committee shall submit its reports including recommendations with regard to the discharge of its functions to the next meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol for consideration and appropriate action.

7. The Committee shall develop and submit its rules of procedure to the Conference of the Parties serving as the meeting of the Parties for its consideration and approval.

### **III. Functions of the Committee**

1. The Committee shall, with a view to promoting compliance and addressing cases of possible non-compliance, and under the overall guidance of the Conference of the Parties serving as the meeting of the Parties to the Protocol, have the following functions:

Identify the specific circumstances and possible causes of individual cases of possible non-compliance referred to it;

Consider information submitted to it regarding matters relating to compliance and possible cases of non-compliance;

Provide advice and/or assistance, as appropriate, to the concerned Party, on matters relating to compliance with a view to assisting it to comply with its obligations under the Protocol;

Review ~~general-specific~~ issues of compliance by Parties with their obligations under the Protocol, taking into account the information provided in the national reports communicated in accordance with Article 33 of the Protocol and also through the Biosafety Clearing-House;

Take measures, as appropriate, consistent with Section VI or make recommendations, to the Conference of the Parties serving as the meeting of the Parties to the Protocol;

Carry out any other functions as may, consistent with the Protocol, be assigned to it by the Conference of the Parties serving as the meeting of the Parties to the Protocol.

### **IV. Procedures**

1. The Committee shall receive, through the Secretariat, any submissions relating to compliance from:

(a) Any Party with respect to itself;

(b) [Any Party, if directly involved, with respect to another Party; or]

(c) [The Conference of the Parties serving as the meeting of the Parties to the Protocol].

2. The Secretariat shall, within fifteen days of receipt of submissions under paragraphs 1 (b) and (c) above, make the submissions available to the Party concerned, and once it has received a response and information from the concerned Party, it shall transmit the submission, the response and information to the Committee.

3. A Party that has received a submission regarding its compliance with the provision(s) of the Protocol should respond and, with recourse to the Committee for assistance if required, provide the necessary information preferably within three months and in any event not later than six months. This period of time shall commence on the date of the receipt of the submission as certified by the Secretariat. In the case where the Secretariat has not received any response or information from the concerned Party within the six months as referred to above, it shall transmit the submission to the Committee.

4. A Party, in respect of which a submission is made or which makes a submission, is entitled to participate in the deliberations of the Committee. This Party shall not participate in the elaboration and adoption of a recommendation of the Committee.

#### ***V. Information and consultation***

1. The Committee shall consider relevant information from:

- (a) The Party concerned;
- (b) [The Party that has made a submission with respect to another Party.]

2. The Committee may, as appropriate, seek or receive and consider relevant information, including from:

- (a) The Biosafety Clearing-House [and other bodies of the Convention on Biological Diversity and the Protocol];
- (b) [Non-governmental organizations, the private sector and other civil-society organizations and relevant intergovernmental organizations, if directly involved];
- (c) [The Secretariat-;]
- (d) Parties.

3. The Committee may seek expert advice from the biosafety roster of experts.

4. The Committee, in undertaking all of its functions and activities, shall maintain the confidentiality of any information that is confidential under Article 21 of the Protocol.

#### ***VI. Measures to promote compliance and address cases of possible non-compliance***

1. The Committee may take one or more of the following measures with a view to promoting compliance and addressing cases of possible non-compliance:

- ~~(a)~~ (a) Provide advice or assistance to the Party concerned, as appropriate;

~~(e)(b)~~ Make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol regarding the provision, consistent with Articles 22 and 28 of the Protocol, of financial and technical assistance, technology transfer, training and other capacity-building measures;

~~(f)(c)~~ Make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol that the Conference ~~r~~Request or assist, as appropriate, the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a timeframe to be agreed upon between the ~~Conference Committee~~ and the Party concerned, [taking into account ~~its existing capacity to comply~~ any other compliance assistance being provided to the Party through the Committee or the Conference of Parties serving as the meeting of the Parties]; and

~~(g)(d)~~ Invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Protocol.

2. The Conference of the Parties serving as the meeting of the Parties may, upon the recommendations of the Committee, and taking into account such factors as the cause, type, degree and frequency of ~~non-compliance~~ the conduct in question, ~~[and the capacity of the Party concerned, in particular of developing country Parties in complying with the Protocol]~~ and the efforts of the Party concerned to comply either on its own or, where capacity is lacking, with assistance from the Committee, also decide upon one or more of the following measures:

~~(h)(a)~~ Consistent with Articles 22 and 28 of the Protocol, ~~P~~provide financial and technical assistance, technology transfer, training and other capacity-building measures;

~~(i)(b)~~ [Issue a caution to the concerned Party;]

~~(j)~~ [Publish cases of possible non-compliance; or]

~~(k)(c)~~ [~~Suspend the specific rights and privileges of the concerned Party under the Protocol [consistent with international law].~~] In appropriate cases, take additional measures consistent with international law as reflected in Article 60 of the Vienna Convention on the Law of Treaties.

## **VII. Review of the procedures and mechanisms**

The Conference of the Parties serving as the meeting of the Parties to the Protocol shall, in line with Article 35 of the Protocol, review the effectiveness of these procedures and mechanisms and take appropriate action.