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OPEN-ENDED AD HOC
INTERGOVERNMENTAL COMMITTEE
FOR THE NAGOYA PROTOCOL ON
ACCESS TO GENETIC RESOURCES
AND THE FAIR AND EQUITABLE
SHARING OF BENEFITS ARISING
FROM THEIR UTILIZATION

First meeting
Montreal, Canada, 5-10 June 2011
Item 6 of the provisional agenda*

OVERVIEW OF COMPLIANCE PROCEDURES AND MECHANISMS ESTABLISHED UNDER OTHER MULTILATERAL ENVIRONMENTAL AGREEMENTS

Note by the Executive Secretary

I. BACKGROUND

1. Article 30 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol) states that “the Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate. They shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms under Article 27 of the Convention”.

2. The Conference of the Parties at its tenth meeting in October 2010 mandated the Intergovernmental Committee for the Nagoya Protocol (ICNP) to consider, at its first meeting, cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance, including procedures and mechanisms to offer advice or assistance, where appropriate (decision X/1, annex II, section A, para. 4).

3. The present document has been prepared by the Executive Secretary to assist the ICNP in fulfilling its mandate. It provides additional information to supplement UNEP/CBD/ICNP/1/6 by reviewing existing compliance regimes and experience established under other multilateral environmental agreements.

* UNEP/CBD/ICNP/1/1/Add.1.

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4. In addition, useful information can be found in several documents prepared in the framework of the Cartagena Protocol compliance regime, namely: UNEP/CBD/ICCP/1/7 regarding the development of compliance procedures and mechanisms under Article 34 and UNEP/CBD/BS/COP-MOP/3/2/Add.1 and UNEP/CBD/BS/COP-MOP/BS/CC/3/2 providing information and experience regarding repeated cases of non-compliance under the compliance procedures and mechanisms of other multilateral environmental agreements.

5. The full texts of the compliance procedures and mechanisms adopted under the Cartagena Protocol and, more recently, under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) are found in UNEP/CBD/ICNP/1/INF/4.

6. Section II summarizes the compliance procedures and mechanisms adopted by different MEAs. It examines how they are actually working in practice. Section III provides an overview of the compliance regimes currently under negotiation and other international developments. Section IV draws some conclusions that will be further developed in document UNEP/CBD/ICNP/1/6.

II. REVIEW OF EXISTING COMPLIANCE PROCEDURES AND MECHANISMS AND EXPERIENCE UNDER OTHER MULTILATERAL ENVIRONMENTAL AGREEMENTS

7. Section II summarizes the compliance procedures and mechanisms and experience developed under other MEAs. The summaries are not exhaustive. They are meant to highlight the main and common elements in the configuration of a compliance procedure.

8. Compliance procedures and mechanisms normally establish a compliance body with a defined size, composition and function. Generally speaking, a party's non-compliance can be invoked by the party experiencing difficulties to comply, by other parties, and in some instances by a MEA's body (e.g., the Secretariat or the compliance body) or by members of the public. In response to non-compliance, the competent body normally follows a procedure of information gathering and communication and after taking into account several considerations, it can decide to take measures that can range from facilitative measures to sanctions.

A. The 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol)

9. The Cartagena Protocol on Biosafety was adopted on 29 January 2000 as a supplementary agreement to the Convention on Biological Diversity. It entered into force on 11 September 2003.

10. Pursuant to Article 34 of the Protocol, procedure and mechanisms on compliance were adopted by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP) in February 2004. The decision BS-I/7 on the "Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety"¹ sets up a regime that is simple, facilitative, non-adversarial and cooperative in nature. Its objectives are to promote compliance with the Protocol, to address cases of non-compliance by Parties, and to provide advice or assistance, where appropriate.²

11. The procedure is administered by a Compliance Committee consisting of 15 members with recognized expertise and elected by the COP-MOP for a period of four years based on the principle of equitable geographic distribution. The Committee meets twice a year, unless it decides otherwise, and

¹ MOP decision BS-I/7, annex, UNEP/CBD/BS/COP-MOP/1/15 (2004).

² Ibid, Section I.

reports to the COP-MOP.³ The rules of procedure for meetings of the Compliance Committee were approved by COP-MOP decision BS-II/1.⁴

12. The Committee functions are to:

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

(b) Consider information submitted to it regarding matters relating to compliance and cases of non-compliance;

(c) 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;

(d) Review general 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;

(e) Take measures, as appropriate, or make recommendations, to the COP-MOP; and

(f) Carry out any other functions as may be assigned to it by the COP-MOP.⁵

13. The compliance procedures can be initiated through a submission to the Secretariat by:

(a) Any Party with respect to itself; or

(b) A Party, which is affected or likely to be affected, with respect to another Party.⁶

14. The Committee considers the submissions as well as relevant information from the Parties concerned. It may also seek advice and receive information from other sources such as the Biosafety Clearing-House, relevant international organizations or biosafety experts.⁷

15. Both the Committee and the COP-MOP are competent to take measures to promote compliance and address cases of non-compliance, taking into account the capacity of the Party concerned. The Committee may take one or more of the following measures:

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

(b) Make recommendations to the COP-MOP regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures;

(c) Request or assist, as appropriate, the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol; and/or

(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.⁸

16. The COP-MOP may decide upon one or more of the following measures:

(a) Provide financial and technical assistance, technology transfer, training and other capacity-building measures;

(b) Issue a caution to the concerned Party;

³ Ibid, Section II

⁴ Rule 18 on Voting of the Rules of Procedure for meetings of the Compliance Committee is still in square brackets.

⁵ Ibid, Section III.

⁶ Ibid, Section IV, para. 1.

⁷ Ibid, Section V.

⁸ Ibid, Section VI, para. 1.

(c) Request the Executive Secretary to publish cases of non-compliance in the Biosafety Clearing-House; and/or;

(d) In cases of repeated non-compliance, as may be decided by the COP-MOP at its third meeting, and thereafter within the review process in accordance with Article 35 of the Protocol.^{9 10}

17. Section VII of the procedures and mechanisms provides that their effectiveness is to be reviewed at COP-MOP 3, and thereafter, in line with the assessment and review of the Protocol under Article 35.

Experience and lessons learned

18. Six years after the adoption of the compliance procedure, no submission relating to compliance has been put forward by a Party for consideration by the Compliance Committee.

19. At its fifth meeting, the Chairman of the Compliance Committee reported to members about information received from a group of non-governmental organizations alleging the non-compliance of a certain Party. It was the first case of its kind and, in accordance with decision BS-I/7 establishing the compliance procedure; the Committee is not mandated to consider submissions by non-governmental organizations (NGOs). The Committee discussed the matter and agreed that for the future "...in the event of allegations received from non-Party sources concerning the state of compliance of a Party, the Committee may invite the Party concerned to indicate, if the Party so wishes, to the Committee to consider the information received with a view to providing advice and assistance to that Party, as appropriate".¹¹ At its sixth meeting, the Committee discussed the submission received from a NGO, made on the basis of the above paragraph, alleging non-compliance of a Party with its obligations under the Protocol. However, the Committee, in its discretion, decided not to invite the Party concerned to indicate whether it wished the Committee to consider the submission.¹²

20. Recognising the difficulty the Parties may have in effectively implementing the Protocol and in the absence of submissions by Parties, the Committee undertook an evaluation of the perceived limitations of the procedures and rules, within the framework of the overall evaluation of the effectiveness of the Protocol pursuant to Article 35.¹³ At its fourth meeting the COP-MOP asked Parties to submit their views on how the supportive role of the Compliance Committee could be improved.¹⁴

21. Consequently, the fifth meeting of the COP-MOP in decision BS-V/1¹⁵ decided that in the event of a submission relating to compliance by a Party with respect to itself, the Compliance Committee shall only consider taking those measures relating to advice or assistance and/or to the provision of financial and technical assistance, technology transfer, training and other capacity-building measures. In addition, the same decision provides for an enhanced role of the Compliance Committee which is thereafter entitled to take the measures above in a situation where a Party fails to submit its national report, or where information has been received through a national report or through the Secretariat, based on information

⁹ COP-MOP considered this issue at its third and fourth meetings. In decision BS-IV/1 the Parties decided "to defer consideration or adoption of measures on repeated cases of non-compliance until such time as experience may justify the need for developing and adopting such measures".

¹⁰ Ibid, Section VI, para. 2.

¹¹ Report of the Compliance Committee under the Cartagena Protocol on Biosafety on the work of its fifth meeting (19-21 November 2008). Document UNEP/CBD/BS/CC/5/4 (2008) para. 25.

¹² Report of the Compliance Committee under the Cartagena Protocol on Biosafety on the work of its sixth meeting (4-6 November 2009). Document UNEP/CBD/BS/CC/6/4 (2009), paras. 20 and 21.

¹³ Decision BS-III/1, para. 1.

¹⁴ Decision BS-IV/1, para. 6. For further information see: Compilation of Views on How the Supportive Role of the Compliance Committee Could Be Improved (document UNEP/CBD/BS/COP-MOP/5/2/ADD1), and the Compilation of the Work of the Committee Concerning the Trigger Mechanism of the Compliance Procedures under the Protocol as Recorded in the Reports of its Previous Meetings (document UNEP/CBD/BS/CC/7/2).

¹⁵ Para. 1(b).

from the Biosafety Clearing-House, that shows that the Party concerned is faced with difficulties complying with its obligations under the Protocol.

22. The Committee also expressed its concern regarding the absence of a procedure to expeditiously replace Committee members who resign inter-sessionally or who are otherwise unable to complete their terms. At its fourth meeting the COP-MOP called upon each regional group to consider and apply mechanisms to ensure that nominees to the Compliance Committee were willing and able to attend and fully participate in the meetings of the Committee and to replace them in an expeditious manner in cases of non-completion of their term.¹⁶ It has now become the practice for each regional group to nominate the necessary members of the Committee and also to nominate one or two replacements in case of a resignation during the inter-sessional period.

23. The procedures and mechanisms provide that the Committee is to meet twice a year unless it decides otherwise. At MOP 4, the Parties encouraged the Committee to meet less than twice a year if deemed sufficient and within the budget adopted by MOP. At both MOP 4 and MOP 5, the Parties have adopted budgets that only provide for one meeting per year of the Committee so it has only been meeting once a year since 2008.

B. *The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to the 1985 Vienna Convention on the Protection of the Ozone Layer (Montreal Protocol)*

24. The Montreal Protocol on Substances that Deplete the Ozone Layer was adopted in 1987 and entered into force in 1989. The Montreal Protocol is the first multilateral environmental agreement which unambiguously constituted a formal mechanism to identify and address non-compliance.

25. Pursuant to Article 8, an interim non-compliance procedure was approved in 1990 and reviewed and finalized in 1992 at the Fourth Meeting of the Parties. It was further reviewed and amended in 1998 as reflected in annex II of the report of the tenth meeting of the Parties.¹⁷

26. The procedure is conceived as a way of “securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol”¹⁸ and finding the best way “to bring about full compliance with the Protocol”.¹⁹

27. The procedure is administered by an Implementation Committee consisting of ten Parties elected by the Meeting of the Parties for two years based on the principle of equitable geographical distribution.²⁰ It meets twice a year, unless the Committee decides otherwise.²¹

28. The functions of the Implementation Committee are the following:

- (a) Receive, consider and report on any submissions to it regarding non-compliance;
- (b) Receive, consider and report on any information or observations forwarded to it by the Secretariat;
- (c) Request, where it considers necessary, through the Secretariat, further information on matters under its consideration;

¹⁶ Decision BS-IV/1, para. 2.

¹⁷ Final compliance procedure as reflected in the report of the Tenth Meeting of the Parties, Annex II. Document UNEP/OzL.Pro.10/9 (1998); and in the report of the Fourth Meeting of the Parties, Annex V. Document UNEP/OzL.Pro.4/15 (1992).

¹⁸ Ibid, para. 8.

¹⁹ Ibid, para. 9.

²⁰ Ibid, para. 5.

²¹ Ibid, para. 6.

(d) Identify the facts and possible causes relating to individual cases of non-compliance referred to it and make recommendations to the Meeting of the Parties;

(e) Undertake, upon the invitation of the Party concerned, information gathering in the territory of that Party; and

(f) For the purposes of drawing up its recommendations, exchange information with the Executive Committee of the Multilateral Fund related to the provisions of financial and technical cooperation.²²

29. The procedure can be triggered by:

(a) One or more Parties regarding another Party's implementation of its obligations;

(b) A Party with respect to itself; or

(c) The Secretariat when it becomes aware of possible non-compliance by any Party during the course of preparing its report on data submitted by Parties according to the reporting obligations.²³

30. The submissions are to be sent to the Secretariat, which transmits them to the Implementation Committee.

31. The Committee submits its report, including any recommendation, to the Meeting of the Parties, which may decide upon and impose measures that, according to the indicative list developed at the Fourth Meeting of the Parties, can be the following:

(a) Appropriate assistance, including assistance for collecting and reporting data, technical assistance, technology transfer and financial assistance, information transfer and training;

(b) Issuance of cautions; and/or

(c) Suspension of specific rights and privileges under the Protocol, including those concerned with industrial rationalisation, production, consumption, trade, transfer of technology, the financial mechanism and institutional arrangements.²⁴

Experience and lessons learned

32. One of the significant changes brought by the 1998 review involved giving the Implementation Committee the duty not only to gather information but also to identify the possible causes leading to non-compliance.

33. The compilation of decisions of individual Parties' non-compliance²⁵ reveals that decisions on non-compliance have been addressed to 64 different Parties, most of them initiated by referrals of the Secretariat. The compliance procedure takes into account three categories of Parties: (a) developing countries, (b) countries with economies in transition and (c) industrialized countries.

34. Developing countries under Article 5 of the Protocol are not bound by the same time frame for control measures as other countries. Overall, the Committee submits a recommendation to the Meeting of the Parties, which in a decision requests the Party to submit a plan of action with time-specific benchmarks for ensuring their prompt return to compliance. In the case of non-compliance by developing countries, the Multilateral Fund of the Montreal Protocol and the executing agencies (United Nations Industrial Development Organization, United Nations Environmental Programme and United Nations Development Programme) review and adapt their technical and financial assistance according to the

²² Ibid, para. 7.

²³ Ibid, paras. 1, 3 and 4.

²⁴“Indicative list of measures that might be taken by a meeting of the Parties in respect of non-compliance with the Protocol”, annex V of the report of the Fourth Meeting of the Parties. Document UNEP/OzL.Pro.4/15 (1992).

²⁵ As contained in the 8th edition of the Handbook for the Montreal Protocol on Substance that Deplete the Ozone Layer, 2009.

relevant decisions of the Meeting of the Parties in order to ensure their compliance. For Parties with economies in transition the assistance has been so far provided through the Global Environment Facility.

35. Suspension of specific rights and privileges under the Protocol related to trade are only foreseen for cases of repeated non-compliance. Trade restrictions for repeated non-compliance to date have been only applied to one country.

C. *The UNECE 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP)*

36. The Convention was adopted in 1979 and entered into force in 1983. The Convention has been extended by eight protocols that identify specific measures to be taken by Parties to cut their emissions of air pollutants.

37. The text of the Convention does not provide for the establishment of a compliance procedure but does require the Executive Body (EB) of the Convention to review implementation. By decision 1997/2 the EB adopted a compliance procedure and mechanisms applicable to all the protocols under the Convention. In 2006 the procedure was replaced by decision 2006/2.²⁶

38. The procedure is administered by an Implementation Committee consisting of nine Parties to the Convention selected by the Executive Body. Each member shall be a Party to at least one Protocol.²⁷ The Committee meets twice a year, unless it decides otherwise.²⁸

39. The Committee has the mandate to:

- (a) Review compliance by Parties with the reporting requirements;
- (b) Consider any submission regarding non-compliance;
- (c) Provide, when it deems necessary, for the evaluation of the quality of data reported by a Party, by a relevant technical body or expert; and
- (d) Prepare reports on compliance at the request of the Executive Body.²⁹

40. The trigger mechanism of the procedure is similar to that of the Montreal Protocol. The procedure can be initiated: (a) by one or more Parties regarding another Party's implementation of its obligations, (b) by a Party with respect to itself or (c) by the Secretariat when it becomes aware of possible non-compliance by any Party upon reviewing reports submitted by Parties in accordance with the reporting requirements.³⁰

41. In the discharge of its functions, the Committee may request, through the Secretariat, further information on matters under its consideration; undertake, at the invitation of the Party concerned, information gathering in the territory of the Party; and consider any information forwarded by the Secretariat concerning compliance with the protocols.³¹

42. The Committee reports annually to the EB who decides upon the measures to be taken by consensus. Unlike the Montreal and Cartagena Protocols the LRTAP procedure does not include express reference to underlying principles nor to a specific range of measures that can be imposed on a non-compliant Party. The only reference is that measures decided must be of a "non-discriminatory nature to bring full compliance with the Protocol in question, including measures to assist a Party's compliance".³²

²⁶ EB decision 2006/2. Document ECE/EB. AIR/2006/2 (2006).

²⁷ Ibid, para. 1.

²⁸ Ibid, para. 2.

²⁹ Ibid, para. 3.

³⁰ Ibid, paras. 4 and 5.

³¹ Ibid, para. 6.

³² Ibid, para. 11.

Experience and lessons learned

43. Relevant changes in the 2006 amendment of the procedure simplify the selection procedure of the Committee members, enlarge membership from 8 to 9 and give more discretion to the Committee in order to fulfil its function (see para. 39(c)) that was mandatory before the amendment.

44. Since its establishment in 1997, the Committee has considered 13 cases of non-compliance. Five of them have been initiated by the Party itself and the rest through referrals made by the Secretariat. Five cases are still open and under follow-up by the Committee. In practice, Parties found in breach are to prepare timetables and to offer practical suggestions to accelerate emission reductions. The steps taken by Parties to achieve compliance are reviewed each year and followed-up through recommendations and decisions from the Executive Body.

D. *The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*

45. CITES was adopted in 1973 and entered into force in 1975. Its compliance regime has evolved during 30 years of operation on the basis of the legally-binding text of the Convention (in particular articles VIII, XII and XIII), interpretative resolutions and decisions of the Conference of the Parties, decisions and recommendations of CITES subsidiary bodies and historical practice.³³

46. Recently, resolution Conf. 14.3 adopted a “Guide to CITES compliance procedures”. The guide is not legally binding but serves “...to facilitate consistent and effective handling of compliance matters relating to obligations under the Convention, taking into account relevant Resolutions and Decisions...”³⁴

47. The procedure is based on the general principle that “a supportive and non-adversarial approach is taken towards compliance matters, with the aim of ensuring long-term compliance”.³⁵

48. Various CITES bodies have compliance-related tasks but the CITES Standing Committee acts as the administrative body of the compliance procedure. Its members are representatives from Parties from each of the six major geographical regions (Africa, Asia, Central and South America and the Caribbean, Europe, North America and Oceania) with the number of representatives weighted according to the number of Parties within the region.³⁶

49. The Standing Committee is tasked with monitoring overall compliance with the Convention, advising and assisting Parties in complying, verifying information and taking compliance measures. In addition, the Animals and Plants Committees advise and assist the Standing Committee and the Conference of the Parties by undertaking reviews, consultations and reporting namely on matters related to the Review of Significant Trade.³⁷

50. The compliance procedure can be initiated by (a) any Party over matters related to another Party, (b) a Party regarding itself, (c) and by the Secretariat through the examination of reports, legislative texts as well as other special responses to information requests.

51. After a submission, the Secretariat first communicates with the Party and if the Party does not take remedial action within reasonable time limits, then the Secretariat brings the matter to the attention of the Standing Committee.

³³ “Compliance with the Convention”, 12th meeting of the Conference of the Parties, CoP12 doc. 26 (2002), para. 8.

³⁴ COP resolution Conf. 14.3. “Guide to CITES compliance procedures”, Annex, (2007), para. 1.

³⁵ Ibid, para. 4.

³⁶ COP resolution Conf. 11.1 (Rev. CoP 14) annex 1 “Establishment of the Standing Committee of the Conference of the Parties”.

³⁷ Mechanisms to provide remedial action when there is reason to believe that certain listed species (in appendix II) are being traded at significant levels without adequate implementation of CITES provisions.

52. The Standing Committee, when deciding the measures to be taken, and after consultation with the Party, takes into account the capacity of the Party concerned, as well as the cause, type, degree and frequency of the compliance matter, the appropriateness of the measures in relation to the gravity of the compliance matter, and the possible impact on conservation and sustainable use.³⁸ It can decide to take one or more of the following measures:

- (a) Provide advice, information and appropriate facilitation of assistance and other capacity-building support to the Party concerned;
- (b) Request special reporting from the Party concerned;
- (c) Issue a written caution, requesting a response and offering assistance;
- (d) Recommend specific capacity-building actions to be undertaken by the Party concerned;
- (e) Provide in-country assistance, technical assessment and a verification mission, upon the invitation of the Party concerned;
- (f) Send a public notification of a compliance matter through the Secretariat to all Parties, advising that compliance matters have been brought to the attention of a Party, and that up to that time, there has been no satisfactory response or action;
- (g) Issue a warning to the Party concerned that it is in non-compliance, for example, in relation to national reporting and/or the National Legislation Project; and/or
- (h) Request a compliance action plan to be submitted to the Standing Committee by the Party concerned identifying appropriate steps, a timetable for when those steps should be completed and means to assess satisfactory completion.³⁹

53. In cases of repeated non-compliance, the Standing Committee may decide to recommend to the Conference of the Parties the suspension of trade in specimens of one or more CITES-listed species.⁴⁰

Experience and lessons learned

54. Every meeting of the CITES Standing Committee considers a range of potential compliance matters regarding:

- (a) National reports: including those Parties potentially subject to a recommendation to suspend trade for failing to submit annual reports for three consecutive years;⁴¹
- (b) National legislation: including those Parties who have failed to comply with decision 14.25 that asks Parties with legislation in category 2⁴² and 3⁴³ to submit newly enacted legislation for implementation of the Convention or to provide adequate justification for its failure to do so;⁴⁴ and
- (c) The Review of Significant Trade and concerns that the Convention is not being effectively implemented.

55. Some specific compliance matters may also be addressed under individual agenda items (e.g., ranching operations in Madagascar regarding concerns to specific species trade).

³⁸ COP resolution Conf. 14.3, para. 32.

³⁹ Ibid, para. 29.

⁴⁰ Ibid, para. 30.

⁴¹ Resolution Conf. 11.17 (Rev. CoP14).

⁴² Category 2: Legislation which is believed generally not to meet all requirements for the implementation of CITES.

⁴³ Category 3: Legislation that is believed generally not to meet the requirements for the implementation of CITES.

⁴⁴ See SC59 Doc. 11 (2010) regarding national laws for implementation of the Convention. The Secretariat recommended to the Standing Committee to consider appropriate compliance measures, including recommendations to suspend commercial trade for 24 countries.

56. Conference of the Parties recommendations to suspend trade provide a period of time during which the relevant country can move from non-compliance to compliance by making progress enacting adequate legislation, combating and reducing illegal trade, submitting missing annual reports or responding to specific recommendations of the Standing Committee in the context of the Review of Significant Trade.

57. As of January 2011, twenty-two countries have one or more trade suspension measures in place due to different circumstances of repeated non-compliance:

- (a) Three are based on the lack of national legislation;
- (b) Two are due to non-submission of specific action plans as requested by the Conference of the Parties;
- (c) One regards failure to submit annual reports;
- (d) One relates to non-effective implementation of trade measures for certain species; and
- (e) The rest are within the context of the Review of Significant Trade.⁴⁵

58. The Conference of the Parties may review the procedure periodically and revise it where appropriate.

E. The UNECE 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)

59. The Espoo Convention was adopted in 1991 and entered into force on 10 September 1997. The Implementation Committee and the compliance procedures were established by the Meeting of the Parties in February 2001 by decision II/4 and revised by decision III/2.⁴⁶

60. The objective of the compliance procedure is to assist Parties to comply fully with their obligations under the Convention.⁴⁷

61. The Committee consists of eight Parties to the Convention. Each Party appoints a member of the Committee⁴⁸. The Committee meets once a year, unless it decides otherwise.⁴⁹

62. The Committee is tasked to:

- (a) Consider any submission with a view of securing a constructive solution;
- (b) Periodically review compliance by Parties on the basis of the information provided in their reports; and
- (c) Prepare reports to the Meeting of the Parties with a view to providing assistance to Parties, providing advice relating to procedural, technical or administrative questions, and on the compilation and communication of information.⁵⁰

63. Submissions can be made by (a) one or more Parties about another Party's compliance, (b) a Party with respect to itself, or (c) by the Committee if it becomes aware of possible non-compliance.⁵¹

64. The Committee can request further information, gather information in the territory of a Party, upon its invitation, and seek the services of experts. The Meeting of the Parties is to consider the

⁴⁵ See: http://www.cites.org/eng/disc/trade_suspension.shtml.

⁴⁶ COP decision III/2, Appendix. Document MP.EIA/2004/3 (2004).

⁴⁷ Ibid, para. 4.

⁴⁸ Ibid, para. 1.

⁴⁹ Ibid, para. 2.

⁵⁰ Ibid, para. 4.

⁵¹ Ibid, paras. 5 and 6.

recommendations and reports from the Committee and decide upon the general measures to bring about compliance. The decision does not list the possible measures to be taken.

Experience and lessons learned

65. The Implementation Committee under the Espoo Convention has considered five cases of non-compliance. Two were initiated by the Committee and three by Parties regarding compliance by other Parties.

66. Even though NGOs cannot trigger the compliance procedure, the Committee considered how to deal with information other than submissions from Parties and decided that it was linked to the Committee initiative⁵² as described in paragraph 6 of decision III/2 “where the Committee becomes aware of possible non-compliance by a Party with its obligations...” The Committee considered and identified a number of possible sources of information by which the Committee might become aware of possible non-compliance by a Party and therefore could initiate the compliance procedure itself. It finally agreed that when receiving information regarding compliance from NGOs, the Committee would gather information, contact the concerned Parties, copy the information received from the NGO and seek the Parties’ observations, and then the Committee would decide whether to proceed at its own initiative.⁵³

F. The UNECE 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

67. The Aarhus Convention was adopted in June 1998 and entered into force on 30 October 2001. Its Compliance Committee was set up in 2002 by decision I/7⁵⁴ on review of compliance and it has met thirty times since it became operational (four meetings annually). The Committee’s rules of procedure set out in the decision have developed by interpretation and practice and are regularly updated in compilations.⁵⁵

68. The procedure has some distinctive features. The Committee consists of eight independent experts who have recognized competence in the field. They serve in their personal capacity and do not represent the countries of which they are nationals. NGOs and Convention signatories can nominate Committee members.⁵⁶ Contrary to other compliance procedures, the rules of procedure of the Committee do not need to be approved by the Meeting of the Parties.⁵⁷ The Committee meets at least once a year, unless it decides otherwise.

69. The Committee’s functions are to:

- (a) Consider any submission, referral or communication;
- (b) Prepare, at the request of the Meeting of the Parties, a report on compliance with or implementation of the provisions of the Convention; and
- (c) Monitor, assess and facilitate the implementation of and compliance with the reporting requirements.⁵⁸

⁵² Report on the activities of the Implementation Committee on its fourteenth session, 15-17 January 2008, Geneva. Document ECE/MP.EIA/2008/5, paragraph 21.

⁵³ Report of the Implementation Committee on its sixteenth session. 10-12 March 2009, Berlin. Document ECE/MP.EIA/IC/2009/2, paragraphs 49 and 50.

⁵⁴ COP decision I/7, Annex. Document ECE/MP.PP/Add.8 (2004).

⁵⁵ Guidance document on the Aarhus Convention Compliance Mechanism, UNECE http://www.unece.org/env/pp/compliance/CC_GuidanceDocument.pdf

⁵⁶ COP decision I/7, para. 4.

⁵⁷ See Koester, Veit: “The Compliance Committee of the Aarhus Convention-An overview of Procedures and Jurisprudence. *Environmental Policy and Law* 37/2-3 (2007) p 83-95, p. 92.

⁵⁸ Ibid, para. 13.

70. The compliance procedure can be triggered in four ways: (a) by a self-submission, (b) by one or more Parties regarding another Party's compliance, (c) by the Secretariat through referrals to the Committee and (d) by members of the public concerning a Party's compliance. In addition, the Committee may examine compliance issues on its own initiative.⁵⁹

71. Based on the report and recommendations of the Committee and taking into account the cause, degree and frequency of the non-compliance, the Meeting of the Parties may decide to:

(a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;

(b) Make recommendations to the Party concerned;

(c) Request the Party concerned to submit a strategy, including a time schedule, and to report on the implementation of this strategy;

(d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;

(e) Issue declarations of non-compliance;

(f) Issue cautions;

(g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention; and/or

(h) Take such other non-confrontational, non-judicial and consultative measures.⁶⁰

Experience and lessons learned

72. As of February 2011, one submission was made by one Party with regard to the compliance by another Party and 55 communications were received from the public, of which:

(a) Fourteen were found to be inadmissible or the file was closed for lack of corroborating information or lack of collaboration from the communicants;

(b) Ten were identified as cases of non-compliance;

(c) Eleven were found to be compliant;

(d) Fourteen are pending; and

(e) The remaining communications are still under examination of admissibility by the Committee.⁶¹

73. On the basis of the Committee's proposals, the MOP has adopted decisions regarding the non-compliance of six countries.

G. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)

74. The Basel Convention was adopted in 1989 and entered into force in 1992. Even though the text of the Convention does not include or provide for a compliance procedures and mechanisms, pursuant to

⁵⁹ COP decision I/7, paras. 15-23.

⁶⁰ Ibid, para. 37.

⁶¹ See <http://www.unece.org/env/pp/pubcom.htm>.

Article 19, the Conference of the Parties in decision VI/12 decided to establish a procedure for promoting implementation and compliance.⁶²

75. The compliance procedure is similar to that in the Cartagena Protocol. Its objective is to assist Parties to comply with their obligations under the Convention and to facilitate, promote and monitor and aim to secure the implementation of and compliance with those obligations.⁶³ The nature and principles are similar to those reflected in the Cartagena and Montreal Protocols, the procedure is non-confrontational, transparent, cost-effective, preventive, and flexible, non-binding and takes into account the special needs of developing countries.⁶⁴

76. A Committee consisting of 15 members based on equitable geographical representation administers the procedure. The Committee meets at least once between each regular meeting of the Conference of the Parties and in conjunction with meetings of other Convention bodies.⁶⁵

77. The trigger mechanism is similar to that of the Montreal Protocol and LRTAP. Submissions by the Secretariat to the Committee are limited, however, to cases related to compliance with reporting requirements under Article 13.3 of the Convention and provided that they have not been resolved within three months after consultation with the Party concerned.⁶⁶

78. After a submission, the Committee may provide a Party, after coordination with that Party, with advice, non-binding recommendations and information relating to:

- (a) Establishing and/or strengthening its domestic/regional regulatory regimes;
- (b) Facilitating assistance including how to access financial and technical support, such as technology transfer and capacity-building;
- (c) Elaborating voluntary compliance action plans, and reviewing their implementation. A voluntary compliance action plan may include benchmarks, objectives and indicators, as well as an indicative timeline for its implementation; and/or
- (d) Any follow-up arrangements for progress reporting to the Committee, including through the national reporting procedure.⁶⁷

79. If the Committee considers that further measures are needed, and taking into account the capacity of the Party, as well as the cause, type, degree and frequency of compliance difficulties, it may recommend to the Conference of the Parties to consider:

- (a) Further support under the Convention for the Party concerned, including prioritisation of technical assistance and capacity-building and access to financial resources; and/or
- (b) Issuing a cautionary statement and providing advice regarding future compliance in order to help Parties to implement the provisions of the Basel Convention and to promote cooperation between all Parties.⁶⁸

Experience and lessons learned

80. As pointed out with concern at the fifth session of the Compliance Committee in 2007⁶⁹, no submission had been received so far to initiate the compliance procedure. The Committee suggested that this might result from the following shortcomings or limitations:

⁶² COP decision VI/12, Appendix. Document UNEP/CHW.6/40 (2003).

⁶³ Ibid, para. 1.

⁶⁴ Ibid, para. 2.

⁶⁵ Ibid, para. 8.

⁶⁶ Ibid, para. 9 (c).

⁶⁷ Ibid, para. 19.

⁶⁸ Ibid, para. 20.

- (a) The inability of the Committee to initiate consideration of a particular case of implementation and compliance difficulties of which it becomes aware;
- (b) The lack of a “civil society trigger”;
- (c) The lack of resources to assist Parties that are determined to be facing difficulties in implementation and compliance;
- (d) The restricted scope of the Secretariat trigger, which is limited to submissions relating to the difficulties that a Party may have in complying with its reporting obligations; and
- (e) The need to promote a better understanding of the facilitative nature of the mechanism.⁷⁰

81. The Committee has examined possible ways to improve its work. At its sixth session, the Committee recommended that the Secretariat use its mandate to make submissions focusing on: (a) cases where no national reports have been submitted by a Party since the date of its ratification of the Convention; and (b) cases where the information provided by a Party required under part I of the national reports on competent national authority, focal point and legislation was incomplete.⁷¹ At the Committee’s seventh and most recent meeting, the Secretariat reported that, according to its records, twelve Parties fell under criteria (a), while one hundred and thirteen Parties fell under criteria (b) limited to the 2006 national reports, including 77 Parties that had not submitted their 2006 national report. The Committee recommended that the Secretariat engage in consultations with the Parties falling under criteria (a) and (b), as these consultations would provide an opportunity to assist individual Parties in their implementation of their reporting obligation.⁷²

82. The Committee agreed to request the Ninth Meeting of the Conference of the Parties to include a budget line, which could be accessed to assist Parties in connection with the compliance difficulties that they bring to the Committee⁷³ following the example of the Multilateral Fund for Implementation of the Montreal Protocol. The Conference of the Parties decided in consequence to enlarge the scope of the Technical Cooperation Trust Fund by establishing an implementation fund.⁷⁴

H. The 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change (Kyoto Protocol)

83. The Kyoto Protocol was adopted on 11 December 1997 and entered into force on 16 February 2005. In 2005 pursuant to Article 18, COP 7 adopted decision 24/Cp.7. The decision was confirmed afterwards by the first Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP) in decision 27/CMP.1.⁷⁵

84. The objective of the compliance procedure is to facilitate, promote and enforce compliance with the commitments under the Protocol.⁷⁶ The Compliance Committee operates within the framework of a

⁶⁹ Report of the fifth session of the Basel Convention Implementation and Compliance Committee (Geneva, 8-9 September 2007). Document UNEP/CHW/CC/5/6, para. 9.

⁷⁰ Report of the Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention and proposed work programme for the Committee for the period 2009–2010. Document UNEP/CHW.9/3, para. 26.

⁷¹ Report of the sixth session of the Basel Convention Implementation and Compliance Committee (Geneva, 28-29 February 2008). Document UNEP/CHW/CC/6/7, para. 17.

⁷² Report of the seventh session of the Basel Convention Implementation and Compliance Committee (Geneva, 25-26 June 2009) document UNEP/CHW/CC/7/10, paras. 14 and 15.

⁷³ Report of the sixth session of the Basel Convention Implementation and Compliance Committee (Geneva, 28-29 February 2008). Document UNEP/CHW/CC/6/7, para. 18.

⁷⁴ Decision IX/2: Work programme for the Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention for the period 2009–2011.

⁷⁵ CMP decision 27/CMP.1, annex. Document FCCC/KP/CMP/2005/8/Add.3 (2005).

⁷⁶ Ibid, Section I.

plenary, a bureau and two branches: the facilitative branch and the enforcement branch.⁷⁷ Branches are composed of ten members⁷⁸ elected for four years. The plenary comprises members of both branches. For each member of the Committee, the CMP elects an alternate member. Members and alternates serve in their individual capacities and are selected on the basis of their recognized competence in climate change.⁷⁹

85. The Committee meets twice a year, unless otherwise decided and taking into account the desirability of holding the meetings in conjunction with the meetings of the subsidiary bodies.⁸⁰ The functions of the plenary of the Committee are related to administrative and budgetary matters, reporting to the Conference of the Parties and developing further rules of procedure if necessary.

86. The compliance procedure can be triggered (a) by expert review teams⁸¹ established under Article 8 of the Protocol, (b) by any Party with respect to itself, (c) or by a Party with respect to another Party.⁸² The bureau of the Committee allocates a submission to the appropriate branch based on the different mandates. The branch conducts a preliminary review to decide whether to proceed.⁸³

87. The role of the facilitative branch is to provide technical and financial advice and assistance to Parties with difficulties meeting the Protocol's obligations, including from sources other than those established under the Convention and the Protocol.⁸⁴

88. The enforcement branch is responsible for determining whether a Party included in annex I is not in compliance with (a) its emissions targets; (b) the methodology and reporting requirements; and (c) the eligibility requirements to benefit from the flexibility mechanisms.⁸⁵ When non-compliance is established, the enforcement branch, taking into account certain considerations, can decide to make a declaration of non-compliance and ask the Party to present a plan within three months, analyzing the causes of non-compliance and indicating measures and a timetable to correct the situation.⁸⁶ Consequences to be applied depend upon which parts of the Protocol a Party is not complying with. For example, the enforcement branch can decide to suspend eligibility to participate in the Clean Development Mechanism and emissions trading; or to require the Party to make up the difference between its current emissions and its assigned amount during the following period, plus an additional deduction of 30 per cent.⁸⁷

89. The consequences of non-compliance are not legally binding on Parties. The first CMP decided to consider an amendment to the Protocol, which would make the measures binding on Parties that ratified it, in conformity with Article 18 of the Protocol, which stipulates that "any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol." Until now, no agreement has been reached regarding this amendment.

90. The two branches of the Compliance Committee base their deliberations on reports from expert review teams, subsidiary bodies under the Protocol and the Convention, Parties and other official sources.

⁷⁷ Ibid, Section II, para. 2.

⁷⁸ Ibid, Section II, para. 3.

⁷⁹ Ibid, Section II, paras. 5 and 6.

⁸⁰ Ibid, Section II, paras. 3 and 10.

⁸¹ Groups of experts, nominated by Parties, who review national reports submitted by annex I Parties to the UNFCCC, and the Kyoto Protocol.

⁸² Ibid, Section VI, para. 1.

⁸³ Ibid, Section VII.

⁸⁴ Ibid, Section XIV.

⁸⁵ Ibid, Section V, para. 4.

⁸⁶ Ibid, Section XV, para. 1.

⁸⁷ Ibid, Section XV, para. 5.

Competent intergovernmental and non-governmental organizations may submit relevant factual and technical information to the relevant branch after the preliminary examination.⁸⁸

Experience and lessons learned

91. To date, the facilitative branch has received only one substantive submission. This was made by South Africa in its capacity as chair of the G-77 and China regarding 15 other Parties. The matter involved the late filing of reports on demonstrable progress by annex I Parties toward meeting their emission reduction targets. Since the compliance procedure does not include the possibility of submissions by one or more Parties, the branch could not agree on whether this submission could be considered properly filed, and it was not able to make a preliminary decision on how to proceed.⁸⁹ The branch reported this failure to the Compliance Committee. To date, no further submission has been made either by a Party or by an expert review team. The branch is engaged in discussions on how it can better carry out its responsibilities to provide advice and facilitation. Two of the issues under consideration are:

(a) The role of the branch in relation to continuing delays in the submission of national communications;⁹⁰ and

(b) How to enhance the role of the reports of the expert review teams to facilitate compliance.

92. The enforcement branch has addressed four referrals initiated by expert review teams. Until now the enforcement branch has suspended three countries from participating in the flexibility mechanisms. One has been reinstated after returning to compliance. Some lessons can be drawn from the analysis of these cases:

(a) All procedures in the enforcement branch were initiated by expert review teams; but it seems that there is a lack of consistency in bringing issues before the Committee, resulting in allegations regarding the independence, impartiality and possible conflict of interests of the enforcement branch;

(b) The role of the Secretariat has been the subject of some discussion and there is no agreement as to whether it should play a more active role. Until now, the Secretariat has resisted requests from members of the enforcement branch for preliminary analyses of submissions; and

(c) The expertise and engagement of members in the two branches vary and in some instances technical or legal expertise has been lacking. Both branches face shortcomings related to the trigger mechanism and one of the envisaged solutions is giving the branches a more active role in examining the expert review teams' reports and the capacity to trigger the procedure as well as the possibility for the facilitative branch to engage in consultations with Parties experiencing difficulties to comply.⁹¹

I. The 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London Protocol)

93. There is no compliance procedure under the London Convention. However, with the entry into force of the London Protocol on 26 March 2006, a set of Compliance Procedures and Mechanisms, pursuant to Article 11, was adopted in November 2007 by decision LC 29/17.⁹²

⁸⁸ Ibid, Section VIII, paras. 3 and 4.

⁸⁹ The Rules of Procedure approved by Decision 4/CMP.2 and amended by Decision 4/CMP.4 clarify the process for this kind of submissions.

⁹⁰ Reports of the 8th and 9th meeting of the facilitative branch recommend the plenary to invite the CMP to clarify any action that the Committee could take to address this issue.

⁹¹ See Doelle Meinhard: "Early experience with the Kyoto Compliance System: Possible lessons from MEA compliance system design" (2010).

⁹² LC 29/17, Annex 7 (2007).

94. The established Compliance Group is limited to fifteen members selected on the basis of their expertise after nomination by Parties and elected by the Meeting of the Contracting Parties based on balanced geographical representation.⁹³ The Group meets at least once a year. It also meets when requested to do so by the Meeting of the Contracting Parties.⁹⁴

95. The functions of the Compliance Group are the following:

- (a) Consider and assess cases of possible non-compliance;
- (b) Make recommendations to the Meeting of Contracting Parties on systemic compliance issues, individual situations and on other activities to promote compliance;
- (c) Review the implementation of the decisions;
- (d) Review and provide advice to the Meeting of Contracting Parties on reports and records;
- (e) Upon request of a non-Party, provide advice and guidance to facilitate its becoming a Party to the Protocol;
- (f) Request advice and information from the Scientific Group under the London Protocol; and
- (g) With a view to addressing compliance issues without delay, provide advice and guidance to a Party pending consideration by the Meeting of Contracting Parties.⁹⁵

96. The issues of possible non-compliance can be raised by the Meeting of the Contracting Parties, a Party regarding itself or by a Party regarding another Party's compliance.⁹⁶

97. Taking into account the capacity of the Party concerned and the cause, degree and frequency of non-compliance, the Compliance Group can recommend to the Meeting of the Contracting Parties: (a) the provision of advice and recommendations; (b) the facilitation of co-operation and assistance; (c) the elaboration, with the co-operation of the Party or Parties concerned, of compliance action plans, including targets and timelines; or the issuing of a formal statement of concern regarding a Party's compliance situation.⁹⁷

Experience and lessons learned

98. As of 18 August 2010 the Group has not received any submissions.⁹⁸ The Compliance Group has concentrated its efforts in trying to improve compliance with the reporting requirements of Article VI (4) of the London Convention and Article 9.4 of the Protocol.

J. The UNECE 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water and Health Protocol)

99. The Protocol on Water and Health was adopted in 1999 and entered into force the 4 August 2005. Article 15 of the Protocol required Parties to establish, at their first meeting, "multilateral arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance". These

⁹³ Ibid, paras. 3.1-3.4.

⁹⁴ Ibid, para. 3.7.

⁹⁵ Ibid, para. 2.2.

⁹⁶ Ibid, para. 4.1.

⁹⁷ Ibid, para. 5.1.

⁹⁸ Annotations to the Provisional Agenda of the Third Meeting of the Compliance Group (11-13 October 2010). Document LP-CG 3/1/1.

arrangements were to allow for appropriate public involvement. With this aim, Parties adopted decision I/2.⁹⁹

100. The objective of the procedure is to facilitate, promote and aim to secure compliance with the obligations under the Protocol by addressing cases of non-compliance by Parties and by providing advice or assistance to Parties, where appropriate. The procedure is to be simple, facilitative, non-adversarial and cooperative in nature, and its operation shall be guided by the principles of transparency, fairness, expedition and predictability.¹⁰⁰

101. The Compliance Committee consists of nine members, serving in their personal capacity.¹⁰¹ They are elected by the Meeting of the Parties to the Protocol from among candidates nominated by the Parties, taking into consideration any proposal for candidates made by signatories or by NGOs qualified or having an interest in the fields to which the Protocol relates¹⁰². In electing the Committee, consideration is given to the geographical distribution of membership and to diversity of experience and expertise.¹⁰³ The Committee, unless it decides otherwise, meets at least once a year.¹⁰⁴

102. The functions of the Committee are the following:

(a) Consider any submission, referral or communication relating to specific issues of compliance;

(b) Prepare, at the request of the Meeting of the Parties, a report on compliance with, or implementation of, specific provisions of the Protocol;

(c) Monitor, assess and facilitate the implementation of, and compliance with, the reporting requirements; and

(d) Make recommendation or take measures if, and as, appropriate.¹⁰⁵

103. The Committee can request further information, gather information in the territory of a Party upon invitation and seek the services of experts.¹⁰⁶

104. The Committee may decide upon one or more of the following measures:

(a) Provide advice and facilitate assistance to individual Parties regarding their compliance with the Protocol, which may include assistance in seeking support from specialized agencies and other competent bodies, as appropriate;

(b) Request or assist, as appropriate, the Party concerned to develop an action plan to achieve compliance with the Protocol within a time frame to be agreed upon by the Committee and the Party concerned;

(c) Invite the Party concerned to submit progress reports to the Committee on the efforts that it is making to comply with its obligations under the Protocol;

(d) Issue cautions; and/or

(e) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public.

⁹⁹ MOP decision I/2, Annex, document ECE/MP.WH/2/Add.3 (2007).

¹⁰⁰ Ibid, Section I.

¹⁰¹ Ibid, para. 4.

¹⁰² Ibid, para. 5.

¹⁰³ Ibid, para. 7.

¹⁰⁴ Ibid, para. 9.

¹⁰⁵ Ibid, para. 11.

¹⁰⁶ Ibid, Section VII.

105. The procedure can be triggered by (a) submission by one or more Parties about another Party's compliance, (b) by a Party regarding its own compliance, (c) by referrals from the Secretariat and (d) by communications from the public.¹⁰⁷

106. Upon consideration of the Committee report and recommendations, and taking into account the cause, type, degree and frequency of the non-compliance, the Meeting of the Parties may decide upon one or more of the following measures:

- (a) Take measures as recommended by the Committee;
- (b) Recommend to Parties to provide financial and technical assistance, training and other capacity-building measures and facilitate technology transfer;
- (c) Facilitate financial assistance and provide technical assistance, training and other capacity-building measures, subject to financial approval, including, when appropriate, seeking support from specialized agencies and other competent bodies;
- (d) Issue declarations of non-compliance;
- (e) Give special publicity to cases of non-compliance;
- (f) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Protocol; and/or
- (g) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.¹⁰⁸

Experience and lessons learned

107. The Committee has not received any communications from the public or submissions from Parties even though available information shows that several Parties were not in compliance with their obligations under the Protocol. The Committee discussed possible future actions to stimulate compliance amongst the Parties to the Protocol. After analysis of the summary reports submitted during the pilot-reporting exercise, the Committee members concluded that a number of countries were facing difficulties in complying with the Protocol. To respond to this situation, the Committee decided to enhance its facilitation and assistance functions. To that end, the Committee agreed that it would enter into consultations with a number of Parties that on the basis of the national summary reports, appeared to have problems in implementing the Protocol.

K. The 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

108. The International Treaty on Plant Genetic Resources for Food and Agriculture was adopted on 3 November 2001 and entered into force on 29 June 2004. Article 21 requires the Governing Body of the Treaty to “consider and approve cooperative and effective procedures and operational mechanisms to promote compliance with the provisions of this Treaty and to address issues of non-compliance...”

109. Compliance procedures have been under examination since the adoption of the ITPGRFA, first by the Commission on Genetic Resources for Food and Agriculture, acting as Interim Committee for the ITPGRFA, later by the Open-Ended Working Group on the Rules of Procedure and the Financial Rules of the Governing Body, Compliance and the Funding Strategy and, more recently, by the Ad-Hoc Working

¹⁰⁷ Ibid, Sections IV, V and VI.

¹⁰⁸ Ibid, para. 35.

Group on Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance.¹⁰⁹

110. The procedures and operational mechanisms to promote compliance and address issues of non-compliance were adopted at the Fourth Session of the Governing Body (March 2011).¹¹⁰ The Cartagena Protocol's compliance procedures and mechanisms provided the initial basis for work. These were then adapted to the needs of the ITPGRFA and further elaborated. The result introduces some innovative approaches to promote compliance with the ITPGRFA, with an emphasis on a facilitative approach.

111. The objectives of the compliance procedures and mechanisms are to promote compliance with all the provisions of the ITPGRFA and to address issues of non-compliance, including through monitoring and offering legal advice or legal assistance, when needed and requested, in particular to developing countries and countries with economies in transition.¹¹¹

112. The procedures and mechanisms are simple, cost-effective, facilitative, non-adversarial, non-judicial, legally non-binding and cooperative in nature.¹¹² They go beyond the principles included in the Cartagena Protocol's compliance procedures by adding principles of accountability, good faith and reasonableness.¹¹³

113. The Compliance Committee originally established by the Governing Body in resolution 3/2006 will consist of a maximum of 14 members with recognized expertise, serving in their individual capacity, for a period of four years based on the principle of equitable geographic distribution.¹¹⁴ The Committee shall hold its meetings as necessary and preferably in conjunction with other meetings of the ITPGRFA.¹¹⁵ Two-thirds of the members need to be present to constitute a quorum.

114. The functions of the Committee are the following:

- (a) Consider information submitted related to compliance and non-compliance;
- (b) Offer advice or assistance to any Party on compliance-related issues;
- (c) Assist the Governing Body in monitoring ITPGRFA implementation on the basis of reports submitted by Parties according to a standard format to be developed by the Committee, by providing synthesis of the reports along with an analysis addressing any priorities set by the Governing Body, which may include recommendations on the issues analyzed;¹¹⁶
- (d) Addressing issues of non-compliance;
- (e) Promote compliance by addressing statements and questions concerning ITPGRFA implementation referred to the Committee by a Party regarding its own implementation or by a decision of the Governing Body. The scope and nature of this authority is subject to further rules to be developed by the Committee for approval of the Governing Body at its fifth session;¹¹⁷ and
- (f) Submit reports to the Governing Body.¹¹⁸

¹⁰⁹ Created by GB Resolution 2/2009 (2009).

¹¹⁰ GB Resolution 2/2011 (2011).

¹¹¹ Ibid, Section I.

¹¹² Ibid, Section II, para. 1.

¹¹³ Ibid, Section II, para. 2.

¹¹⁴ Resolution 2/2011, Section III, paras. 2-4.

¹¹⁵ Ibid, Section III, para. 5.

¹¹⁶ Ibid, Section V.

¹¹⁷ Ibid, Section IX.

¹¹⁸ Ibid, Section IV.

115. Consideration of any question related to interpretation, implementation or compliance with the Standard Material Transfer Agreement by parties or potential parties to it is explicitly excluded from the functions of the Committee.

116. The procedures can be triggered by any Party (a) in respect to itself, (b) with respect to another Party and (c) by the Governing Body.¹¹⁹ The minimum content of the submission is specified in the procedures.¹²⁰

117. Like the Cartagena Protocol, measures to promote compliance and address issues of non-compliance can be taken by either the Committee or by the Governing Body. The Committee may:

- (a) Provide advice or facilitate assistance, including legal advice or legal assistance;
- (b) Request or assist, as appropriate, the Party concerned to develop an action plan within a time frame; and
- (c) Invite the Party concerned to submit progress report to the Committee.¹²¹

118. The Governing Body may, upon recommendation of the Committee, decide to:

- (a) Provide assistance, including, legal, financial and technical assistance; and
- (b) Take any other actions that it deems appropriate, including for capacity-building.¹²²

119. The Committee shall consider relevant information from the Party concerned, the Party that had made the submissions, or the Governing Body, and may seek expert advice and receive information as may be provided by the Secretary and other relevant sources.¹²³

120. The Governing Body will review the effectiveness of the procedures six years after the adoption and periodically thereafter.

Experience and lessons learned

121. The procedures and operational mechanisms to promote compliance and address issues of non-compliance adopted under the ITPGRFA include some innovative features revealing, among other things, a shift in approach from other fora with a stronger emphasis on promoting compliance and the facilitative aspects of the procedures.

122. Two of the Committee's functions are closely linked to the implementation of the ITPGRFA. The first function includes assisting the Governing Body in its monitoring of the implementation by Contracting Parties of their treaty obligations by examining reports made by Parties, conducting analyses based on the Governing Body's priorities and submitting recommendations to the Governing Body resulting from the analyses. The second function gives the Committee the ability to answer questions and statements on implementation addressed to it, according to specific rules to be developed and approved at the next session of the Governing Body.

123. The procedures and mechanisms adopted have retained only measures of a facilitative nature. Other measures bracketed in earlier drafts, such as the issuing of cautions or notifications, were not reflected in the final text. Nevertheless, the Governing Body retains the possibility to take any other actions it deems appropriate considering the circumstances.

¹¹⁹ Ibid, Section VI, para. 1.

¹²⁰ Ibid, Section VI, para. 2.

¹²¹ Ibid, Section VII, para. 1.

¹²² Ibid, Section VII, para. 2.

¹²³ Ibid, Section VIII.

III. OTHER PROCESSES

A. *Compliance procedures under development in other relevant conventions*

124. The Conference of the Parties to the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade established a working group on the compliance procedures. However it was unable to achieve agreement on a final text and the issue is still pending for consideration by the Conference of the Parties at its next meeting to be held in Geneva from 20 to 24 of June 2011.¹²⁴

125. Under the 2001 Stockholm Convention on Persistent Organic Pollutants, the compliance procedures are currently under the consideration by a contact group.¹²⁵

126. Under the 1946 International Convention for the Regulation of Whaling, some work on compliance was done in 2005 in the context of the Revised Management Scheme Working Group,¹²⁶ but no further discussion has been done to date. The 62nd meeting of the IWC held in June 2010 agreed to include the issue of compliance as part of the discussions on the future of the organisation.

B. *The 2002 UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (UNEP Guidelines)*

127. The UNEP Guidelines were adopted by the Seventh Special Session of the UNEP Governing Council by decision SS.VII/4 in 2002. The guidelines are advisory and non-binding. They provide approaches for enhancing compliance with multilateral environmental agreements and strengthening the enforcement of laws implementing those agreements. Non-compliance mechanisms are reflected in guidelines 14 (d) and 16.

¹²⁴ See “Non-compliance procedures and institutional mechanisms for determining non-compliance with the provisions of the Convention and for the treatment of Parties found to be in non-compliance”: Document UNEP/FAO/RC/COP.4/14 (2008).

¹²⁵ See Decision SC-4/33 “Procedures and mechanisms on compliance with the Stockholm Convention”: Document COP. 4/ SC-4/33 (2009).

¹²⁶ See Appendix V in <http://www.iwcoffice.org/documents/meetings/stkitts/AnnexF.pdf>.

From decision SS.VII/4 of the Seventh Special Session of the UNEP Governing Council¹²⁷

Guideline 14(d): Non-compliance mechanisms: States can consider the inclusion of non-compliance provisions in a multilateral environmental agreement, with a view to assisting parties having compliance problems and addressing individual cases of non-compliance, taking into account the importance of tailoring compliance provisions and mechanisms to the agreement's specific obligations. The following considerations could be kept in view:

- (i) The parties can consider the establishment of a body, such as a compliance committee, to address compliance issues. Members of such a body could be party representatives or party-nominated experts, with appropriate expertise on the relevant subject matter;
- (ii) Non-compliance mechanisms could be used by the contracting parties to provide a vehicle to identify possible situations of non-compliance at an early stage and the causes of non-compliance, and to formulate appropriate responses including, addressing and/or correcting the state of non-compliance without delay. These responses can be adjusted to meet varying requirements of cases of non-compliance, and may include both facilitative and stronger measures as appropriate and consistent with applicable international law;
- (iii) In order to promote, facilitate and secure compliance, non-compliance mechanisms can be non-adversarial and include procedural safeguards for those involved. In addition, non-compliance mechanisms can provide a means to clarify the content, to promote the application of the provisions of the agreement and thus lead significantly to the prevention of disputes;
- (iv) The final determination of non-compliance of a party with respect to an agreement might be made through the conference of the parties of the relevant multilateral environmental agreement or another body under that agreement, if so mandated by the conference of the parties, consistent with the respective multilateral environmental agreement.

Guideline 16: Compliance mechanisms or procedures could be introduced or enhanced after a multilateral environmental agreement has come into effect, provided such mechanisms or procedures have been authorised by the multilateral environmental agreement, subsequent amendment, or conference of the parties' decision, as appropriate, and consistent with applicable international law.

IV. CONCLUSIONS

128. Generally, the compliance procedures and mechanisms under the MEAs analyzed have similar elements and structure. They have many features in common:

- (a) They have similar objectives, nature and principles.
- (b) All the regimes analyzed foresee establishing a standing body specifically to administer the compliance procedure and mechanisms created.
- (c) The structure and functions of the compliance bodies are quite alike.
- (d) They all incorporate a self-trigger by a party as well as a party-to-party trigger, and many of them also add the possibility of an institutional trigger, such as the Secretariat or the compliance body triggering the procedures.
- (e) Measures taken to promote compliance and address cases of non-compliance are also quite similar. Response measures can include incentives, assistance, and/or sanctions.

129. Even though there are many common features there are also some differences depending on the nature of the MEA and its obligations:

¹²⁷ <http://www.unep.org/DEC/docs/UNEP.Guidelines.on.Compliance.MEA.pdf>

(a) Some trade-related MEAs, such as CITES, apply trade sanctions in cases of non-compliance.

(b) MEAs dealing with emissions, such as the Montreal Protocol, the LRTAP and the Kyoto Protocol, work with measurable indexes to assess compliance and in the case of the procedures under the Montreal and Kyoto Protocols, foresee trade sanctions and suspend rights under the instrument in cases of non-compliance.

(c) The compliance regimes of MEAs under the United Nations Economic Commission for Europe (LRTAP, Aarhus Convention, Espoo Convention and the Water and Health Protocol) have similar characteristics. Both the Water and Health Protocol and the Aarhus Convention include a trigger by any member of the public.

(d) The compliance regime under the Kyoto Protocol differs substantially from others in the configuration of the compliance body, which meets in plenary and in its two branches: the facilitative and the enforcement branch.

(e) The compliance procedures and mechanisms recently adopted under the ITPGRFA rely more on promoting compliance by linking the functions of the Committee to implementation. Likewise, measures envisioned are of facilitative nature.

130. The primary shortcoming ascertained with respect to the compliance regimes examined relates to the lack of submissions. To date, no eligible submissions have been received under the Cartagena Protocol, the Basel Convention, the London Protocol and the Water and Health Protocol.

131. The lack of self-submissions by parties hinders the more facilitative and supportive aspect of the compliance regimes examined which aims to address the most common reason for a party's non-compliance: the lack of capacity.¹²⁸

132. Document UNEP/CBD/ICNP/1/6 provides a comparative analysis of the main components of the compliance procedures and mechanisms examined, while taking stock of the experiences and lessons learned identified in the present document.

¹²⁸ UNEP, "Manual on Compliance with and Enforcement of Multilateral Environmental Agreements" UNEP Division of Environmental Conventions (2006) (UNEP Compliance Manual) p. 144.