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INFORMATION AND EXPERIENCE REGARDING REPEATED CASES OF NON-COMPLIANCE UNDER THE COMPLIANCE MECHANISMS OF OTHER MULTILATERAL ENVIRONMENTAL AGREEMENTS

Note by the Executive Secretary

I. INTRODUCTION

1. In accordance with Article 34 of the Biosafety Protocol, the Conference of the Parties serving as the meeting of the Parties to the Protocol adopted, at its first meeting, procedures and mechanisms on compliance as contained in the annex to decision BS-I/7.

2. Section VI of the procedures and mechanisms on compliance provide for measures to promote compliance and address cases of non-compliance. The Conference of the Parties serving as the meeting of the Parties to the Protocol identified and adopted various measures that the Compliance Committee, which was established by the same decision, may take with a view to promoting compliance and in response to cases of non-compliance. In taking such measures the Committee is required to take into account the capacity of the Party concerned and such other factors as the cause, type, degree and frequency of non-compliance (section VI, paragraph 1).

3. The Conference of the Parties serving as the meeting of the Parties to the Protocol may also decide, upon the recommendation of the Compliance Committee, on one or more of the measures specified in paragraph 2 of section VI, taking into account, once again, the capacity of the Party concerned to comply, and such factors as the cause, type, degree and frequency of non-compliance. In relation to the frequency of non-compliance, paragraph 2 (d) of section VI of the procedures and mechanisms on compliance stipulates that in cases of repeated non-compliance, measures could be taken as may be decided by the Conference of the Parties serving as the meeting of the Parties to the Protocol at its third meeting, and thereafter within the review process in accordance with Article 35 of the Protocol.

4. To this end, the Secretariat prepared a note (UNEP/CBD/BS/COP-MOP/3/2/Add.1) on measures in cases of repeated non-compliance, which was considered at the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. In decision BS-III/1, the Parties decided to

* UNEP/CBD/BS/CC/3/1.

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address, *inter alia*, the issue of measures concerning repeated cases of non-compliance at the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol within the framework of the overall evaluation of the Protocol in accordance with Article 35, and requested the Compliance Committee to compile further information on this matter.

5. To assist the Committee fulfil the request addressed to it by the Parties to the Protocol, the Secretariat has compiled information and experiences from other multilateral environmental agreements regarding repeated cases of non-compliance under their compliance mechanisms. This document updates and elaborates upon the document that was considered at the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. Section II of the note reviews the experiences of other multilateral environmental agreements with regard to measures that may be taken in cases of non-compliance, and repeated non-compliance in particular. Section III presents a summary of observations that may possibly be derived from the experiences reviewed.

II. EXPERIENCES FROM OTHER MULTILATERAL ENVIRONMENTAL AGREEMENTS REGARDING MEASURES THAT MAY BE TAKEN IN REPEATED CASES OF NON-COMPLIANCE

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

6. While the word 'compliance' does not appear in the text of CITES itself, measures to achieve compliance have been developed by the Parties over a number of years and continue to evolve. The compliance system includes treaty text, resolutions and decisions of the Conference of the Parties, decisions and recommendations of CITES subsidiary bodies and historical practice. 1/

7. Relevant treaty provisions include articles VIII, IX, XI, XII, XIII and XIV. In particular, Article XIII on 'International measures' contains cooperative procedures and institutional mechanisms for dealing with possible non-compliance. The Article "provides the Conference of the Parties with authority to make "whatever recommendations it deems appropriate" in relation to allegations of unsustainable trade or ineffective implementation."2/ This text is further elaborated by resolutions and decisions of the Conference of the Parties and specific cases of application. Article XIV on the "Effect on domestic legislation and international conventions" recognizes the right of Parties to adopt stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof. This provision has been used on occasion to support Parties' implementation of a recommendation to suspend trade. 3/

8. A range of sequential and graduated responses to non-compliance are available to CITES Parties as identified in the document on "Possible Measures for Non-Compliance" prepared for the forty-sixth meeting of the Standing Committee. 4/ The most serious of these include the suspension of rights and privileges including "recommended suspension of trade in specimens of one or more CITES species or for all CITES species, restriction of the right to vote at one or more meetings of the Conference of the Parties, ineligibility of a Party to be a member of the Standing Committee, loss of the right of a Party and its experts to receive documents for meetings", 5/ and financial penalties, i.e., "ineligibility of a Party to have its participation in a meeting of the Conference of the Parties funded by the Convention, ineligibility

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1/ "Compliance with the Convention", 12th meeting of the Conference of the Parties, 3-15 November 2002, Convention on International Trade in Endangered Species of Wild Fauna and Flora, CoP12 Doc. 26, para. 8.

2/ *Ibid.*, para. 13.

3/ *Ibid.*, para. 10.

4/ "Interpretation and Implementation of the Convention: Possible Measures for Non-Compliance", document prepared by the CITES Secretariat for the 46th meeting of the Standing Committee, 12-15 March 2002, SC46 Doc. 11.3, para. 13.

5/ *Ibid*.

of a Party to receive other financial assistance from the Convention". 6/ While perhaps not explicitly stated in this document, these more serious responses are only put into effect when other efforts (such as advice, assistance, informal warnings, public notification of non-compliance and a compliance action plan) to bring a Party into compliance have failed. These measures can thus be understood as responses to repeated cases of non-compliance. In addition, it was indicated that "Parties often consider the cause, nature, degree and frequency of non-performance before making a formal determination of non-compliance" and that the more serious measures, such as the suspension of rights and privileges and the suspension of trade, are warranted where a Party's non-compliance is wilful and persistent. 7/

9. What constitutes non-compliance with CITES has not necessarily changed *per se* over the years but the Parties have, since 1985, expanded the set of incidents that can trigger the imposition of trade sanctions:

> "While initially justified case-by-case in terms of non-compliance with specific substantive requirements of the Convention, inadequate domestic implementing legislation has since 1999 become the most frequently cited cause (on the basis of systematic country-by-country reviews of national law and administration), followed since 2002 by cases of persistent non-compliance with reporting requirements." 8/

10. More specifically, Sand lists four categories of non-compliance in which the suspension of trade has been recommended: for Parties with major implementation problems, blacklisted Non-Parties (or 'Non-Parties with which Parties have been recommended not to trade'), Parties with inadequate national legislation, and Parties with inadequate reporting. 9/ Between 1985 and 2004, trade suspensions under these four categories were recommended against 37 countries. Each meeting of the Standing Committee generally reviews existing recommendations to suspend trade and such a recommendation is withdrawn as soon as the compliance matter has been resolved or sufficient progress has been made.

11. A Working Group on Compliance was established at the fiftieth meeting of the Standing Committee, held in March 2004. 10/ The Working Group is preparing 'Guidelines for Compliance with the Convention' which will codify or restate the CITES compliance system. The Working Group is working towards consensus and will submit revised Guidelines for consideration at the fourteenth meeting of the Conference of the Parties, to be held in June 2007. As they stand now, the Guidelines are intended to be descriptive of current procedures and not prescriptive (i.e., they are not intended to establish a new compliance system). The provisions in the draft Guidelines include general principles, a description of various CITES bodies and their compliance-related tasks, and a description of the handling of specific compliance matters. This latter section includes a list of measures that the Standing Committee can decide to take where a compliance matter has not been resolved (much like the range of sequential and graduated responses to non-compliance described above) as well as a description of the circumstances under which the Standing Committee may decide to recommend trade sanctions:

> "Such a recommendation may be made in cases where a Party's compliance matter is unresolved and persistent and the Party is showing no intention to achieve

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6/ *Ibid.*

7/ "Compliance with the Convention", *supra* note 1 at paras. 36 and 42.

8/ Peter H. Sand, "Sanctions in Case of Non-Compliance and State Responsibility: *pacta sunt servanda* – Or Else?" in Ulrich Beyerlin, Peter-Tobias Stoll & Rüdiger Wolfrum, eds., *Ensuring Compliance with Multilateral Environmental Agreements* (Leiden: Martinus Nijhoff Publishers, 2006) 259 at 265.

9/ *Ibid.* at 261-262.

10/ "Fiftieth meeting of the Standing Committee: Summary Report", 15-19 March 2004, Convention on International Trade in Endangered Species of Wild Fauna and Flora, doc. SC50 Summary Report at para. 27.

compliance or a State not a Party is not issuing the documentation referred to in Article X of the Convention." 11/

12. Whether the list of measures to achieve compliance is non-exhaustive is in square brackets. The section on the handling of specific compliance measures also includes factors for the Standing Committee to take into account when deciding on measures to take to achieve compliance (e.g., the capacity of the Party concerned, and the cause, type, degree and frequency of the compliance matters), and provisions on the monitoring and implementation of measures to achieve compliance. 12/ Most of the Guidelines would appear to reflect consensus within the Working Group as there is little text in square brackets.

B. The 1979 Convention on Long-Range Transboundary Air Pollution

13. The Convention on Long-Range Transboundary Air Pollution (LRTAP) was concluded under the auspices of the United Nations Economic Commission for Europe in 1979 but it was not until 1997 that the Executive Body (the meeting of the representatives of the Parties to the Convention) established an Implementation Committee. The functions of the Committee include:

(a) Reviewing compliance by the Parties with the reporting requirements of the various Protocols under the Convention;

(b) Considering any submissions made to it by one or more Parties to a Protocol (concerning their own compliance or that of another Party) and considering any referrals of cases of possible non-compliance made to it by the secretariat; and

(c) Preparing reports on compliance with the obligations in a given Protocol. 13/

14. The discussion that established the Committee makes no mention of measures to be taken in repeated cases of non-compliance. That said, the Committee has faced instances of repeated cases of non-compliance (under all three of its functions). For example, the Committee has considered a submission by Norway concerning that country's obligations to reduce emissions under the 1991 Protocol Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes. In 2005, the Committee observed that under Norway's timetable for meeting its national emissions targets, the country would have been in non-compliance for six years, and for seven years in the case of its tropospheric ozone management area. The Committee recommended that the Executive Body adopt a decision wherein it, *inter alia*, remained concerned by the continuing failure of Norway to fulfil its obligations and expressed its disappointment in Norway's inability to shorten the seven years it anticipated it will remain in non-compliance. 14/ The Executive Body duly adopted the recommended decision at its twenty-third session, in December 2005. 15/

15. It has been observed that "the Committee and the Executive Body have used different nuances of language in their reports. For instance, their recommendations "express disappointment", "note with concern", "remain concerned", "urge" or "strongly urge" in order gradually to increase the pressure on

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11/ "Guidelines for Compliance with the Convention (draft)", 54th meeting of the Standing Committee, 2-6 October 2006, Convention on International Trade in Endangered Species of Wild Fauna and Flora, doc. SC54 Com. 4 at section IV(C), para. 2.

12/ *Ibid.* at section IV(C), para. 4 and section IV(D).

13/ See decision 1997/2, as amended.

14/ Economic Commission for Europe, Executive Body for the Convention on Long-Range Transboundary Air Pollution, "The Eighth Report of the Implementation Committee", doc. EB.AIR/2005/3 (13 September 2005) at paras. 9 & 11.

15/ Decision 2005/2.

Parties in breach. 16/ Beyond using language to increase pressure on Parties in continuous non-compliance, each Party found in breach is called on to report by a specified date on the steps it has taken to achieve compliance, to set out a timetable that specifies the year by which it expects to be in compliance, to list the specific measures taken, or scheduled to be taken, to fulfil its emission-reduction obligations under the Protocol and to set out the projected effects of each of these measures up to and including the year of compliance. The purpose of such requirements is to place pressure on the Parties in question to bring about full compliance as quickly as possible. The Committee has placed a heavy emphasis on the preparing of timetables and on offering practical suggestions to accelerate emission reductions. Each year it has reviewed the steps taken by those parties to which Executive Body decisions have been addressed and, as necessary, made recommendations for follow-up decisions by the Executive Body until the Parties concerned have achieved compliance. 17/

16. The Implementation Committee has considered ten cases since it was established and four of these proceedings have now been closed.

C. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention on the Protection of the Ozone Layer

17. Article 8 of the Montreal Protocol required Parties at their first meeting to "consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance". The Parties created a Non-Compliance Procedure (NCP) which was provisionally adopted in 1990. A final version was adopted in 1992 and amended in 1998. The Non-Compliance Procedure is operated by the Implementation Committee.

18. The proposals to amend the Non-Compliance Procedure that were received as part of its review included a suggestion to empower the Meeting of the Parties (MOP) to declare a Party to be a "non-Party" in cases of persistent non-compliance. This proposal was ultimately rejected and, as its stands now, the Non-Compliance Procedure creates a system for receiving and considering submissions on non-compliance and allows the Parties to the Protocol to "decide upon and call for steps to bring about full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objectives." 18/ The Fourth Meeting of the Parties, in 1992, also adopted the "Indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Protocol". 19/ The measures that might be taken are:

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

(b) Issuing cautions;

(c) Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.

16/ Tuomas Kuokkanen, "Practice of the Implementation Committee under the Convention on Long-range Transboundary Air Pollution" in Ulrich Beyerlin, Peter-Tobias Stoll & Rüdiger Wolfrum, eds., *Ensuring Compliance with Multilateral Environmental Agreements* (Leiden: Martinus Nijhoff Publishers, 2006) 39 at 45-46.

17/ *Ibid.* at 46.

18/ "Non-Compliance Procedure (1998)", paragraph 9 of annex II of the report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (UNEP/OzL.Pro.10/9 of 3 December 1998).

19/ See decision IV/5 and annex V of the report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (UNEP/OzL.Pro.4/15 of 25 November 1992).

19. The compilation of decisions of individual Parties' non-compliance with the Montreal Protocol (as contained in the sixth edition of the *Handbook on the International Treaties to Protect the Ozone Layer*) illustrates that there have been cases of repeated non-compliance with the Montreal Protocol, e.g. Belize, Cameroon and Ethiopia. Decisions on non-compliance generally note in what manner the Party is in non-compliance with the Protocol and state that, "[to] the degree that the Party is working towards and meeting the specific Protocol control measures, it should continue to be treated in the same manner as a Party in good standing." 20/ These decisions also caution the Party in non-compliance, "in accordance with item B of the indicative list of measures, that, in the event that it fails to remain in compliance, the Parties will consider measures consistent with item C of the indicative list of measures. Those measures may include the possibility of actions available under Article 4, such as ensuring that the supply of (…) the substance that is the subject of non-compliance is ceased so that exporting Parties are not contributing to a continuing situation of non-compliance". 21/

20. An analysis of experience with the non-compliance procedure of the Montreal Protocol discusses compliance by three categories of countries: Article 5 Parties (i.e. developing countries); Parties that are countries with economies in transition (CEIT Parties); and industrialized Parties. The analysis states that up to and including Sixteenth Meeting of the Parties, in November 2004, while a number of Article 5 Parties were found to be in non-compliance, none were deprived of assistance nor were any steps taken to suspend rights and privileges as provided by item C of the list of indicative measures. 22/

21. Concerning compliance by countries with economies in transition, the Russian Federation and some Parties from Eastern Europe and the former Soviet Union made a statement at the Sixth Meeting of the Parties in 1994 that they would be unable to comply with the control measures on certain ozone-depleting substances (ODS) in the prescribed time due to their domestic conditions. As this situation persisted, these countries were, in effect, in a situation of repeated non-compliance with the Protocol. At their Seventh Meeting, in 1995, the Parties adopted a decision recommending international assistance to the Parties in question. They also "allowed" the Russian Federation to export to non-Article 5 Parties of the former Soviet Union that traditionally depended on Russia for all their supply of ozone-depleting substances. This implicitly suspended the right of the Russian Federation to export to other non-Article 5 Parties as also to Article 5 Parties to meet their basic domestic needs as provided in Articles 2A-2F and 2H. 23/

22. Overall, the analysis lists 14 CEIT Parties that came to notice as being in non-compliance in the period up to and including the Sixteenth Meeting of the Parties, in 2004. According to the former Executive Secretary of the Vienna Convention and its Montreal Protocol, for each Party, "the Implementation Committee pursued its course of obtaining data, identifying actual or potential non-compliance, obtained plans of action and benchmarks to return to compliance and monitored every year their performance in relation to the benchmarks. The Parties recommended assistance by the GEF in each case. They called for explanations when benchmarks were not met." 24/

23. By the Sixteenth Meeting of the Parties, in 2004, all but two of the 14 Parties had returned to compliance with the control measures. One Party, Armenia, had been reclassified as an Article 5 Party

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20/ This example is drawn from paragraph 5 of decision XVII/27 on non-compliance with the Montreal Protocol by Bangladesh.

21/ *Ibid.*

22/ K. Madhava Sarma, "Compliance with the Multilateral Environmental Agreements to Protect the Ozone Layer" in Ulrich Beyerlin, Peter-Tobias Stoll & Rüdiger Wolfrum, eds., *Ensuring Compliance with Multilateral Environmental Agreements* (Leiden: Martinus Nijhoff Publishers, 2006) 25 at 35.

23/ *Ibid.* at 35-36.

24/ *Ibid.* at 36.

and so was no longer bound by the same timeframe for control measures. The other Party, Azerbaijan, was noticed for non-compliance. 25/

24. At the Seventeenth Meeting of Parties in December 2005, Azerbaijan was again noted as being in non-compliance. The Parties decided, *inter alia*:

> "[I]n the light of Azerbaijan's recurrent inability to return to compliance with the Protocol in accordance with the decisions of the Meetings of the Parties and the Party's reservations as to its capacity to enforce its newly introduced ban on the import of controlled substances in Annex A group I (CFCs), to request exporting Parties to assist Azerbaijan implement its commitment by ceasing export of those controlled substances to that Party, and to further caution Azerbaijan in accordance with item B of the indicative list of measures that, in the event that the Party does not achieve total phase out of Annex A, group I, controlled substances (CFC) by 1 January 2006, the Eighteenth Meeting of the Parties shall consider implementation of item C of the indicative measures, which could include action available under Article 4 to cease supply of Annex A, Group I, controlled substances (CFCs) to Azerbaijan." 26/

25. This is the first time that a trade ban has been put into effect against a Party to the Montreal Protocol. The Eighteenth Meeting of the Parties was held from 30 October to 3 November 2006. No further decision on Azerbaijan was taken and no other trade bans against other Parties were put into effect.

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

26. The text of the Basel Convention does not include a compliance mechanism or specifically provide for the creation of one. Nonetheless, a 'Mechanism for Promoting Implementation and Compliance' was established by decision VI/12 of the Conference of the Parties held in 2002. The Mechanism is a subsidiary body of the COP under Article 15(5)(e) of the Convention and it is administered by a Committee.

27. Paragraph 19 of the terms of reference for the Mechanism creates a facilitation procedure. Paragraph 20 provides that after undertaking the facilitation procedure, "and taking into account the cause, type, degree and frequency of compliance difficulties, as well as the capacity of the Party whose compliance is in question", if the Committee considers it necessary to pursue further measures to address a Party's compliance difficulties, it may recommend to the Conference of the Parties that it consider:

(a) Further support under the Convention for the Party concerned, including prioritization of technical assistance and capacity-building and access to financial resources; 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.

Any such action is to be consistent with article 15 of the Convention.

28. Both the facilitation procedure and the possibility of further measures have yet to be used.

25/ *Ibid.* at 36.

26/ See decision XVII/26, para. 5.

E. The 1993 North American Agreement on Environmental Cooperation

29. The North American Agreement on Environmental Cooperation (NAAEC) is one of two side-agreements to the North American Free Trade Agreement (NAFTA) signed by Canada, the United States and Mexico in 1994. One of the purposes of the NAAEC is to enhance compliance with and enforcement of environmental laws and regulations and one of the means by which the agreement attempts to achieve this objective is through consultations between Parties. The consultation mechanism is triggered when a Party requests consultations "with any other Party regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law" (Article 22(1)). If the matter cannot be resolved through consultations, a special session of the Council (which is part of the Commission on Environmental Cooperation created under the NAAEC) may be convened. The Council may use technical advisers, conciliation, mediation or other dispute resolution procedures, or create working or expert groups, or may make recommendations in order to help reach a mutually satisfactory resolution (Article 23(4)).

30. If the matter cannot be resolved by the Council, an arbitral panel can be convened. An arbitral panel can only consider a matter where the alleged persistent pattern of failure by the Party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services:

(a) Traded between the territories of the Parties; or

(b) That compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party (Article 24(1)).

31. The panel then prepares a report that includes, *inter alia*, its determination as to whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and, if it makes such a determination, recommendations, if any, for the resolution of the dispute. These recommendations will normally be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement (Article 31(2)(b) and (c)). The disputing Parties may also agree on an action plan. If the Parties are unable to agree on an action plan or cannot agree on whether the Party complained against is fully implementing the action plan, any Party to the dispute can request that the panel be reconvened. The reconvened panel can impose a "monetary enforcement assessment" in certain circumstances (Article 34(4)(b) and 5(b)). In determining the amount of the assessment, the panel is to take into account, *inter alia*, "the pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its environmental law" and efforts by the Party to begin remedying the pattern of non-enforcement (Annex 34, Article 2(a) and (d)).

32. Where a Party fails to pay the monetary enforcement assessment, any complaining Party may, in certain circumstances, suspend "the application to the Party complained against of NAFTA benefits in an amount no greater than that sufficient to collect the monetary enforcement assessment." (Article 36(1)(b)) The benefits to be suspended should first be those in the same sector as that in which there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law (Annex 36B, Article 2(a)). The Party complained against can request that the panel be reconvened to determine whether the monetary enforcement assessment has been paid or whether the Party complained against is fully implementing the action plan. If so, the suspension of benefits is to be terminated (Article 36(4)).

33. The monetary enforcement assessment is to be paid to the Commission on Environment Cooperation which will use the funds to enhance the environment or the enforcement of environmental law in the Party complained against (Annex 34, Article 3). To date, this Party-to-Party process has not been triggered.

F. The 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change

34. Article 18 of the Kyoto Protocol calls on the Conference of the Parties to the Convention on Climate Change serving as the meeting of the Parties to the Protocol to approve, at its first meeting, procedures and mechanisms to determine and address cases of non-compliance with the Protocol. This was to include the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. These procedures and mechanisms were adopted in decision 24/CP.7 by the Conference of the Parties at its seventh session in 2001. The decision was confirmed by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol in the latter's decision 27/CMP.1.

35. The procedures and mechanisms in the decision include the creation of a facilitative branch and an enforcement branch. Sections XIV and XV of the annex to the decision set out the consequences to be applied by the facilitative and enforcement branches, respectively in cases of non-compliance. From section XIV, the facilitative branch, "taking into account the principle of common but differentiated responsibilities and respective capabilities", is to decide on the application of one or more of a range of consequences including the provision of advice; the facilitation of financial and technical assistance, including technology transfer and capacity-building; and the formulation of recommendations.

36. From section XV, the consequences to be applied by the enforcement branch depend upon which parts of the Protocol a Party is not complying with. In paragraph 1, where the enforcement branch has determined that a Party is not in compliance with Article 5(1) or (2), or Article 7(1) or (4) of the Protocol, it shall apply two consequences, taking into account the cause, type, degree and frequency of the non-compliance of the Party. These two consequences are a declaration of non-compliance and the development of a plan in accordance with paragraphs 2 and 3 of the section. Other consequences relating to other parts of the Protocol include the suspension of the eligibility of a Party to participate in the Clean Development Mechanism and emissions trading, the deduction of tonnes from the Party's assigned emissions in the second commitment period, and the development of a compliance action plan.

G. The 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

37. Article 17 of the Rotterdam Convention requires the Conference of the Parties to, "as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance". At the first meeting of the Conference of the Parties, the Parties decided to convene an open-ended ad hoc working group on article 17. The group prepared a draft text on the establishment of a compliance committee which was considered further at the second meeting of the Conference of the Parties. In decision RC-2/3, the Parties agreed to consider further the procedures and institutional mechanisms on non-compliance at their third meeting.

38. The third meeting of the Conference of the Parties was held in October 2006. The Parties made progress in reaching consensus on the procedures and institutional mechanisms for determining non-compliance but some text still remains in square brackets. As it stands now, the draft text of the procedures and mechanisms on compliance with the Rotterdam Convention includes a facilitation procedure to help a Party with compliance concerns. 27/ Paragraph 19 goes further and provides possible measures to address compliance issues. It would allow the Compliance Committee to recommend to the Conference of the Parties that measures be taken to achieve compliance but only after the Committee has undertaken the facilitation procedure and has taken "into account the cause, type, degree and frequency of compliance difficulties, including financial and technical capacities of the Parties whose compliance is in

27/ See paragraph 18 of the annex to decision RC-3/4.

question". The list of possible measures that could be recommended includes facilitation, access to financial resources, technical assistance and capacity-building; the provision of advice regarding future compliance; issuing a statement of concern regarding possible future or current non-compliance; and requesting the Executive Secretary to make public cases of non-compliance. The text of two further possible measures includes square brackets. They currently read:

> "[(f) Ineligibility to serve as the President of the Conference of the Parties or as a member of the Bureau until the non-compliant Party concerned has fulfilled its obligations;]
>
> "(g) Recommending that a non-compliant situation be [remedied][addressed] by the non-compliant Party."

39. Paragraph 24 of the draft text states that the "Compliance Committee should monitor the consequences of action taken in pursuance of paragraphs 18 or 19 of the text.

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

40. Article 15 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters requires the Meeting of the Parties to establish optional arrangements for reviewing compliance with the Convention. Accordingly, at their first meeting in October 2002, the Parties adopted decision I/7 on 'Review of compliance'. Paragraph 37 of the decision allows the Meeting of the Parties to, "upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention." The paragraph sets out a list of measures that the Meeting of the Parties may decide upon, "depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance". The list of measures includes providing advice and facilitating assistance, making recommendations to the Party concerned, requesting the Party concerned to submit a strategy regarding the achievement of compliance and to report on the implementation of the strategy, issuing declarations of non-compliance, issuing cautions, suspending the special rights and privileges accorded to the Party concerned under the Convention, and taking other measures as may be appropriate.

41. The Compliance Committee of the Aarhus Convention has addressed a number of submissions regarding the compliance of specific countries with the Convention but none of these appears to be in respect of repeated cases of non-compliance.

I. The 2001 International Treaty on Plant Genetic Resources for Food and Agriculture

42. Article 21 of the International Treaty on Plant Genetic Resources for Food and Agriculture requires the Governing Body of the Treaty, at its first meeting, to:

> "[C]onsider 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. These procedures and mechanisms shall include monitoring, and offering advice or assistance, including legal advice or legal assistance, when needed, in particular to developing countries and countries with economies in transition."

43. To this end, an Open-Ended Working Group on the Rules of Procedure and the Financial Rules of the Governing Body, Compliance and the Funding Strategy was established. The Working Group developed a set of "Draft Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance" which was considered by the Governing Body at its first meeting in June 2006. The Governing Body adopted a resolution on compliance (resolution 3/2006) in which it

established a Compliance Committee which will commence its work "following the approval of cooperative and effective procedures and operational mechanisms on compliance".28/ The Governing Body also decided "to consider and approve procedures and operational mechanisms on compliance at its second session, on the basis of the draft procedures and operational mechanisms to promote compliance and address issues of non-compliance, which are contained in Appendix I to this Report, and the submissions made by Parties and observers". .29/ It was also decided that compliance will be included in the agenda of the Governing Body.

44. As they stand following the first meeting of the Governing Body, the draft procedures and operational mechanisms to promote compliance and address issues of non-compliance make little reference to measures to be taken in instances of repeated non-compliance with the Treaty. Section VII of the draft sets out the measures that the Compliance Committee and the Governing Body of the Treaty may take. Text in square brackets would require the Committee and the Governing Body, in deciding upon such measures, to take into account factors such as the frequency of non-compliance.

45. The next meeting of the Governing Body will be held in October/November 2007.

J. The 2001 Stockholm Convention on Persistent Organic Pollutants

46. Article 17 of the Stockholm Convention on Persistent Organic Pollutants requires the Conference of the Parties to, "as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance". At their first Conference, the Parties agreed to convene an open-ended ad hoc working group on non-compliance, which met immediately prior to the second meeting of the Conference of the Parties, in May 2006. The Working Group considered a compilation of views and proposals on a non-compliance mechanism under the Convention. The Working Group made progress in its deliberations but nothing was concluded. The Parties thus decided at their second Conference to convene a second meeting of the Working Group immediately prior to the third Conference of the Parties to be held in April 2007 (decision SC-2/14).

47. As it stands now, the draft text provides for a Compliance Committee to take facilitation measures regarding the Party whose compliance is in question. 30/ It also provides for additional measures that could be taken to address a Party's compliance problems. Depending on the final text that is negotiated, the Compliance Committee could be required to take into account the cause, type, degree, duration and frequency of compliance difficulties before taking any additional measures. The possible additional measures, which, for the most part, are still under square brackets include: providing further support for the Party concerned, providing financial and technical assistance, technology transfer, training and other capacity-building measures, providing advice regarding future compliance, allowing for some sort of declaration or determination of non-compliance and issuing a caution. The list of additional measures also includes in square brackets a provision on repeated non-compliance, which states:

> "[(g) In cases of repeated or persistent non-compliance, [as a last resort,] [suspending rights and privileges under the Convention, in particular rights under Articles 3 and 4 of the Convention][the committee may make recommendations to the Conference of the Parties regarding alternative courses of action] [the Conference of the Parties shall consider the case and undertake any final action that may be required to achieve of the objective of the Convention].]" 31/

28/ Resolution 3/2006 at para. 1.

29/ *Ibid.* at para. 2.

30/ The draft text is contained in the annex to the report of the Open-ended Ad Hoc Working Group on Non-Compliance on the work of its first meeting (UNEP/POPS/OEWG-NC.1/3 of 30 April 2006).

31/ *Ibid.* at para. 36 (g) of the annex.

III. OBSERVATIONS

48. From the experiences reviewed in the foregoing section, the following observations may be derived as regards measures in cases of repeated non-compliance:

(a) The existing compliance procedures and mechanisms almost invariably require the relevant body to take into account factors such as cause, type, degree and frequency of the alleged case of non-compliance in recommending or determining measures;

(b) When setting out measures that may be taken in respect of a Party's non-compliance with the requirements of the instrument in question, not only it is required to take into account certain factors as mentioned above, but the measures are also frequently listed in ascending order of severity, implying that repeated non-compliance will result in the application of more severe measures;

(c) A number of compliance mechanisms adopt facilitation measures as the first response to situations of non-compliance;

(d) It appears that the availability of stringent measures with economic or trade consequences and the application of such measures to practical cases of non-compliance, are situations mostly limited to multilateral environmental agreements such as CITES and the Montreal Protocol where direct trade measures, in the form of the prohibition or restriction of international trade in listed substances or materials, are central to the purpose of the instrument;

(e) Terminologies such as, "persistent non-compliance", "recurrent inability to return to compliance" used by some multilateral environmental agreements may be equivalent to "repeated cases of non-compliance", the term used in the context of the Biosafety Protocol;.
