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**OPEN-ENDED MEETING OF EXPERTS ON A COMPLIANCE
REGIME UNDER THE CARTAGENA PROTOCOL ON
BIOSAFETY**

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Agenda item 2 of the provisional agenda

**COMPILATION OF VIEWS ON COMPLIANCE PROCEDURES AND MECHANISMS
UNDER THE CARTAGENA PROTOCOL ON BIOSAFETY (ARTICLE 34)**

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ARGENTINA

[26 April 2001]

[ORIGINAL: ENGLISH]

Objectives, nature and principles

1. *What should be the nature and objectives of the compliance regime ? Should the regime be non-confrontational and non-judicial ? Should it aim simply at encouraging and supporting Parties to achieve full compliance with their treaty obligations ?*

The objective of the compliance *regime*, according to similar processes initiated in the framework of other environmental agreements, must be the promotion of compliance to the rules implemented in the system through cooperation between Parties. Since the compliance regime to be effective must achieve the objectives of the Protocol, it is also necessary for such a regime to encourage the largest number of participants in the system as possible.

Regarding the nature of the regime, Argentina supports the design of a non-confrontational, non-judicial regime in the understanding that confrontational or judicial ones deter non-parties from entering into the system. Moreover, taking into account that the Protocol already includes a provision on liability and redress, both topics should be maintained as separate issues.

The main objective of the compliance regime should be to achieve an overall effectiveness of the Cartagena Protocol on Biosafety. Such effectiveness, will not depend solely on the existence of a compliance regime, but on other key factors such as the capacity to respond quickly to existing problems, the number and type of countries that are parties to the regime (which should at least include the great majority of LMO exporting and importing countries), and the proper focus of the content of obligations to be able to reach the objectives of the convention.

For this reason, Argentina proposes that a top priority should be to design a compliance regime which not only does not deter possible participants, but on the contrary provides incentives for the entry into the system.

2. *What principles should underpin the operation of the compliance regime? Are the principles of expedition, fairness, transparency, predictability and due process essential to such a regime ? If so, how are these to be guaranteed in the procedures and mechanisms to be developed ?*

All stated principles are key to any compliance system. However, since we propose a non-confrontational, non-judicial system, the most important criteria to be used are those of transparency, fairness and predictability. The principles of due process and expedition are more important in confrontational procedures.

Argentina believes that a compliance system such as the one proposed in the Biosafety regime will need to work on a case-by-case basis, taking into account the special circumstances (including socio-economic realities) which might have triggered non-compliance in a particular case. Obligations arising out of other binding agreements between parties such as the WTO, and IPPC should also be taken into account and harmonized with the obligations arising from the Protocol. The compliance system, then, should analyse the issue and provide Parties with tailored counseling or recommendations regarding the best cost-effective means available for them to comply with their obligations.

Invocation of the procedure

3. *Who can invoke the non-compliance procedure? Could entities other than Parties, for example, non-governmental organisations, intergovernmental bodies, the secretariat etc., trigger the procedure?*

The Protocol is designed in a way that includes general obligations for States, and a AIA procedure that may include obligations to be complied with by exporters or notifiers. The importance of achieving an efficient AIA procedure is key to the success of this Protocol, therefore, such procedure should be expeditious, transparent, non-discriminatory and reasonable. To achieve these objectives, it might be necessary to provide those individuals directly involved in the AIA, standing to trigger non-compliance procedures, but restricted issues regarding obligations relating to AIA.

In the case of the rest of the obligations between parties, it does not seem prudent to allow other entities to trigger a non-compliance procedure. However, such entities could be invited to participate in the design of possible solutions to non-compliance cases, once they are initiated.

Structure and functions of the institutional mechanisms

4. *Should the compliance body be a standing or an ad hoc body of the Protocol? If standing, how often should it meet?*

This issue should be decided once the probable work load of such an organ is known.

5. *What should be the size and composition of the compliance body? What kind of expertise should be represented in the membership of the body and in what capacity should members serve?*

The compliance organ should have similar dimensions to those organs created in other environmental agreements (between 10 and 20 members). Due to the fact that the main task of this organ will be to evaluate compliance by parties and propose means to overcome non-compliance, its job will be mostly technical and related to international trade issues. For that reason, members of the compliance organ should be experts in the field of international economic law, international agricultural trade, and biotechnology. Experts should be named by the Conference/Meeting of the Parties on the basis of a list proposed by parties, to serve in their personal capacity, following a criteria of geographical balance and balance between experts coming from exporting and importing countries.

6. *Should the compliance body generally review and promote the implementation of and compliance with the Protocol besides addressing specific cases of non-compliance ?*

Both functions are mutually compatible and build towards the objectives of the compliance scheme mentioned in article 34. The compliance regime should be based on cooperation between parties aimed at both promoting compliance and offering appropriate advice or assistance in cases of non-compliance.

7. *Should the compliance body make binding decisions, such as the imposition of compliance measures on Parties in non-compliance ?*

The organ should adopt non-binding recommendations for a party in non-compliance, and design, together with such a party, a plan to achieve compliance.

As was stated previously, the implementation of binding decisions is not an effective option because it will become an obstacle to the entry into force of the Protocol and, in the end, run against the effectiveness of the Protocol as a whole.

Consequences of non-compliance

8. *What should be the consequences of non-compliance ? Should such consequences include sanctions and incentive measures ?*

The result of a non-compliance procedures should be, where appropriate, a detailed plan to achieve compliance which should be cost-effective, feasible taking into account the party's capacities, and agreed with the party concerned (allowing for the participation in its design of all relevant stakeholders). It might, for example, include the regular presentation of progress reports and incorporation of feedback and analysis of results to help other countries in similar circumstances.

Incentives, on the other hand, should be of a general nature, available to all parties or groups of parties (such as developing countries).

Role of the Secretariat and the Conference/Meeting of the Parties

9. *What should be the role of the Secretariat and Conference/Meeting of the Parties in the non-compliance procedure ?*

The Secretariat should provide logistic assistance to arrange meetings of the organ, and channel or forward communications between the organ and Parties involved in each case.

The Conference/Meeting of the Parties, may decide to make recommendations to this organ, elect its members, and consider the organ's periodic reports and recommendations in the adoption of its decisions.

Other issues

10. *What other issues should be considered in the development of the compliance regime under the Protocol ?*

Other issues that may be taken into account should be the further development of the biosafety clearing-house to incentivate implementation and as an integral part of the compliance mechanism.

AUSTRALIA

[12 April 2001]

[ORIGINAL: ENGLISH]

At the first meeting of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP1), Governments were invited to submit their views on the elements and options for a compliance regime under the Biosafety Protocol, on the basis of a questionnaire provided by the Secretariat (UNEP/CBD/ICCP/1/7).

This is the Australian Government's submission on a compliance regime for the Biosafety Protocol, based on the Secretariat's questionnaire, work undertaken in other multilateral fora and views expressed at ICCP1. The answers to this questionnaire, contained within this submission, are Australia's preliminary response only.

Objectives, nature and principles

1. *What should be the nature and objectives of the compliance regime? Should the regime be non-confrontational and non-judicial? Should it aim simply at encouraging and supporting Parties to achieve full compliance with their treaty obligations?*

The Australian Government considers the primary objective of the compliance regime should be to assist Parties experiencing difficulties in meeting their Biosafety Protocol obligations achieve or maintain full compliance, through the application of cooperative and facilitative mechanisms that work constructively with these Parties. The compliance regime should also have a more general compliance or implementation review function: to examine general compliance or implementation issues relevant to all Parties and make recommendations of use to all Parties.

In our view, a positive approach would be the most effective means of ensuring the implementation of, and compliance with, the Biosafety Protocol. The compliance regime should focus on preventing potential incidents of non-compliance by adopting a capacity-building, problem-solving approach. Were an incident of non-compliance to arise, the regime should address the actual cause of the problem in a non-confrontational manner.

2. *What principles should underpin the operation of the compliance regime? Are the principles of expedition, fairness, transparency, predictability and due process essential to such a regime? If so, how are these to be guaranteed in the procedures and mechanisms to be developed?*

Australia considers it essential that the principles of expedition, fairness and equitable treatment, transparency, predictability, credibility and cost-effectiveness underpin the operation of the compliance regime. Adherence to these principles would be guaranteed by explicit reference to them by the first meeting of the Conference of the Parties, and by the use of facilitative and cooperative procedures and mechanisms.

Invocation of the procedure

3. *Who can invoke the non-compliance procedure? Could entities other than Parties, for example, non-governmental organisations, intergovernmental bodies, the secretariat, etc, trigger the procedure?*

Australia considers the regime should be initiated by a Party that believes it is or will not be able to comply with the Protocol and is seeking assistance before failing to meet its obligations. Given that the key objective of the regime is to encourage compliance with the Protocol, Australia does not support consideration of any individual Party's compliance being invoked by another State Party, the Secretariat, or any non-Party organisations or bodies. At given intervals, the Conference of the Parties could review general trends in cases being raised and make recommendations on ways in which to improve the ability of Parties to comply with the Protocol.

Structure and functions of the institutional mechanism

4. *Should the compliance body be a standing or an ad hoc body of the Protocol? If standing, how often should it meet?*

The Australian Government considers that, at this early stage, discussion of the compliance mechanism should focus on the fundamental issues of objectives and principles. Once agreement has been reached on these issues, discussion may then move on to the structure and functions of the compliance mechanism, with all options canvassed.

5. *What should be the size and composition of the compliance body? What kind of expertise should be represented in the membership of the body and in what capacity should members serve?*

See response to question 4.

6. *Should the compliance body generally review and promote the implementation of and compliance with the Protocol besides addressing specific cases of non-compliance?*

See response to question 4.

7. *Should the compliance body make binding decisions, such as the imposition of compliance measure on Parties in non-compliance?*

See response to question 4.

Consequences of non-compliance

8. *What should be the consequences of non-compliance? Should such consequences include sanctions and incentive measures?*

In the period after the Protocol's entry into force, we envisage instances of non-compliance being linked to questions of capacity. Therefore, the Australian Government considers the consequences of non-compliance should be the provision of assistance and to develop a voluntary compliance program to restore compliance as soon as possible.

Role of the Secretariat and the Conference/Meeting of the Parties

9. *What should be the role of the Secretariat and Conference/Meeting of the Parties in the non-compliance procedure?*

See answer to question 4.

Other issues

10. *What other issues should be considered in the development of the compliance regime under the Protocol?*

Australia's suggestions for the compliance regime, as outlined above, are based on the premise that the regime's key purpose is to facilitate the effective operation of the Protocol. As such, the regime's primary role is a facilitative one. Implementation of the Protocol could be a considerable challenge for many Parties and it is likely that a number of incidents of non-compliance will arise in the first few years of the Protocol's operation. During this stage, therefore, the compliance regime should be focussed on encouraging, supporting and facilitating Parties' efforts to implement the Protocol. Once this has been achieved, the Conference of the Parties could review the compliance regime as part of its overall evaluation of the effectiveness of the Protocol five years after its entry into force (as provided in Article 35).

BELARUS

[22 February 2001]
[ORIGINAL: ENGLISH]

Objectives, nature and principles

1. *What should be the nature and objectives of the compliance regime? Should the regime be non-confrontational and non-judicial?* YES

Should it aim simply at encouraging and supporting Parties to achieve full compliance with their treaty obligations? YES

2. *What principles should underpin the operation of the compliance regime? Are the principles of expedition, fairness, transparency, predictability and due process essential to such a regime?* YES

If so, how are these to be guaranteed in the procedures and mechanisms to be developed?
Cartagena Protocol guarantees development of the the procedures and mechanisms.

Invocation of the procedure

3. *Who can invoke the non-compliance procedure?* PARTIES SHOULD.

Could entities other than Parties, for example: non-governmental organisations, intergovernmental bodies, the secretariat etc, trigger the procedure? NO

Structure and functions of the institutional mechanism

4. *Should the compliance body be a standing or an ad hoc body of the Protocol?*
STANDING BODY

If standing, how often should it meet? QUARTERLY

5. *What should be the size and composition of the compliance body?* We believe the size and composition are subject to the available technical / financial resources

What kind of expertise should be represented in the membership of the body and in what capacity should members serve? Experts on GMOs, Law, AgroPlants&Animals Selection.

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6. *Should the compliance body generally review -and promote the implementation of and compliance with the Protocol besides addressing specific cases of non-compliance?* NO

7. *Should the compliance body make binding decisions, such as the imposition of compliance measures on Parties in non-compliance?* NO

Consequences of non-compliance

8. *What should be the consequences of non-compliance? Should such consequences include sanctions and incentive measures?* YES

Role of the Secretariat and the Conference / Meeting of the Parties

9. *What should be the role of the Secretariat and Conference/Meeting of the Parties in the non-compliance procedure?* Conference/Meeting of the Parties should address some specific cases of non-compliance.

Other issues

10. *What other issues should be considered in the development of the compliance regime under the Protocol?* The non-compliance documents should be prepared in 6 official UN languages.

CHILE

[16 May 2001]

[ORIGINAL: SPANISH]

Chile ha considerado el cuestionario enviado por el Secretariado de la Convención y ha decidido que, previo a su respuesta, es necesario definir los mecanismos y procedimientos de cooperación, asistencia técnica y financiamiento, tal como lo establece el Artículo 34, que son indispensables para el efectivo cumplimiento de las obligaciones que emanan del Protocolo de Cartagena.

Sin perjuicio de expresar la importancia de analizar acuciosamente todos los aspectos que aborda el cuestionario, Chile desea enfatizar el carácter de colaboración que debería tener el régimen de cumplimiento del Protocolo.

En este contexto, dicho régimen debería ser un mecanismo no confrontacional, no judicial y no condenatorio, tal como se establece en otros Convenios Internacionales. Dicho mecanismo debería monitorear la implementación y el cumplimiento del Protocolo, orientándose a proporcionar apoyo técnico y financiero a las Partes, a objeto que éstas puedan llegar a poner en práctica el Protocolo, cumplir con sus obligaciones y actuar en consecuencia.

El mecanismo de cumplimiento debería ser transparente, preventivo, simple, flexible, sin costo adicional y orientado a facilitar y promover la ya mencionada implementación. Debería contener elementos de eficacia, además de ser expedito, predecible, justo y equitativo. Estos principios deberían quedar

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garantizados, por escrito, en el mecanismo de cumplimiento, haciendo expresa mención a principios de responsabilidad compartida pero diferenciada.

Es probable que un intercambio periódico de información acerca del estado de aplicación del Protocolo contribuya eficazmente a su cumplimiento, así como a la creación y al fomento de las capacidades y potencialidades de determinados países.

Por ello, debería establecerse un órgano permanente "Comité de Aplicación" que atienda a los casos concretos de incumplimiento y que le dé seguimiento a la aplicación del Protocolo, con informes periódicos al Secretariado y a las Partes.

En casos de incumplimiento, este Comité de Aplicación debería recomendar, asesorar e informar a la COP/MOP las medidas de cumplimiento que considere necesarias, primordialmente en función de los mecanismos de cooperación y asistencia técnica y financiera que se hayan aprobado en la primera reunión de la COP que actúe como Reunión de las Partes (MOP).

CUBA

[24 April 2001]

[ORIGINAL: SPANISH/ENGLISH]

1. *Objectives, nature and principles*

The objectives of the Compliance Regime are aimed at facilitating the accomplishment of the provisions of the Protocol, focusing mainly on the support given to the parties facing hardships when applying it.

The procedure is simple, crystal clear and based on non-confrontation, and on the principles of predictability, fairness, expedition, and due process.

2. *Invocation and activation of the procedure*

The compliance procedure will be triggered as follows :

- a) By one or more Parties lodging a complaint to the Secretariat about another Party's implementation of the obligations ;
- b) By a Party itself concluding that after its best, it is unable to comply fully with its obligations under the Protocol;
- c) By the Secretariat becoming aware of a possible case of non-compliance by a Party through revising the national records.

3. *Structure and functions of the institutional mechanism*

The Compliance Committee is established in order to promote the entire application of the Protocol. To these purposes, the Committee will:

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- a) Periodically analyze the compliance of the obligations by the Parties regarding notifications;
- b) Advice and assist Parties concerning their decisions on the compliance;
- c) Receive consider and report on any information or observations forwarded to it by the Secretariat ;
- d) To submit the recommendations and measures proposed for consideration to the Meeting of the Parties, through the Secretariat, for possible solutions in case of non-compliance ;
- e) Request where it considers necessary, through the Secretariat, further information on matters under its consideration;
- f) Undertake, upon the invitation of the Party concerned, information gathering in the territory of that Party, and;
- g) Submit its report, including any recommendations it considers appropriate to the Meeting of the Parties to enhance the implementation and application of the Protocol.

The implementation Committee consists of no less than 20 Parties elected by the Meeting of the Parties for two years based on the principle of equitable geographical distribution.

The members of the Compliance Committee will stand for the Parties' interests and will gather together as often as it is required as per the performance statutory. The parties will determine the expertise that is to be represented within the Executive Body by the time their officials are designated.

4. Conference of the Parties and Meeting of the Parties

The Conference/Meeting of the Parties of the Protocol will be in charge of making the final decision regarding a. Party's breach of its obligations on the basis of recommendations of the compliance body.

5. Consequences of non-compliance

The Conference/Meeting of the Parties of the Protocol will make decisions upon the following measures :

- a) Appropriate assistance, including assistance for the collection and reporting of data, technical and financial assistance, information transfer and training.
- b) Issuance of cautions.
- c) Suspension of specific rights and privileges under the Protocol, in accordance with the applicable rules of international law.

6. Procedure before cases of non-compliance

- The Secretariat will report on the compliance of the obligations under the Protocol, to the National Authority of the Party or the Parties involved.
- The Party or Parties that are referred to in the previous paragraph, will report on the relevant issues regarding non-compliance to the Secretariat within the framework of legal prescriptions and will propose the corrective measures. This report should be issued no later than 30 days.
- The Secretariat upon the reception of the precedent information will :

- a) Collaborate with the Party concerned on giving solutions to the problem, providing counseling and technical assistance.
 - b) Report on the matter to the Executive Committee that will investigate it directly together with the Party involved.
- The Compliance Committee will consider the information and the observations submitted in view of reaching an amicable solution to the problem on the basis of respect to the provisions of the Protocol. To these purposes, the relevant recommendations will be proposed including the draft of the established measures as per item 5.

The Secretariat will submit the conclusions and recommendations of the Compliance Committee to the Conference of the Parties and Meeting of the Parties Alternatively, the Secretariat will keep the party concerned informed about such outcomes.

- The Conference/ Meeting of the Parties will receive the reports from the compliance body ; it will consider its conclusions and adopt the proper decisions including the measures set forth in paragraph 5.
- The concerned Party will be able to impugn the decision adopted regarding non-compliance before the Conference/Meeting of the Parties, providing the relevant information it deems necessary to that purpose.

The Meeting of the Parties will revise its decision in a period no less than 30 days, from which the final outcome will be notified, through the Secretariat, to the National Authority of the Party involved.

ECUADOR

[30 March 2001]
[ORIGINAL: ENGLISH]

Objectives, nature and principles

1. *What should be the nature and objectives of the compliance regime? Should the regime be non-confrontational and non-judicial? Should it aim simply at encouraging and supporting Parties to achieve full compliance with their treaty obligations?*

Its objective would be to promote and facilitate compliance by Parties. The regime should have an administrative function, i.e. to help and individual Party and, perhaps, in persistent cases to push it by stronger measures to comply with the Protocol.

Procedures should be non-judicial and non-confrontational.

2. *What principles should underpin the operation of the compliance regime? Are the principles*

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of expedition, fairness, transparency, predictability and due process essential to such a regime? If so, how are these to be guaranteed in the procedures and mechanisms to be developed?

Principles are very important to the Ecuador. In Non-Compliance Procedures (NCP), they do not only support the incorporation of procedural principles, such as due process, but also of general principles of international law, notably the principle of common but differentiated responsibilities. They should be guaranteed including a special reference to such principles in a principles section of a decision on the NCP.

Invocation of the procedure

3. *Who can invoke the non-compliance procedure? Could entities other than Parties, for example, non-governmental organisations, intergovernmental bodies, the secretariat, etc, trigger the procedure?*

Parties can invoke the NCP with respect to themselves and with respect to other Parties. The invocation of the procedure by NGOs is not convenient because it would enable national NGOs to challenge the conduct of the government at the international level. The invocation of the NCP by the Secretariat should be rejected because such a role of the Secretariat could jeopardise its independence.

Structure and functions of the institutional mechanism

4. *Should the compliance body be a standing or an ad hoc body of the Protocol? If standing, how often should it meet?*

The Compliance Committee must be a standing body as there will always be cases of non-compliance, but it does not need to be in session on a permanent basis.

5. *What should be the size and composition of the compliance body? What kind of expertise should be represented in the membership of the body and in what capacity should members serve?*

The size of the Compliance Committee would depend of the equitable geographical representation and should be composed of experts, nominated by Parties.

As for the required expertise, a compliance committee that deals with biosafety should obviously include technical experts. However, some legal experience is also required for the proper functioning of the body. These persons do not necessarily have to be lawyers as long as some of the technical experts have experience with compliance procedures. There should't have a strict formulation of this provision because developing countries may not possess the required expertise.

6. *Should the compliance body generally review and promote the implementation of and compliance with the Protocol besides addressing specific cases of non-compliance?*

The consideration of individual cases of non-compliance should be a main function of the Compliance Committee. However, it may be useful to give it some additional functions once it has been established. In particular, it could be useful for the CoP/MoP to ask the Compliance Committee to give an opinion on the interpretation of specific provisions of the Biosafety Protocol or to analyse national reports in order to assess how specific provisions have been complied with.

7. *Should the compliance body make binding decisions, such as the imposition of compliance measures on Parties in non-compliance?*

The Compliance Committee can make binding decisions depending on the degree of competence that the CoP/MoP wants to confer on the compliance body. Binding decisions may not be convenient for developing countries, like Ecuador, because we don't have enough capacity to comply.

Consequences of non-compliance

8. *What should be the consequences of non-compliance? Should such consequences include sanctions and incentive measures?*

The compliance regime should be non-judicial and non-confrontational, however there will be the need of taking measures. Ecuador supports softer as well as stronger measures, because soft measures could be used to provide assistance to LMO-importing countries, whereas stronger measures would provide a mechanism to 'force' LMO-exporting countries to comply with the Biosafety Protocol. Soft consequences would include to facilitate the provision of advice as well as technical and financial assistance. Stronger measures could include all sorts of measures, e.g. issuance of cautions, the suspension of a Party's rights and privileges under the Protocol or financial penalties.

Role of the Secretariat and the Conference/Meeting of the Parties

9. *What should be the role of the Secretariat and Conference/Meeting of the Parties in the non-compliance procedure?*

The compliance body should not be entitled to make decisions of its own, but it should make recommendations to the CoP/MoP. The CoP/MoP, which is the supreme entity of the Biosafety Protocol, should take all decisions. As for the role of the Secretariat, it should not participate in the non-compliance procedure.

Other issues

10. *What other issues should be considered in the development of the compliance regime under the Protocol?*

The questions cover by and large all the issues to be addressed in a decision on a NCP. One issue that will have to come up, however, are procedures that have to be followed by the Compliance Committee. In this respect, it may also be useful to consider fast-track procedures in cases where problems arise with respect to the export/import of LMOs that need to be settled quickly.

It's necessary to develop a link between Non-compliance Procedure and Liability and Redress Regime.

EUROPEAN COMMISSION

[29 March 2001]

[ORIGINAL: ENGLISH]

Objectives, nature and principles

The objective is to promote compliance with the provisions of the Protocol and to address cases of non-compliance. The procedures shall include provisions to offer advice or assistance (Article 34).

The Protocol states that the mechanism shall be without prejudice to the settlement of disputes mechanism in Article 27 of the Convention. The mechanism should be simple, transparent, non-judicial and of a facilitative nature with the aim of preventing disputes from arising. The mechanism should also aim at clarifying the interpretation and application of Protocol provisions.

Invocation of the procedure

The procedure can be invoked/triggered by:

- a) The Compliance committee after assessment of the information submitted to it or upon request of the MoP,
- b) A Party with regard to its own ability to comply fully with the obligations,
- c) One or more Parties having reservations regarding another Party's compliance.

NGO's, the private sector and civil society in general may put forward information to the Secretariat on all compliance related-issues.

Structure and functions of the institutional mechanism

A standing body is preferred instead of setting up ad hoc bodies for each compliance case. This could be a "Compliance committee" with a limited number of experts nominated by Parties on the basis of equal geographic distribution. The EU believes that it is preferable that the experts serve in their individual capacities. This would enhance the independence with which the compliance body provides its recommendations. Such independence could be guaranteed by an adequate "statement" or "declaration".

As to size and composition of the body, 10 members could be the appropriate number. The body would need to have legal as well as technical expertise. If additional technical expertise is needed one could draw upon the Roster of experts. The MoP could appoint experts for a period of two years renewable only once.

The Committee could have regular intersessional meetings, e.g. twice a year or more often if it decides otherwise.

Article 34 of the Protocol describes the functions of compliance procedure and mechanisms as “to promote compliance with the Protocol, to address cases of non-compliance, and to offer advice and assistance”. The Compliance committee should therefore promote compliance in general in addition to addressing individual cases of non-compliance.

Possible tasks for the Committee could be to:

- Receive, consider and report on submissions to it regarding non-compliance
- Monitor the implementation of and compliance with the Protocol in general
- Undertake, after acceptance from the Party concerned, information gathering in the territory of that Party
- Give advice to Parties in order to help them to comply
- Make recommendations to Parties and to the Meeting of Parties on the interpretation and application of the Protocol and on measures to be taken

Consequences of non-compliance

Measures to be taken by the Compliance committee and/or by the Meeting of Parties may include:

- a) Appropriate advice including with respect to assistance such as technical and financial assistance, technology transfer, training etc.
- b) Recommendations on how to secure full compliance with the Protocol, for example through a compliance action plan
- c) Invitation to a Party to submit progress reports on how it has complied with the obligations
- d) Issuance of cautions
- e) Publication of non-compliance
- f) Suspension of specific rights and obligations under the Protocol.

Role of the Secretariat and role of the Meeting of Parties

The Secretariat could provide all the compliance-related information it has gathered to the Compliance committee. It could arrange for and service the meetings of the Compliance committee. The Secretariat should be the body through which information is channelled.

The Compliance committee would report regularly to the Meeting of Parties, which may also become the body that makes the final decision regarding a Party's non-compliance on the basis of recommendations from the Compliance committee.

INDIA

[30 March 2001]
[ORIGINAL: ENGLISH]

Objectives, nature and principles

The basic tenet of Article 34 of Cartagena Protocol is to develop a mechanism comprising a non-confrontational, conciliatory and co-operative mechanism for promoting compliance with the provisions of the protocol.

In line with this, India considers that the compliance regime should be non-confrontational and non-judicial besides aiming at encouraging and supporting parties to achieve full compliance with treaty obligations. It is desirable that the compliance regime does not leave scope for an issue to escalate into a dispute situation.

The operation of the compliance regime should underpin the principles of timeliness, fairness cooperation, transparency and predictability.

Invocation of the Procedure

Parties to the Protocol alone can invoke the compliance procedure. Entities other than Parties such as the non-governmental organisations, inter-governmental bodies and secretariat may not have any locus standi to trigger the procedure. These organisations may work closely with the Parties towards invoking the procedure.

Structure and function of the institutional mechanism

It is desirable that the compliance body be a small standing body established by the meeting of parties. Ideally it could be an elected body, on the basis of equitable geographical distribution. The body can meet periodically every six months. The compliance body should review and promote the implementation of and compliance with protocol besides addressing specific cases of non-compliance. It can also weigh the cases of non-compliance on the basis of equity.

The compliance body can make any recommendations to the MoP and not binding decisions. The binding decisions may be taken only by the meeting of the parties based upon the recommendation made by the compliance body.

Consequences of non-compliance

In case of non-compliance, corrective censure by Parties would act as a deterrent. Such consequences should not include sanctions. However, a provision for incentive in case of compliance may be a welcome move.

Role of the Secretariat and the conference/meeting of the parties

The Secretariat can collect the complaints concerning non-compliance by the Parties and place it before the compliance body for recommendation. The recommendations of the compliance body need to be placed before the meeting of the parties for final decision.

Other issues

The compliance regime needs to address the diverse level of technological developments and the socio-economic considerations. It has to address the capacity building measures as a vehicle to promote the compliance. The biosafety clearing house should be helpful in providing necessary information concerning the decision procedure.

INDONESIA

[27 June 2001]

[ORIGINAL: ENGLISH]

Objectives, nature and principles

What should be the nature and objectives of the compliance regime? Should the regime be non-confrontational and non-judicial? Should it aim simply at encouraging and supporting parties to achieve full compliance with their treaty obligation ?

Principally the objective of the compliance system is simply for encouraging and supporting parties to achieve full compliance with the obligation stated in the treaty obligation. In line with this principle, the compliance will form the character of treaty as a soft law. The compliance system should be of advisory, facilitative, open, transparent, simple and non-confrontational.

What principle should underpin the operation of the compliance regime? Are the principles of expedition, fairness, transparency, predictability and due process essential to such a regime ? If so, how are these to be guaranteed in the procedures and mechanisms to be developed ?

We agree to all the principles of expedition, fairness, and predictability. The important point is how to ensure those principles work. The guaranty of implementation is more effective if they are left to each party through legal and administrative measures at national level.

Allowing the independent body appointed by the COP to monitor the implementation of the protocol also ensures the effectiveness of the compliance mechanism.

Invocation of the procedure

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Who can invoke the non-compliance procedure? Could entities other than Parties, for example, non-governmental organizations, intergovernmental bodies, the secretariat etc., trigger the procedure?

To implement the concept of good governance, the involvement of the whole stakeholder in compliance procedure is very important. However the scope of involvement should be tailored to facilitate and to promote compliance as principle mentioned in No. 1.

The role of stakeholders to invoke the non-compliance procedure should be limited as the advisory, facilitative, open, simple, and transparent in the compliance process, for example to raise the biodiversity issues.

For the effectiveness of the Protocol, the legal and technical measures for encouraging the whole stakeholders' participation in the compliance procedure will be followed up at the national level.

Should the compliance body be a standing or an ad hoc body of the protocol? If standing how often should it meet ?

The compliance body should be a standing committee so the compliance system can be evaluated and monitored periodically, and accurately. The intensity of meetings should be decided by Conference of the Parties.

What should be the size and composition of the compliance body ? What kind of expertise should be represented in the membership of the body and in what capacity should members serve?

The size and the composition of the compliance body should be effective and efficient for implementing its function. The compliance committee should be composed of technical and legal experts nominated by parties. The composition should also consider the representative from various countries such as from developed, developing, economic in transition, center of origin biodiversity, import, and export countries.

Should be compliance body generally review and promote the implementation of and compliance with protocol besides addressing specific cases of non-compliance ?

Once the compliance committee established as standing committee, its function is to review and to promote the implementation of and compliance with the Protocol besides to address specific cases of non-compliance.

Should the compliance body make binding decisions, such as the imposition of compliance measures on Parties in non-compliance?

The compliance body is an advisory body which function is to provide recommendation to Conference of the Party as the highest body. The authority for making binding decisions is the authority of Conference of the Parties.

Consequences of non-compliance

What should be the consequences of non-compliance? Should such consequences include sanctions and incentive measures ?

As stated in the article 34 of the Protocol, the nature to address of the non-compliance is stressed on facilitative and non-confrontational. The consequence of non-compliance may cover a broad range of measures, including from incentive measures to other soft sanction.

Role of the secretariat and the cQnhrgxkee/meedng of the parties

What should be the role of the secretariat and conference/meeting of the parties in the non-compliance procedure?

The role of secretariat is administrative and facilitative for the implementation of the Protocol, including providing information needed for addressing non-compliance and enhancing the capacity building to comply the Protocol.

Conference of the Parties as decision-making authority may has an authority of making a binding decision in a matter of non-compliance. The binding decision is based on the recommendation from the Compliance Body.

Conference of the Parties as the highest body has authority to establish Compliance Body for reviewing compliance and for conducting monitoring.

What other issues should be considered in the development of the compliance regime under that protocol?

Technical measures for ensuring non-parties to comply with the protocol provisions cited in Article 24 are needed.

The incentive for being a party of the protocol should be distinctive; otherwise the implementation of the protocol will be ineffective.

The capacity building is the key factor for developing countries and for countries in economic transition to comply with the protocol provisions.

Objective, nature and principles

Japan understands that the objectives of the compliance regime are to promote compliance with the provisions of the Protocol, to address cases of non-compliance, and to offer advice and assistance where appropriate, in accordance with Article 34.

Therefore Japan sees that this provision envisages cooperative procedures and institutional mechanisms, but not judicial settlement.

Regarding principles, Japan considers expedition, fairness, transparency, predictability and due process as essential to the compliance regime. Expedition and fairness can be ensured by opting for a regionally balanced and standing body. Transparency could also be ensured by opening up discussions and decisions made by such a body, to all Parties.

Invocation of the procedure

It is appropriate that the non-compliance procedures should be triggered by Parties or the Conference of the Parties serving as the meeting of the Parties (COP/MOP) that have the ability to make decisions. The involvement of non-governmental organizations would be a clear political provocation and such an option is not suitable as an invocation of the non-compliance procedure.

Structure and functions of the institutional mechanism

- a) Japan considers that Parties should opt for a standing body on compliance not only in order to address individual cases of non-compliance, but also to regularly monitor, research cases of non-compliance based on request from any Party or the COP/MOP and promote compliance with the Protocol, in accordance with Article 34.

The periodicity of meetings of the standing body should be decided in the light of the number of cases of non-compliance.

(Japan needs more time to consider the size and composition of the compliance body to give a concrete answer.)

- a) It is the view of Japan that the general review and promotion of the implementation of and compliance with the Protocol are also an important function of the compliance body (see the above 3 (a)). Japan also considers that the implementation of and compliance with the Protocol can be reviewed through the national reports submitted by the Parties.
- b) The COP/MOP is the only authority which can make decisions under this Protocol. Therefore, the compliance body should not make any legally-binding decision, but simply verify cases of non-compliance and make recommendations to the COP/MOP on appropriate measures to improve implementation and compliance.

Consequences of non-compliance

Japan considers that the compliance regime should be cooperative such as to offer advice and assistance (see the above 5(1)) because measures to be taken for the implementation of the Protocol such as the risk assessment needs the most advanced scientific knowledge, and many of the Parties, especially developing countries, lack such capacities.

On top of this, it is also important to consider the necessity of sanctions and incentives as possible measures in response to non-compliance.

Japan also considers that the scope of compliance regime should include not only the matter concerning transboundary movements of LMOs but also the national legislation and administration system established for the Protocol.

Role of the Secretariat and the Conference/Meeting of the Parties

It is the view of Japan that in the non-compliance procedure, the COP/MOP is the institution that makes the final decision regarding a Party's non-compliance of its obligations. This decision should be based on recommendations given by the compliance body, whilst the Secretariat should play simply a administrative role to facilitate such processes.

KOREA (Republic of)

[21 May 2001]

[ORIGINAL: ENGLISH]

1. Compliance regime should have a differentiated approach according to whether it is for exporting parties or for importing parties.
2. Compliance regime for exporting parties should have a judiciary and punitive functions for the issues related with exporting parties while it should have a facilitative functions for the issues related with importing parties which lacks capacity to deal with biosafety protocol.
3. As for the principles for the operation of the compliance regime, we would like to add the principle of the « extended exporters responsibility »
4. We support standing body composed of about 20 experts nominated by the governments based on equitable geographical representation and it should be the government who could invoke the compliance regime. Compliance regime should focus on specific issues related with certain non-compliance cases and review of the implementation of the protocol should be the function of the COP/MOP not that of compliance regime.
5. MOP should have final authority and compliance mechanism should be able to impose punitive sanctions as a last resort when other measures are exhausted.
6. The role of the secretariat should be administrative and supportive function while COP/MOP should have authority of providing the final. policy guidance.

7. Other issues to be considered in the development of the compliance regime is the issue of liability of exporters and capacity building of importers.

NEW ZEALAND

[28 March 2001]

[ORIGINAL: ENGLISH]

Objective, nature and principles

1. *What should be the nature and objectives of the compliance regime? Should the regime be non-confrontational and non-judicial? Should it aim simply at encouraging and supporting Parties to achieve full compliance with the treaty obligations.*

New Zealand supports a compliance regime that aims to support and encourage compliance with the obligations under the Biosafety Protocol. This is in accordance with Article 35 of the Protocol which states:

“...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 established by Article 27 of the Convention.”

New Zealand therefore, supports a compliance regime that is non-confrontational, non-judicial and seeks to identify facts and reasons, rather than to make judgments or apply sanctions.

2 *What principles should underpin the operation of the compliance regimes? Are the principles of expedition, fairness, transparency, predicability and due process essential to such a regime? If so, how are these to be guaranteed in the procedures and mechanisms to be developed?*

The principles that New Zealand would support underpinning the compliance regime are:

- Effectiveness: the processes should provide a positive contribution to the aims of the Protocol. The objective of the processes should be to encourage and support capacity improvements and future compliance;
- Transparency: there should be clear procedures for discussion amongst the Parties. All parties should be able to contribute to the compliance regime, including developing countries; and
- Fairness: It is important that a fair process is developed that is appropriate to each case, and is agreed to by the affected parties.

- Efficiency: The process should be cost-effective, designed to minimise both direct and indirect costs. Resources available for implementation of the Protocol will be more valuably used for capacity building than for compliance work.

Invocation of the procedure

3. *Who can invoke the non-compliance procedure? Could entities other than Parties, for example, non-governmental organisations, intergovernmental bodies, the secretariat etc, trigger the procedure?*

New Zealand supports only Parties to the Protocol being able to invoke the procedures. While other entities may have a legitimate interest, they should be required to convince a Party of the value of the invoking the regime. This will help to ensure that the regime is not used unnecessarily and that both entities working together to agree on an issue are equal (ie both are Parties).

Structure and functions of the institutional mechanism

4. *Should the compliance body be a standing or an ad hoc body of the Protocol? If standing, how often should it meet?*

New Zealand supports the idea of the Meeting of the Parties and the Conference of the Parties reviewing the systems and procedures. This would ensure that all Parties had a say in the process and were able to present and share their own experiences. It would also enable other Parties such as developing countries to learn from other countries' experiences.

However if there is a consensus that a separate compliance body is needed, New Zealand believes it should be an ad hoc body, established to deal with a particular case and structured with the circumstances of that case in mind.

5. *What should be the size and composition of the compliance body? What kind of expertise should be represented in the membership of the body and in what capacity should members serve?*

The body should be the minimum size required to provide the necessary expertise and resources for the work with the membership tailored to fit the needs of the case. Members should be appointed as individuals who are there to carry out their designated functions within the ad hoc body. Their accountability would be to COP/MOP, through the Bureau, not to the countries from which they came.

6. *Should the compliance body generally review and promote the implementation of and compliance with the Protocol besides addressing specific cases of non-compliance?*

No. If, in considering a particular case it identified matters that it considered might have broader implications, (e.g., capacity problems which might be present in other countries) they should be able to draw these to the attention of COP/MOP.

7. *Should the compliance body make binding decisions, such as the imposition of compliance measures on Parties in non-compliance?*

The compliance body should not make binding decisions in cases where Parties have not complied. Such cases would involve a dispute between two Parties and would either be for the Parties to resolve or to be dealt with under the disputes resolution mechanism.

Consequences of non-compliance

8. *What should be the consequences of non-compliance? Should such consequences include sanctions and incentive measures?*

As previously stated where there is a case of non-compliance then it is for the Parties concerned to resolve the matter. In such cases the Meeting of the Parties and Conference of the Parties should focus on supporting capacity building or other actions which are necessary to prevent further non-compliance arising from the same cause.

Role of the Secretariat and the Conference/Meeting of the Parties

9. *What should be the role of the Secretariat and Conference/Meeting of the Parties in the non-compliance procedure?*

The Conference of the Parties and Meeting of the Parties should encourage a co-operative approach to how compliance might be achieved. In particular they should focus on:

- agreeing that a compliance regime activity was justified;
- establishing the process to be used;
- receiving the agreement and/or report from the process; and
- undertaking any steps necessary to implement the process results, such as encouraging capacity building support.

Other issues

10. *What other issues should be considered in the development of the compliance regime under the Protocol?*

An issue that is important to address is the relationship between the compliance regime and the dispute resolution process.

A second issue is the relationship between compliance under Biosafety and under other international conventions that affect the same activities (e.g., IPPC and SPS).

NORWAY (Preliminary views)

[22 March 2001]
[ORIGINAL: ENGLISH]

Objectives, nature and principles

The objective is to promote compliance with the provisions of the Protocol and to address cases of non-compliance. The procedures shall include provisions to offer advice or assistance (Article 34). Appropriate measures to bring about compliance with the Protocol need to be considered.

The Protocol states that the mechanism shall be without prejudice to the settlement of disputes mechanism in Article 27 of the Convention. Therefore the mechanism should be non-judicial with the aim of preventing disputes from arising. The principles of fairness, transparency, predictability etc. need to be ensured through Rules of Procedure for the non-compliance mechanism.

Invocation of the procedure

The procedure may be invoked :

- a) by a Party with regard to its own ability to comply fully with the obligations
- b) by one or more Parties having reservations regarding another Party's compliance
- c) by the Secretariat becoming aware of possible non-compliance by a Party inter alia when reviewing national reports and through information gathering
- d) by the Meeting of Parties

The possible role of NGO's, industry (e.g. export companies) and the public needs to be considered at least as regards the submission of information in order to assess a possible situation of non-compliance. The specific role of the Secretariat needs to be clarified.

Structure and functions of the institutional mechanism

A standing committee is preferred instead of setting up ad hoc bodies for each compliance case. This could be a Committee with a limited number of experts nominated by Parties on an equitable geographical basis. The Committee should meet at least once a year. The experts should preferably serve in their individual capacities rather than as representatives of the countries of which they are nationals. This is important in order to guarantee the independence of the compliance body.

As to size and composition of the body, a number of members ranging for example from 8 to 10 could be envisaged. The body would need to have legal expertise as well as technical expertise. If additional

technical expertise is needed one could draw upon the Roster of experts consisting of experts in the fields of risk assessment and risk management.

The Committee needs to have rules of procedure addressing such questions as the rights of parties to be heard, information gathering, respect of confidential information, openness of proceedings, rights to participate in the proceedings, reports to the Meeting of Parties and decision-making.

The Committee should promote compliance in general in addition to addressing individual cases of non-compliance. The aim should be to reach an amicable solution in cases of non-compliance. Article 34 of the Protocol already describes the functions as "to promote compliance with the Protocol, to address cases of non-compliance, and to offer advice and assistance".

Possible tasks for the Committee could be to:

- Receive, consider and report on any submissions referred to it regarding noncompliance and make such recommendations as it considers appropriate
- Review periodically the implementation of and compliance by the Parties with their obligations under the Protocol on the basis of information provided in *inter alia* their reports
- Request further information on matters under its consideration and undertake as necessary, after acceptance from the Party concerned, information gathering in the territory of that Party
- Make recommendations to the Parties concerned and to the Meeting of Parties on questions concerning the interpretation and application of the Protocol
- Make recommendations to the Parties concerned and to the Meeting of Parties on appropriate measures to bring about compliance with the Protocol

Consequences of non-compliance

Indicative measures to be taken may include:

- a) Appropriate advice and assistance such as technical and financial assistance, technology transfer, training etc.
- b) Recommendations/decisions on how to secure full compliance with the Protocol, for example through a compliance action plan
- c) Requirement on a Party to submit progress reports on how it has complied with the obligations
- d) Issuance of cautions
- e) Publication of non-compliance
- f) Decisions with respect to the suspension of specific rights and privileges under the Protocol in accordance with the applicable principles of international law.

Role of the Secretariat and role of the Meeting of Parties

The Secretariat could be given the right to initiate the procedure. The Secretariat may also be the body through which information is channelled.

The Meeting of Parties is the body that makes the final decision regarding a Party's non-compliance on the basis of recommendations from the Compliance Committee. The Meeting of Parties may decide upon appropriate measures to bring about compliance with the Protocol and measures to assist in a Party's compliance.

SLOVENIA

[29 March 2001]

[ORIGINAL: ENGLISH]

Objectives, nature and principles

- (1) The nature and objectives of compliance regime should be non-confrontational and non-judicial. It should encourage and supporting Parties to achieve full compliance with their treaty obligations.
- (2) Operational principles of the compliance regime should be transparency and predictability. Such mechanisms should be develop under elaboration of international laws on these matters. The Parties shall consider and approve cooperative procedures and institutional mechanism to promote compliance with the provisions of the Protocol. The development of an legal model and administrative regimes could be use to support the above approaches.

Invocation of the procedure

- (3) Intergovernmental bodies could trigger the compliance procedure.

Structure and functions of the institutional mechanism

- (4) The compliance body should be an ad-hoc body of the Protocol established under art. 29(4b) of the Protocol and shall be open to participate by all Parties to the Protocol. Decision under the Protocol shall be taken only by the Parties.
- (5) The development of principles and criteria of co-operative procedures and institutional mechanism to promote compliance and the effective implementation of the environmental goals of the Protocol, in a manner that also enhances those provisions that seek to ensure a consistent approach to the international transfers of LMOs, should be the main issues of expertise.
- (6) The compliance body should generally review and promote the implementation of and compliance with the Protocol besides addressing specific cases of noncompliance.
- (7) The compliance body should not make binding decision.
- (8) Consequences of non-compliance should include sanctions and incentive measures.

Role of the Secretariat and the Conference meeting of the Parties

- 9) *The Secretariat established by art. 24 of the Convention should serve as the Secretariat to this Protocol in a case of non-compliance procedure. Conference of the Parties serving as the meeting of the Parties to this Protocol shall make decisions necessary to promote its effective implementation according the art. 29 (4a, e and f) in a case of non-compliance procedure.*

Other issues

- 10) *Currently, a comprehensive draft Act on the use of Gene Technology follows provisions of the EU directives and the Protocol is under Governmental procedure. The law set out procedures for contained use, deliberate release into the environment, placing on the market and intentional transboundary movement of LMO's. On the basis of the act control over handling, transport, packaging and identification of LMO's is introduce.*

SWITZERLAND (Preliminary views)

[16 May 2001]
[ORIGINAL: ENGLISH]

At this early stage of the discussion the compilation of all government views must serve as a background document for deeper consideration by both the Open-Ended Meeting of Experts on Compliance and ICCP2. Switzerland reserves its rights to reconsider its position on the compliance regime for the Cartagena Protocol based on the outcome of these two meetings taken into consideration that this issue will have to be addressed at the first meeting of the Parties (MOP1).

1. *What should be the nature and objectives of the compliance regime? Should the regime be non-confrontational and non-judicial? Should it aim simply at encouraging and supporting Parties to achieve full compliance with their treaty obligations?*

The nature and the objective of the compliance regime should be to strengthen the compliance with the Cartagena Protocol. Such a regime should be non-confrontational and non-judicial. It should encourage and support Parties to achieve full compliance with their treaty obligation. Parties shall be convinced to fulfil their treaty obligations and not be forced by means of punitive measures to comply with their obligations.

2. *What principles should underpin the operation of the compliance regime? Are the principles of expedition, fairness, transparency, predictability and due process essential to such a regime'. If so, how are these to be guaranteed in the procedures and mechanisms to be developed?*

The above mentioned principles are essential to such a regime. Procedures and mechanisms should be explored to ensure efficient management of the compliance regime.

3. *Who can invoke the non-compliance procedure? Could entities other than Parties, for example, non-governmental organisations, intergovernmental bodies, the secretariat etc. trigger the procedure?*

A non-compliance procedure should only be triggered with the consent of the concerned Parties. All the mentioned entities on the other hand should be enabled to invoke the procedure. NGO's should in general not be allowed to invoke the procedure.

4. *Should the compliance body be a standing or an ad hoc body of the Protocol? If standing, how often should it meet?*

At this stage, due to the overall resources constraints, Switzerland favours more an ad hoc body of the Protocol which should be invoked only if necessary.

5. *What should be the size and composition of the compliance body? What kind of expertise should be represented in the membership of the body and in what capacity should members serve?*

It is difficult to fix the size of a compliance body in advance. In our view the size of the body should depend on the specific nature of the problem under consideration.

6. *Should the compliance body generally review and promote the implementation of and compliance with the Protocol besides addressing specific cases of non-compliance?*

The general review of the implementation of and compliance with the Protocol is a general obligation, which has to be managed by the Conference of the Parties, the subsidiary bodies and the secretariat. The compliance body should consider the specific cases of non-compliance. On request of the Secretariat the compliance body could also express its opinion on questions of general character.

7. *Should the compliance body make binding decisions, such as the imposition of compliance measures on Parties in non-compliance?*

The compliance body shall not make binding decisions and shall not impose compliance measures on Parties. The compliance shall offer advice and assistance, where appropriate as it is written in article 34 in the Biosafety Protocol. The procedures shall be separate from the dispute settlement procedures of the CBD-Convention.

8. *What should be the consequences of non-compliance? Should such consequences include sanctions and incentive measures?*

Sanctions are not the appropriate means to enforce compliance. We prefer therefore advice, assistance and support in order to convince the Parties of the need to establish compliance. The use of incentives measures should be considered

9. *What should be the role of the Secretariat and Conference/Meeting of the Parties in the non-compliance procedure?*

The Secretariat should co-ordinate all activities around the compliance procedure and give logistic support. The Conference of the Parties should only be involved in compliance questions if there is a general problem of compliance with several Parties to the protocol. It should be possible on the other hand that subsidiary bodies which are dealing with specific items of the Protocol (e.g. labelling, or illegal traffic) can be involved in a compliance procedure.

10. *What other issues should be considered in the development of the compliance regime under the Protocol?*

The whole procedure should be simple, user-friendly, economic and provide for incentives to promote compliance.

TURKEY

[18 April 2001]

[ORIGINAL: ENGLISH]

Objective, nature and principles

1. As well known purpose of the Cartagena Protocol on Biosafety is to contribute ensuring an adequate level of protection in the field of the safe transfer, handling and use of LMOs that may have adverse effects on the conservation and sustainable use of biological diversity and also minimize risk to human health. Therefore, the objective of the compliance regime should be the facilitation of the implementation of provisions of the protocol and the addressing cases of non-compliance.

The compliance regime of the Protocol should be considered in connection with the liability and redress mechanism of the Protocol, it should define ways and means of the implementation of the provisions and nature of cases of non-compliance. The regime should encourage and support Parties to achieve full compliance and it should serve basis to solve conflicts between parties as well as the issues under liability and redress mechanism of the protocol.

2. Principles of expedition, fairness, transparency, predictability and due process are essential for compliance regime. The clear rules should be developed under the Protocol to implement its particular provisions, such as risk assessment. The self-control mechanisms in country and region level may assist

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the process, inter alia the follow-up process of the protocol in terms of reporting to COP/MOP. The non-governmental organizations have an important role to achieve transparency and due process.

Invocation of the Procedure

3. The Secretariat as an independent body of the Protocol may assist Parties as well as non-governmental organizations and intergovernmental bodies, to invoke the non-compliance procedure, The harm or complaint of a particular Party is necessarily be required to trigger non-compliance procedure, The compliance body may advise Secretariat to communicate cases of non-compliance to all Parties and it should prepare documentation to reach a solution for the cases via SBSTTA and COP/MOP of the Protocol.

Structure and Functions of the institutional mechanism

4. The compliance body should be a Standing body of the Protocol, it should be entitled to take measures of precautions at required and emergency situations and it should meet at the same venue and time with SBSTTA to interview technical issues as well.

5. The compliance body should be composed of lawyers mainly. Because of being a very technical subject the compliance body should be supported by roster of experts on biosafety and SBSTTA. The Parties should be represented equally in the body in accordance with their import/export applications and the biodiversity that they have.

6. The aim of the compliance body should be serving advise for the implementation of the Protocol. It should review and promote the implementation of and compliance with the Protocol as well as particular cases and report its suggestions to COP/MOP.

7. The compliance body should have important powers for ensuring the implementation of the Protocol. Results on non-compliance of this Protocol will be very hazardous for human health and nature. For carrying risks to the minimum the compliance body should prepare guidelines and develop measures to ensure compliance with the Protocol and prevent cases of non-compliance in advance. The binding decisions and impositions with regard to particular cases should be determined via COP and liability/redress mechanism of the Protocol, or via annex II of the CBD,

Consequences of non-compliance

8. Damages that are created intentionally or negligently should be handled by COP and liability and redress mechanism of the Protocol. The compliancc body should analyze the nature and reasons of the non-compliance and should advise to COP for incentive measures.

Role of the Secretariat and the Conference/Meeting of the Parties

9. In the compliance procedure the Secretariat have an important role in terms of triggering the procedures, communicating with the Parties and disseminating the related information. The COP/MOP to the Protocol is the authority to take decisions regarding to the compliance procedures and cases of non-compliance.

Other issues

10. The step-by-step approach may be considered in the development and implementation of the compliance regime under the protocol. The compliance body may prepare a work plan, and guidelines for the implementation of provisions, and parties may report their capacities to perform work plan and guidelines. The transboundary movements and environmental release of LMOs should be conveyed with this step-by-step implementation. The commercialization and environmental release of LMOs should be permitted only after the fulfillment of requirements of Parties to implement the provisions of the Protocol.

UNITED STATES OF AMERICA

[5 April 2001]

[ORIGINAL: ENGLISH]

1. *What should be the nature and objectives of the compliance regime? Should the regime be non-confrontational and non-judicial? Should it aim simply at encouraging and supporting Parties to achieve full compliance with their treaty obligations?*

- ***Compliance procedures/mechanisms should suit the unique needs of the Protocol.*** As a preliminary matter, the compliance regime (procedures and mechanisms) for the Biosafety Protocol should be designed to fit the specific needs and unique features of that agreement. Although elements from other regimes (environmental and/or non-environmental) may ultimately be adapted for Biosafety purposes, it is unlikely that wholesale adoption of a regime from a prior agreement will be appropriate.
- ***Procedures and mechanisms should promote implementation.*** Regarding the objectives of the regime, Article 34 of the Protocol makes clear, by referring to promoting compliance (and not only to addressing cases of non-compliance), that the regime is to concern itself with more than actual treaty violations. As such, the regime should have as its objectives not only preventing and addressing actual violations of legal obligations, but also promoting implementation of the Protocol more generally.
- ***Procedures and mechanisms should be facilitative and "cooperative".*** In the absence of express authority to do so in the Protocol, there is no basis for imposing binding consequences on parties determined to be out of compliance. Moreover, Article 34 provides that the Parties shall "consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance."

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(Emphasis added.) The CBD Parties clearly intended, in this context, for the compliance regime to be facilitative in nature; its purpose should be to assist Parties in implementing the Protocol. A confrontational, judicial regime would be inconsistent with this mandate.

- Moreover, there are separate procedures available for Parties who seek a judicial process. They may pursue dispute settlement under the procedures set forth in Article 27 and Annex II of the CBD. Unlike in some other multilateral environmental agreements, dispute settlement procedures would seem to have particular relevance under the Protocol, where bilateral trade-related disputes may arise.
- The question of the nature of the compliance regime is addressed in the answer to Question 2 below.

2. *What principles should underpin the operation of the compliance regime? Are the principles of expedition, fairness, transparency, predictability and due process essential to such a regime? If so, how are these to be guaranteed in the procedures and mechanisms to be developed?*

- **Transparency is essential**, The regime should be as transparent as possible. Transparency is likely to foster compliance, as well as confidence on the part of both Parties and the public in the system. Considering compliance in light of the reporting from Parties (submitted pursuant to Article 33) on their efforts to implement the Protocol will be an important factor in achieving transparency.
- **Fairness** should also be a key element of the Protocol's compliance procedures and mechanisms, especially with regard to Parties' efforts to facilitate compliance by countries facing difficulties in meeting their obligations under the protocol. These efforts should fairly take into account the needs of all countries requiring and requesting assistance and advice. In addition, compliance procedures and mechanisms should apply equally to all parties, although, of course, the resulting advice or assistance will need to take into account the needs of individual parties.
- **Expedition, due process, predictability** are concepts often associated with judicial regimes and dispute settlement processes. As we noted above, settlement of disputes under the Protocol is covered under Article 27, not article 34. It is unclear to what extent these terms might have application in the context of offering advice or assistance, which we view as a key feature of Article 34.
- To the extent they are relevant, **expedition and due process** need to be considered in tandem, as there is sometimes an inverse relationship between them. For example, a process should not be so expedited that it failed to allow concerned parties to be heard.
- **Predictability** is generally desirable but, given that this is essentially a cooperative, facilitative regime, there should also be sufficient flexibility to deal with Parties and situations on a case-by-case basis.

- In terms of how to "guarantee" such concepts in the operation of the regime, such concepts are more likely to be guaranteed if they are reflected in the actual design of the regime, rather than included in a freestanding provision on "nature." For example, transparency can be promoted, inter alia, by providing for openness in the procedures that will govern the institution's operation. Similarly, fairness can be promoted, inter alia, through the procedures of the institution, as well as its composition.

3. *Who can invoke the non-compliance procedure? Could entities other than Parties, for example, non-governmental organizations, intergovernmental bodies, the secretariat, etc., trigger the procedure?*

- In light of the cooperative, facilitative nature of the regime, the United States considers that questions may be referred either by a Party in respect of itself or a Party in respect of another Party. In our view, a Party should feel free and even be encouraged to self-initiate a request for assistance, acknowledging that it is having difficulty with compliance in a certain area.
- In addition, it will be important to consider compliance in light of the reporting from Parties (submitted pursuant to Article 33) on their efforts to implement the Protocol. This would be true for the MOP as a whole, as well as for any smaller group charged with facilitating compliance.
- In any event, the compliance mechanism would determine whether to pursue a particular question brought to its attention. It would not be compelled to take action simply because, for example, a Party made a complaint.
- Other entities, such as NGOs or industry, should not have the ability to raise questions, as an initial matter, directly before the mechanism. Having said that, once the compliance mechanism decides to take up an issue, competent intergovernmental and non-governmental organizations with relevant factual and technical information should be able to submit such information to the mechanism.

4. *Should the compliance body be a standing or an ad hoc body of the Protocol? If standing, how often should it meet?*

- At this stage, it is entirely unclear what will be the kinds of compliance issues that might arise under the Protocol. In general, these could vary from issues of capacity building to issues of complying with specific obligations. The specifics involved in practice cannot be predicted at this early time before entry into force.
- Therefore, the US believes that compliance issues should be addressed, at least at the outset, by an **ad hoc body to be created by the MOP** that would facilitate cooperative procedures as needed and dictated by the circumstances.
- If experience on that basis indicates that a standing body would be desirable, such a body can be established at a later date.
- As an alternative to an ad hoc body, the MOP could establish an **"interim" standing body**, the effectiveness of which could be reviewed at a date certain (e.g., within 2 years. or at the next Meeting of the Parties) when Parties would have a better understanding of the compliance issues arising in connection with implementation of the Protocol.

5. ***What should be the size and composition of the compliance body? What kind of expertise should be represented in the membership of the body and in what capacity should members serve ?***

- The compliance body should be of limited membership, perhaps 10- 15.
- There should be a balance between importing and exporting Parties and between developed and developing country Parties.
- Members should serve as representatives of their governments.
- Given that the compliance body will be facilitative, members would need technical expertise in order to assess implementation problems and promote solutions.

6. ***Should the compliance body generally review and promote the implementation of and compliance with the Protocol besides addressing specific cases of non-compliance?***

- Yes. As noted above, the mandate of the compliance regime, as reflected in Article 34, focuses on promoting compliance with the Protocol, beyond merely addressing cases of non-compliance.
- As such, the compliance body should provide advice assistance, upon request, to Parties in implementing the Protocol. The compliance body could also, as appropriate, provide its recommendations to the MOP on general issues of implementation.

7. ***Should the compliance body make binding decisions, such as the imposition of compliance measures on Parties in non-compliance?***

- No. As noted above, the cooperative procedure/mechanisms called for in Article 34 would be at odds with the imposition of legally binding consequences.
- The primary role of the compliance body should be to provide advice and assistance to Parties. In appropriate cases involving non-compliance, the compliance body could advise the MOP, which would in turn have the authority to make recommendations or take other measures consistent with international treaty law.

8. ***What should be the consequences of non-compliance? Should such consequences include sanctions and incentive measures?***

- Incentive measures may be appropriate, depending on the Party and the situation.
- As noted above, recommendations from the MOP might also be appropriate. While not legally binding, they would carry political weight.
- We do not interpret Article 34 to authorize the imposition of sanctions.
- Apart from actions taken under the authority of Article 34, the other Parties could consider action consistent with that permitted under customary international law, e.g., as described in Article 60 of the Vienna Convention on the Law of Treaties. (It should be noted that there is no authority, under Article 60, to impose binding consequences that would compel a non-compliant Party to take certain action or refrain from certain action.)

- Also, as noted above, where a judicial rather than facilitative process is desired, Parties have the option of pursuing dispute settlement under Article 27 of the CBD.

9. *What should be the role of the Secretariat and Conference/Meeting of the Parties in the non-compliance procedure?*

- The role of the Secretariat should be twofold :
 - to receive and process reports on implementation submitted by Parties pursuant to Article 33, and to bring such information to the attention of the compliance body, and
 - to convey to the compliance body reports received from a Party concerning non-compliance by another Party.
- The MOP would establish the compliance body, initially on an ad hoc basis. In cases of non-compliance, the MOP could consider recommendations of the compliance body, and could take decisions, as appropriate.

10. *What other issues should be considered in the development of the compliance regime under the Protocol?*

- Other issues should include, e.g.:
 - The linkage between capacity building and effective implementation of the Protocol. Capacity building is key to giving Parties, especially developing countries, the means to fulfill their obligations under the Protocol ; and
 - The need for effective domestic enforcement by Parties of their laws implementing the Protocol (see, e.g., Article 25), given that achieving compliance with the Protocol's obligations will largely depend upon the effectiveness of compliance efforts at the domestic, rather than international, level.

Submission of the United States

Cooperative Procedures and Mechanisms under Article 34 of the Cartagena Protocol on Biosafety

Proposed Terms of Reference for the Compliance Body

I. Status

- To be established at the first Meeting of the Parties on an ad hoc basis.
- Alternatively, to be established as an interim standing body, whose status would be reviewed at a date certain to determine, on the basis of experience gained, whether it would be desirable to have a permanent standing body.

II. Composition

/...

- 10-15 members, representing governments.
- Balance between importing and exporting parties, and between developed and developing country parties.
- Technical expertise with respect to implementation is desirable.
- Chairman to be selected by the members. Chairmanship shall be for a fixed term, and shall rotate among importing and exporting, and developed and developing, countries.

III. Mandate

- To promote compliance with the provisions of the Protocol, and to address cases of non-compliance, through cooperative means, particularly the provision of advice and assistance.
- Without prejudice to the ability of parties to pursue dispute settlement under Article 27 of the CBD.

IV. Operations

- The compliance body shall meet periodically as needed.
- The body shall develop its own rules of procedure for adoption by the MOP.
- The body shall report periodically on its activities to the Bureau and to the MOP.

V. Invocation of action by the compliance body

- A party may request assistance with respect to some aspect of its own compliance efforts.
- A party may express its concerns over the compliance efforts of another party.
- The Secretariat may bring to the attention of the body reports on implementation submitted by parties pursuant to Article 33.
- The compliance body shall decide whether to take action in a particular matter brought to its attention.

VI. Promoting compliance

- This may often be closely linked to capacity-building efforts.
- The body may provide advice or assistance to a requesting party.
- In an appropriate case, this could involve the use of assistance from the roster of experts, the Secretariat, other parties, or other sources.
- The body may also, as appropriate, make recommendations to the Meeting of the Parties on general issues of implementation of the Protocol.

VII. Addressing cases of non-compliance

- The body may seek to mediate, but not to arbitrate, in such cases.
- The body may engage in fact-finding through consultations with concerned parties, and may facilitate discussions between those parties.
- The body shall not have authority to impose measures as a consequence of a party's non-compliance.
- If matters cannot be satisfactorily resolved in this manner, the body may so advise and submit recommendations to the Meeting of the Parties, which may then take action to the extent consistent with international law, e.g., as reflected in Article 60 of the Vienna Convention on the Law of Treaties.
