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CARTAGENA PROTOCOL ON BIOSAFETY
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COMPLIANCE (ARTICLE 34)

Development of compliance procedures and mechanisms under the Cartagena Protocol on Biosafety

Note by the Executive Secretary

I. INTRODUCTION

1. As the number of multilateral environmental agreements has grown over the years, the international community has increasingly turned its attention and concern towards ensuring the compliance of States with their international environmental obligations. The issue of compliance was an important area of focus during the preparatory process for the United Nations Conference on Environment and Development (UNCED). Subsequently, in April 1993, European environment ministers at a meeting in Lucerne adopted a declaration urging Contracting Parties to environmental conventions in the region covered by the United Nations Economic Commission for Europe (UN-ECE) to cooperate within the respective governing bodies of those conventions to work towards the establishment of compliance regimes to address issues of non-compliance with treaty obligations. Since then, the international community has demonstrated its concern in the negotiation of recent environmental agreements and in various initiatives to further improve existing mechanisms and processes regarding compliance with, and implementation and enforcement of, multilateral environmental agreements.

2. In contrast to the Convention on Biological Diversity, the Cartagena Protocol on Biosafety provides explicitly for the development of procedures and mechanisms to ensure compliance. Article 34 states that the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with its provisions and to address cases of non-compliance. Such procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate, and shall be separate from, and without prejudice to, the dispute-settlement procedures and mechanisms established by Article 27 of the Convention.

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3. According to the work plan of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP), adopted by the Conference of the Parties to the Convention at its fifth meeting, compliance is one of the issues to be addressed by the ICCP at its first meeting (decision V/1, annex, section A, item 5). In this regard, the ICCP is required to consider

(a) The elements for a compliance regime; and

(b) The options for a compliance regime.

4. The present document has been prepared by the Executive Secretary to assist the ICCP in its consideration of these issues. The document reviews relevant precedents in multilateral environmental agreements, examines ongoing initiatives for the development of compliance regimes, and outlines and discusses the possible elements and options for a compliance regime under the Cartagena Protocol.

II. REVIEW OF EXISTING COMPLIANCE REGIMES IN MULTILATERAL ENVIRONMENTAL AGREEMENTS

5. Several multilateral environmental agreements adopted since the 1970s have endeavoured to lay down measures for the verification of compliance with their provisions. In many cases, such measures do not go beyond requiring Parties to submit regular national reports on measures taken to meet their obligations. Although these reports do provide a means through which the secretariats of the agreements and other Parties can assess the extent to which Parties are discharging their obligations, in many instances the agreements do not specify the course to be followed when such national reports indicate that a Party is remiss in doing so. Fully-fledged non-compliance procedures are still a rarity, and the process of establishing them is largely in its infancy. Only three multilateral environmental agreements have laid down specific requirements in this regard: these are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, and the UN-ECE Convention on Long-range Transboundary Air Pollution. The present section reviews and analyses the regimes established under these instruments with a view to drawing lessons that may be pertinent to the consideration of the issue under the Cartagena Protocol on Biosafety.

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

6. CITES was adopted in Washington in 1973 and came into force in 1975. It currently has 152 Parties. The Convention seeks to protect endangered and threatened species from overexploitation by regulating or prohibiting international trade in such species or their specimens. It establishes a system of permits that must be presented to designated officials before listed species and specimens are allowed to cross the borders of any State party. Export and import licences are issued by national Management Authorities on the advice of national Scientific Authorities established by each Contracting Party.

7. The CITES non-compliance regime has developed piecemeal over the years and is largely based on the provisions of the Convention dealing with reporting requirements and international measures (articles VIII, XII and XIII), as well as various resolutions and decisions adopted by the Conference of the Parties over the years.

8. Article VIII of the Convention requires Parties to submit to the Secretariat periodic reports regarding national implementation of the Convention. The reports are to include information on legislative, regulatory and administrative measures taken to enforce the provisions of the Convention. Article XIII lays down a rudimentary procedure for addressing cases of non-compliance: when the Secretariat receives information of non-compliance with treaty obligations in respect of a Party, it is required to communicate such information to the Management Authority of the Party or Parties concerned. On receipt of the communication the Party concerned is required to inform the Secretariat of

any relevant facts insofar as its laws permit and, where appropriate, propose remedial action. Where the Party in question considers that an inquiry is desirable, such inquiry may be carried out by one or more persons expressly authorized by that Party. The information provided by the Party or resulting from an inquiry shall be reviewed by the Conference of the Parties, which may make whatever recommendations it deems appropriate.

9. Several decisions and resolutions adopted by the Conference of the Parties to CITES have amplified the requirements of these provisions. Resolution Conf. 7.5 imposed a time-limit of one month within which a Party is required to respond to a request by the Secretariat for information on an alleged infraction. A Standing Committee of the Convention was first established by the Conference of the Parties at its sixth meeting (resolution Conf. 6.1) and reconstituted by the ninth meeting of the Conference of the Parties (resolution Conf. 9.1). The Standing Committee is composed of Parties elected from each of the six major geographic regions and in accordance with criteria established by the resolution. It oversees the work of the Convention during the inter-sessional period between meetings of the Conference of the Parties and provides general policy and operational direction to the Secretariat concerning the implementation of the Convention. The Committee reviews non-compliance by Parties with CITES provisions, takes appropriate decisions relating thereto and recommends action by the Conference of the Parties.

10. Decisions 10.121 and 122 require the submission of separate reports on infractions and other implementation problems to each regular meeting of the Conference of the Parties. In practice, compliance is monitored by the Animals and Plant Committees (also established by resolution Conf. 9.1 and which undertake Significant Trade Reviews that often lead to suggested trade measures with regard to specific species) and by the Secretariat on the basis of information provided by TRAFFIC, the joint wildlife trade monitoring programme of the WWF and IUCN.

11. Once it is determined by the Secretariat that major problems exist with the implementation of the Convention by a Party, the Secretariat is required to: (i) work together with the Party to try to solve the problem and offer advice and technical assistance; (ii) refer the matter to the Standing Committee which may pursue the matter in direct contact with the Party concerned; and (iii) keep the Parties informed as fully as possible, through notifications, of such implementation problems and the actions taken to solve them (resolutions Conf. 7.5 and 8.4 and decision Conf. 10.115). In cases of persistent non-compliance or failure to comply with decisions of the Conference of the Parties regarding remedial measures, the Standing Committee can advise Parties to impose bans on trade in CITES specimens on the offending Party (decision Conf. 10.18). Such trade sanctions have been imposed on a number of Parties. It should be noted, however, that trade prohibitions are a measure of last resort. The CITES framework puts significant emphasis on inducing Parties into compliance through negotiation and technical assistance and advice.

B. The Montreal Protocol on Substances that Deplete the Ozone Layer

12. The Montreal Protocol on Substances that Deplete the Ozone Layer was adopted in 1987 as a protocol to the 1985 Vienna Convention on the Protection of the Ozone Layer. It entered into force in 1989 and currently has 172 Parties.

13. The objective of the Protocol is to reduce and ultimately eliminate the production and consumption of all categories of ozone-depleting substances (ODS), specified in four annexes to the Protocol. Parties are given a series of target dates by which they are required to reduce production and consumption levels by specified percentages. Restrictions are imposed on trade with non-Parties so as to provide an incentive for universal participation and to prevent industrial relocations aimed at circumventing the Protocol's controls.

14. The Montreal Protocol is the first multilateral environmental agreement that sought to address the issue of non-compliance in a comprehensive manner. Enabling provisions for the development of a non-compliance procedure was provided by Article 8 of the Protocol, which required Parties, at their first meeting, to "consider and approve procedures and institutional mechanisms for determining non-compliance with its provisions and for treatment of Parties found to be in non-compliance". In 1990, the Parties approved an interim non-compliance procedure for monitoring and enforcing compliance with the Protocol. This interim procedure was reviewed and established on a permanent basis by the Fourth Meeting of the Parties, in 1992. An Ad Hoc Working Group of Legal and Technical Experts established by the Ninth Meeting of the Parties further reviewed the operation of the procedure, and amendments to the non-compliance procedure were adopted by the Tenth Meeting of the Parties, in November 1998.

15. The procedure was conceived as a non-confrontational, conciliatory and cooperative mechanism calculated to encourage and assist Parties in breach of their obligations to achieve full compliance with the Protocol. Indeed, the Working Group that developed the regime emphasized that the non-compliance procedure should aim at simplicity, be non-confrontational, be transparent, and leave the taking of decisions to the Meeting of the Parties. It was believed that the objectives of the Protocol were better served by a regime that assisted and encouraged Parties to comply rather than one which was accusatorial and confrontational in nature.

16. The procedure is administered by an Implementation Committee consisting of 10 Parties elected by the Meeting of the Parties for two years based on the principle of equitable geographical distribution. It can be triggered in one of three ways:

(a) By one or more Parties lodging a complaint to the Secretariat about another Party's implementation of its obligations;

(b) By the Secretariat becoming aware of a possible case of non-compliance by a Party; and

(c) By a Party itself concluding that despite its best, bona fide efforts, it is unable to comply fully with its obligations under the Protocol.

17. The functions of the Committee are, *inter alia*, to:

(a) Receive, consider and report on any submissions to it regarding non-compliance;

(b) Receive, consider and report on any information or observations forwarded to it by the Secretariat;

(c) Request, where it considers necessary, through the Secretariat further information on matters under its consideration;

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

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

(f) Exchange information with the financial mechanism of the Protocol for the purposes of drawing up its recommendations.

18. The Committee is required to consider the submissions, information and observations before it "with a view to securing an amicable solution to the matter on the basis of respect for the provisions of the Protocol". The Committee submits its report, including any recommendations it considers appropriate, to the Meeting of the Parties. On receipt of the report of the Committee, the Meeting of the Parties may decide upon and impose measures to secure full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the objectives of the Protocol. On the request of the Meeting of the Parties, the Working Group developed an indicative list of measures

that may be taken by a meeting of the Parties in respect of non-compliance. Three types of measures were proposed by the Working Group and adopted as an indicative list by the Fourth Meeting of the Parties. These 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) Issuance of 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.

19. The Implementation Committee has so far mainly dealt with cases of countries with economies in transition that have experienced difficulties in meeting their phase-out target dates. The drastic measures of suspension of rights and privileges under the Protocol, withdrawal of financial assistance or the imposition of trade sanctions have not been applied to these Parties. A number of recent cases of non-compliance by such countries with the London Amendment illustrate the use of financial assistance to promote compliance with the Protocol. In these cases, the Seventh Meeting of the Parties, in 1995, recommended international assistance for ODS phase-out projects in the countries concerned but at the same time provided for close monitoring of their efforts to achieve compliance. In 1998 and 1999, the Meeting of Parties adopted a number of decisions on non-compliance by several countries with economies in transition. In those decisions, the Parties referred to the full range of measures in the indicative list: they decided that the countries should continue to receive international assistance to enable them to meet their commitments but at the same time cautioned them that in the event that they failed to do so, the Parties would consider measures consistent with those listed in paragraph 18 (c) above, including the possibility of actions under article 4 of the Protocol, which restricts trade with non-Parties.

C. The UN-ECE Convention on Long-range Transboundary Air Pollution and its Protocols

20. The Convention on Long-range Transboundary Air Pollution (LRTAP) was adopted in 1979 by UN-ECE member States and entered into force in 1983. It currently has 47 Parties. It provides a framework for cooperation with regard to transboundary air pollution. It lays down the general principles for cooperation in air pollution abatement and establishes a framework for scientific research, assessment and monitoring, and for information exchange. Since its entry into force the general framework of the Convention has been extended through the adoption of eight protocols. These are the 1984 Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe; the 1985 Protocol on Reduction of Sulphur Emissions or their Transboundary Fluxes; the 1988 Protocol concerning the Control of Nitrogen Oxides or their Transboundary Fluxes; the 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (hereinafter the “VOC Protocol”); the 1994 Protocol on Further Reduction of Sulphur Emissions; the 1998 Protocol on Heavy Metals; the 1998 Protocol on Persistent Organic Pollutants (POPs); and the 1999 Protocol to Abate Acidification, Eutrophication and Ground-level Ozone.

21. The Convention, like all multilateral environmental treaties of its time, does not contemplate a non-compliance procedure. However, article 10 provides for a review of implementation by the Executive Body, composed of representatives of Contracting Parties. In 1991, the Parties to the Convention, drawing on the experience of the Montreal Protocol, decided to include in the VOC Protocol a provision on compliance. Article 3, paragraph 3, of the Protocol requires the Parties to “establish a

mechanism for monitoring compliance with the Protocol". As a first step, Article 3, paragraph 3, empowered the Executive Body to receive and decide upon cases referred to it by Parties with regard to non-compliance by other Parties. In 1997, the Executive Body adopted, through decision 1997/2, a non-compliance procedure applicable to all protocols under the Convention. The regime is modelled on the Montreal Protocol procedure although there are important points of divergence.

22. Decision 1997/2 establishes an Implementation Committee composed of eight Parties to the Convention. The functions of the Committee are, *inter alia*, to review periodically compliance by Parties with the reporting requirements of the protocols and to consider any submissions or referrals made to it concerning a Party's non-compliance with treaty obligations. The decision does not establish any objectives or general principles underpinning the procedure. For example, there is no requirement that the Implementation Committee should seek "an amicable solution with the Party in breach", as is the case under the Montreal Protocol.

23. Submissions or referrals can be made to the Committee by a Party or Parties to a protocol; by a Party that concludes that it is unable to comply with its obligations under a protocol; or by the Secretariat becoming aware, particularly through its review of national reports, of cases of possible non-compliance. In the discharge of its functions, the Committee may request, through the Secretariat, further information on matters under its consideration; undertake, at the invitation of the Party concerned, information gathering in the territory of the Party; and consider any information forwarded by the Secretariat concerning compliance with the protocols.

24. The Committee is required to report and make recommendations annually to the Executive Body on cases of non-compliance. The Parties to a protocol, meeting within the Executive Body, consider the report of the Committee, together with its recommendations, and decide on the measures to be imposed. These measures are supposed to be non-discriminatory in nature, calculated to bring about full compliance with the protocol, and assist a Party's compliance. It should be noted, however, that the decision does not expressly specify the range of measures that can be imposed on a Party in non-compliance.

III. RECENT INITIATIVES IN OTHER PROCESSES

25. Important initiatives for addressing the issues of compliance with and implementation and enforcement of multilateral environmental agreements as well as the development of non-compliance procedures have been launched in a number of relevant processes.

A. United Nations Environment Programme

26. In recognition of the serious environmental effects of violations of multilateral environmental agreements and the need to combat organized crime in this area, the environment ministers of the G8 countries, meeting in Leeds Castle, United Kingdom, in April 1998, decided to provide full support for the effective implementation of multilateral environmental agreements and identified for initial focus the CITES, the Montreal Protocol and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Subsequently, with the support of the G8 countries, UNEP convened in Geneva in July 1999 a workshop on environmental crime, the main aim of which was to address issues related to enforcement of and compliance with those three agreements. One of the major outcomes of this workshop was the decision to develop guidelines on enforcement, compliance and environmental crime.

27. As a follow-up to the workshop, a preparatory meeting of the UNEP Working Group of Experts on Enforcement and Implementation of Environmental Conventions was held in Geneva in December 1999. The Working Group discussed a set of draft guidelines for the implementation of and compliance

with multilateral environmental agreements prepared by the UNEP secretariat, which were further refined by two sub-working groups established during the meeting. The draft guidelines will be the subject of further discussions in future meetings of the Group. As regards compliance, the draft guidelines focus on the transparency approach, incentives for compliance, sanctions, and the treaty process and institutional measures. Some of the key proposals which could be considered in the design of a non-compliance regime are:

(a) Parties should promote, as appropriate, strategies to bring their actions as well as actions of other relevant participants into the open for appropriate scrutiny by Parties and, as appropriate, other groups in the international system (the so-called "transparency approach");

(b) Parties should be required to report on a common format and to follow a standard protocol in the reporting of data. There should be timely review of reports from Parties by the secretariat to the agreement, by experts, by peers, or by the Parties themselves;

(c) On-site monitoring should be available at request as an option to verify compliance with the agreement and to identify compliance problems and possible solutions. Secretariats, non-governmental experts, peers, and government experts may conduct on-site monitoring;

(d) Non-governmental organizations, the private sector, and individuals should be enlisted, as appropriate, to assist monitoring compliance with the agreement;

(e) International agreements should make provision for measures designed to enhance national and local capacity to comply with the agreements. These include such measures as technical and financial assistance, training and the supply of the necessary equipment;

(f) Where Parties need to build capacities to comply with international agreements or meet unusually burdensome obligations benefiting the global community, they should have access to funding mechanisms in order to build such capacities;

(g) Economic incentives should be considered to facilitate efficient implementation of and compliance with international obligations;

(h) A suite of sanctions should be available for Parties to use as appropriate to bring about compliance. Where appropriate, sanctions should include the possibility of excluding non-compliant countries from access to certain benefits from membership in the agreement or of treating them as non-parties to the agreement. Sanctions may include restraints on trade in controlled items across national borders in cases of non-compliance with trade-related obligations. These sanctions must be developed and implemented consistently with international trade law;*

(i) In becoming Parties to international agreements, countries should assess the extent to which they are already in compliance and, if necessary, develop plans for achieving compliance. The compliance plan should include benchmarks. The ratifying State should inform the treaty secretariat of the country compliance plan, which might accompany a country's ratification of the agreement;

(j) Parties to international agreements should meet regularly to hold each other accountable for compliance with the agreement and to consider measures aimed at strengthening compliance; and

(k) In drafting international agreements, States should consider providing for an Implementation Committee and for special procedures to be used to address individual cases of non-compliance.

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* *Note*. The issue of sanctions was very controversial during the meeting as most delegates felt that Parties should be encouraged to comply with MEAs rather than resort to punitive measures.

B. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

28. The Basel Convention was adopted in 1989 and entered into force in 1992. It currently has 136 Parties. Its main objective is to protect human health and the environment from adverse effects associated with the generation, transboundary movement and management of hazardous wastes. The major focus is on the regulation of international trade in hazardous wastes listed in its annexes. International trade is permitted only between Parties and is predicated on a prior informed consent procedure. A Party has the right to prohibit the import of all hazardous waste into its territory. An amendment to the Convention, not yet in force, prohibits all export of hazardous wastes destined for final disposal from developed to developing countries.

29. The Basel Convention does not, as yet, have a non-compliance procedure. Article 19 of the Convention, on verification, provides that a Party which has reason to believe that another Party is in breach of its treaty obligations may inform the Secretariat and the offending Party. The Secretariat is required to submit all relevant information to the Parties. The Convention does not specify what is to happen thereafter. Given the limitations of Article 19 and the need to promote compliance with the Convention, the Conference of the Parties at its third meeting, by decision III/11, mandated the Convention's Consultative Sub-Group of Legal and Technical Experts to study all issues related to the establishment of a mechanism for monitoring implementation and compliance with the Convention and its design and to report its findings to the fourth meeting. At its first session in June 1996 the Consultative Sub-Group developed a questionnaire to gather views from Parties concerning the proposed mechanism. The work of the Sub-Group was extended in February 1998 at the fourth meeting of the Conference of the Parties to the Convention.

30. In June 1998, the Sub-Group identified principles and elements of a regime for monitoring implementation of and compliance with the Convention. These draft elements were forwarded to the fifth meeting of the Conference of the Parties, which by decision V/16 mandated the Legal Working Group to prepare a draft decision for adoption by the Conference of the Parties at its sixth meeting establishing a mechanism for promoting implementation and compliance based on the draft elements annexed to the decision. Decision V/16 contemplates the establishment of a mechanism to be administered by an existing or a new body to monitor implementation of and compliance with the Convention with a view to recommending the best way to promote full implementation of the provisions of the Convention. In terms of the decision, the mechanism is to be “transparent, cost-effective, preventive in nature, simple, flexible, non-binding and oriented in the direction of helping Parties to implement the provisions of the Basel Convention”.

C. The United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol

31. The UNFCCC was adopted in 1992 and entered into force in 1994. It currently has 184 Parties. The objective of the Convention is to stabilize concentrations of greenhouse gases in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Annex I Parties (i.e., most OECD and Central and East European countries) are under the obligation to aim at stabilizing their greenhouse gas emissions at 1990 levels by the year 2000. All Parties are required to prepare national inventories of net greenhouse gas emissions and report on national programmes and strategies to combat climate change and its impacts. The Kyoto Protocol was adopted at the third meeting of the Conference of the Parties in December 1997 and contains new emissions targets for Annex I Parties for the post-2000 period. The developed countries are under obligation to reduce their collective emissions of key greenhouse gases by at least 5 per cent. Each country's emission target is to be achieved by the period 2008-2012.

32. Article 13 of the Convention provides that the Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process (MCP) for the resolution of questions regarding the implementation of the Convention. The Conference of the Parties at its first meeting, by decision 20/CP.1, established an Ad Hoc Working Group of Technical and Legal Experts "to study all issues relating to the establishment of a multilateral consultative process and its design." The final report of the Ad Hoc Working Group adopted at its sixth session was presented to the fourth meeting of the Conference of the Parties in November 1998. By decision 10/CP.4, the Conference of the Parties approved the text of the multilateral consultative process submitted by the Ad Hoc Working Group. The multilateral consultative process is to be facilitative, cooperative, non-confrontational, transparent and timely in manner, and non-judicial. A standing Multilateral Consultative Committee (MCC) will be established to provide assistance to Parties to overcome difficulties they encounter in implementing the Convention, promote understanding of the Convention, and prevent disputes from arising. Issues regarding implementation may be raised by a Party regarding its own implementation; by a Party or group of Parties regarding implementation by other Parties; or by the Conference of the Parties. The Committee is to consider the issue(s) raised in consultation with the Party or Parties concerned and provide assistance in relation to the difficulties encountered in implementation by: (i) clarifying and resolving questions; and (ii) providing advice and recommendations on the procurement of technical and financial resources for the resolution of difficulties regarding implementation. The Committee reports to the Conference of the Parties. The final adoption of the multilateral consultative process has been postponed to the sixth meeting of the Conference of the Parties due to lack of consensus on a number of outstanding issues, in particular the composition of the Committee and the nomination of its members. An interesting aspect of the multilateral consultative process is the complete absence of sanctions against non-compliance. The procedure simply provides a framework to assist Parties to implement their obligations under the Convention through consultations, advice and technical and financial assistance.

33. A more robust procedure is likely to emerge under the on-going initiative under the Kyoto Protocol. This is mainly because the relevant provisions of the Protocol call for the development of a full-fledged non-compliance procedure. For example, Article 16 of the Protocol makes it clear that any multilateral consultative process that may be applied to the Protocol shall operate without prejudice to the non-compliance procedure to be established in accordance with Article 18, which requires the Conference of the Parties, serving as the meeting of the Parties to the Protocol, at its first meeting, to develop appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance, including through an indicative list of consequences of non-compliance. Any procedures and mechanisms entailing binding consequences shall be adopted by means of amendment to the Protocol.

34. The Conference of the Parties at its fourth meeting, by decision 8/CP.4, established a Joint Working Group (JWG) of the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) to look into the issue of procedures and mechanisms relating to a compliance system under the Kyoto Protocol. By the time of the fifth meeting of the Conference of the Parties in November 1999, the Joint Working Group had, on the basis of inputs from Parties, tentatively identified the elements of a compliance regime under the Protocol. At its fifth meeting, by decision 15/CP.5, the Conference of the Parties requested the Joint Working Group to submit its findings at its sixth meeting so as to enable the Conference to adopt a decision at that meeting on a compliance regime for the Protocol. The elements of the regime were further refined during the twelfth sessions of the subsidiary bodies held in June 2000. At the thirteenth session of the subsidiary bodies, in September 2000, the Co-Chairs of the Joint Working Group submitted a draft text on a compliance system for the Kyoto Protocol for the consideration of delegates (see FCCC/SB/2000/7). As a result of the deliberations, a revised text was produced and adopted by the joint session of the subsidiary bodies as a basis for future negotiation at the sixth meeting of the Conference of the Parties, to be held in November 2000.

IV. ELEMENTS AND OPTIONS FOR A COMPLIANCE REGIME

35. The foregoing review reveals some elements and options concerning the institutional and procedural aspects of a compliance regime that the ICCP may wish to consider. These elements and options are discussed below under the following headings: objectives, nature and principles of the regime; structure and functions of the institutional mechanism; invocation of the non-compliance procedure; outcomes/consequences of non-compliance; role of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol; and the role of the Secretariat.

A. Objectives, nature and principles of the regime

36. *Objectives*. Generally, the objective of the non-compliance regimes analysed above is to promote compliance with treaty obligations through the provision of assistance to Parties and the imposition of sanctions where appropriate. The non-compliance regime under the Montreal Protocol seeks to secure "an amicable solution of the matter on the basis of respect for the provisions of the Protocol". The LRTAP system seeks to ensure full compliance with the provisions of a protocol by, *inter alia*, deciding on measures to assist a Party's compliance. The aim of the multilateral consultative process under the UNFCCC is to resolve questions regarding implementation by providing advice on assistance to Parties to overcome difficulties encountered in their implementation. The emerging framework under the Basel Convention is calculated to assist and encourage compliance rather than attributing blame. Article 34 of the Cartagena Protocol already indicates the fundamental objective of the proposed non-compliance procedure: the procedures and mechanisms to be developed are to promote compliance with the provisions of the Protocol, to address cases of non-compliance, and are to include provisions to offer advice or assistance where appropriate.

37. *Nature*. The dominant typology is of a simple, transparent, non-confrontational and non-judicial process. This is largely consistent with the overall objective of assisting and encouraging Parties to comply with their treaty obligations. A simple, transparent and non-confrontational regime is more likely to engender credibility, trust and support than one that is accusatorial and based on complex quasi-judicial procedures. The concept was first established during the formulation of the non-compliance procedure for the Montreal Protocol and has, since then, been followed by the multilateral consultative process of the UNFCCC and the LRTAP regime, and is the emerging scenario under both the Basel Convention and the Kyoto Protocol. It is worth noting that the enabling provision under the Cartagena Protocol envisages *cooperative* procedures and institutional mechanisms.

38. *Principles*. The principles of timeliness, fairness, predictability, transparency and due process are deemed as essential underpinnings to the non-compliance regimes. Timeliness is achieved through provisions requiring decision-making within defined time-frames. Fairness and due process are facilitated through opportunities granted to the Party whose conduct is in issue to rebut the information presented and to participate fully in the process. The procedures have to be transparent and the outcomes predictable in order to avoid any accusations of witch-hunting and arbitrariness.

B. Structure and functions of the institutional mechanism

39. The institution responsible for addressing issues of compliance can be a standing or an ad hoc body. By its very nature, an ad hoc body is constituted only as and when issues of non-compliance are raised. The mandate of such an institution would, therefore, be rather limited; restricted to addressing the issue raised in a specific complaint. It would not, for example, be suited to regular monitoring of the implementation of and compliance with treaty obligations. In all the regimes analysed, Parties have opted for a standing body on compliance that not only considers cases of non-compliance, as and when they arise, but also periodically monitors compliance in order to promote full implementation of the treaty in question.

40. Given the nature of its functions, the membership of a compliance institution should be limited and small. Such is the case in all the regimes examined. The Implementation Committee under the Montreal Protocol is composed of ten Parties and that of LRTAP of eight Parties. The alternatives being considered under the multilateral consultative process of the UNFCCC are 10, 15 or 25 members. Under the Basel Convention a membership of between 14 and 20 has been suggested. Equitable geographical representation has been one of the criteria used in determining the composition of existing compliance institutions. Members are representatives of Parties. However, there have been suggestions under both the Kyoto Protocol and the Basel Convention initiatives that members could be experts either nominated by Parties or drawn from a roster of experts and serving in their individual capacities. An important consideration that will have to be taken into account in deciding whether the compliance body should consist of representatives of Parties or independent experts is the continuing sensitivity of Governments to external scrutiny regarding the implementation of their treaty obligations.

41. The functions of a compliance body will depend on whether it is conceived as a mechanism for the promotion of implementation and compliance in general or as a body to address individual cases of non-compliance. The regimes analysed reveal a number of options. The Standing Committee of CITES is an implementation body providing general policy and operational direction to the Secretariat and reviewing compliance by Parties with CITES provisions. On the other hand, it would seem that the functions of the Implementation Committee of the Montreal Protocol are restricted to considering and reporting to the Meeting of the Parties on individual cases of non-compliance. In discharging its functions, the Committee may request further information or undertake on-site monitoring in the territory of the Party allegedly in non-compliance. The Implementation Committee of the LRTAP, besides its mandate to consider any submission or referral made to it "with a view to securing a constructive solution", has the further mandate to: (i) undertake periodic reviews of Parties' compliance with their reporting obligations and, (ii) prepare, at the request of the Executive Body, a report on compliance with or implementation of specified obligations in an individual protocol. The suggested functions of the proposed implementation and compliance body under the Basel Convention are even much broader. They range from providing Parties with advice on establishing and strengthening domestic regulatory regimes, through monitoring and assisting individual Parties in their efforts to implement decisions on compliance, to making recommendations on monitoring and compliance issues in general, including priorities.

42. Another option is to establish a compliance body that not only performs most of the functions described above but also makes binding decisions on the cases of non-compliance referred to it, including the imposition of compliance measures. This option has not found favour in the existing regimes. It has been felt that decision-making with regard to a Party's non-compliance with its treaty obligations is ultimately a political issue which should be left to the Conference of the Parties. This is particularly so given the fact that the consequences of non-compliance might include the suspension of the rights and privileges of a Party. A compliance body is considered less than fully representative of the Parties and should therefore not be entrusted with decision-making on such a crucial issue. Thus, in all the cases examined the compliance body merely makes recommendations to the Conference or Meeting of the Parties, which then takes the final decision. Even in the case of CITES, where the Standing Committee routinely imposes trade sanctions on errant Parties, this action is effected only on the authority of the Conference of the Parties.

43. The enabling provision of the Cartagena Protocol on Biosafety already broadly circumscribes the intended functions of the compliance body. These are to promote compliance with the provisions of the Protocol; to address cases of non-compliance; and to offer advice and assistance, where appropriate. It would seem, therefore, that the functions of the contemplated body are not restricted to simply considering individual cases of non-compliance. In view of this, the following elements could constitute, at a minimum, the mandate of the compliance body: receiving submissions on non-compliance;

considering individual cases of non-compliance referred to it; seeking further information on cases referred to it; undertaking on-site monitoring in the territory of concerned Parties; providing advice and assistance to Parties in non-compliance; and monitoring the implementation of and compliance with the provisions of the Protocol in general and making recommendations to the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol on appropriate measures to improve implementation and compliance.

C. Invocation of the procedure

44. A critical issue to consider is that of determining the entities that can invoke the non-compliance procedure. The non-compliance procedures under both the Montreal Protocol and the LRTAP provide in identical terms that the procedure can be triggered in either of three ways: (i) by one or more Parties having reservations about another Party's compliance; (ii) by a Party with regard to its own inability to comply fully with its obligations; or (iii) by the Secretariat becoming aware of possible non-compliance by a Party in the course of reviewing national reports. In all three cases the information received is then transmitted by the Secretariat to the Implementation Committee. Another option is provided by the multilateral consultative process of the UNFCCC which, besides (i) and (ii) above, empowers a group of Parties (with respect to their own implementation) or the Conference of the Parties to invoke the procedure. In addition, the Secretariat has no role under the multilateral consultative process in this regard. In the discussions under the Kyoto Protocol, there have been suggestions that Protocol bodies such as the Meeting of the Parties, the subsidiary bodies, expert review teams and the Secretariat should be able to initiate the non-compliance procedure. In the development of the Montreal Protocol regime, there were even suggestions that non-governmental organizations and private individuals should be able to trigger the process. This suggestion did not find much favour since the procedure was considered already intrusive enough into the internal affairs of Parties and the involvement of non-governmental organizations would be a clear political provocation. It should be noted that the draft UNEP guidelines do envisage a compliance monitoring role for non-governmental organizations, the private sector and individuals. Whether such a role includes the ability to initiate the non-compliance procedure is not clear from the text of the draft guidelines.

D. The outcomes/consequences of non-compliance

45. Although there is general agreement that an effective non-compliance regime should be backed by both incentive measures and enforcement measures or sanctions, the approach adopted by all the regimes analysed is a cautious one. There is an all-embracing emphasis on providing advice and assistance to Parties to overcome difficulties encountered in implementation. This tendency may be explained by the fact that the regimes are conceived as non-confrontational and supportive of Parties' efforts to achieve full compliance. Thus, whereas the 1992 Montreal Protocol non-compliance procedure contained an indicative list* of measures (including enforcement measures) that might be taken by the Meeting of the Parties in respect of non-compliance, the emphasis in practice has been to assist Parties to comply with their obligations. The LRTAP and the multilateral consultative process regimes similarly focus on assistance to Parties. It is only under the CITES regime that trade sanctions have been imposed as a matter of course in cases of persistent non-compliance or failure to comply with the decisions of the Conference of the Parties regarding remedial measures.

46. The 1992 Montreal Protocol regime in its indicative list recommended the following measures: assistance, including assistance with data collection and reporting, technical assistance, technology

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* Decision IX/35, by which the Ninth Meeting of the Parties to the Montreal Protocol established the Ad Hoc Working Group of Legal and Technical Experts to revise the 1992 procedure, expressly excluded the indicative list from the mandate of the Group, and the suite of measures contained therein remain operative even though they have not been included in the actual text of the 1998 procedure.

transfer and financial assistance, information transfer and training; issuance of cautions; and suspension of rights and privileges in accordance with international law. The suite of consequences of non-compliance being considered under the Kyoto Protocol go much farther than the indicative list of the Montreal Protocol. However, most of them can be explained on the basis of the specificity of the obligations contained in the instrument. The measures include provision of advice and assistance; publication of non-compliance; issuance of cautions; compliance action plan; loss of eligibility to participate in one or more of the Kyoto mechanisms; suspension of rights and privileges; and financial penalty.

E. Role of the secretariat

47. There are two main options regarding the role of the secretariat. On the one hand, it can simply be a conduit through which information on non-compliance is channelled to the compliance body. On the other hand, the secretariat can have the additional mandate to trigger the non-compliance procedure. The secretariat of a multilateral environmental agreement plays a pivotal role in the implementation of its provisions. In the day-to-day discharge of its functions, such as the review of national reports submitted by Parties, a secretariat is likely to come across cases of non-compliance. It is logical that it should be able to flag such cases to the compliance body. In the development of the Montreal Protocol regime, there were misgivings that such an option would cast the secretariat in the role of an accuser of a Contracting Party. The interim procedure adopted in 1990 did not consequently invest the Secretariat with the power to initiate the process. A critical policy shift was taken in 1992 and non-compliance procedure under the Montreal Protocol, as is also the case with the other regimes analysed, retains a significant role for the Secretariat in the initiation of the non-compliance process.

F. The role of Conference/Meeting of the Parties

48. The Conference/Meeting of the Parties of a multilateral environmental agreement is the supreme authority regarding its implementation. Its role in the non-compliance procedure must therefore be clearly defined. The Conference/Meeting of the Parties could be the institution that makes the final decision regarding a Party's breach of its obligations on the basis of recommendations of the compliance body. In this regard, the Conference/Meeting of the Parties would receive the report of the compliance body, consider its conclusions and make the appropriate decision. For the reasons stated earlier, this is the option that has been adopted in all existing regimes. However, where the compliance body has the mandate to make decisions on non-compliance, the Conference/Meeting of the Parties could play the role of an appelate body, handling appeals from the decisions of the former. Whatever option is selected ,the Conference/Meeting of the Parties should also have the additional power to review its own decisions or those of the non-compliance body either at the instance of the affected Contracting Party or on its own initiative.

V. RECOMMENDATIONS

49. The Intergovernmental Committee for the Cartagena Protocol on Biosafety may wish to:

(a) Further review and develop the elements and options for a compliance regime on the basis of the foregoing analysis and review;

(b) Invite Parties to the Convention, through the Executive Secretary, to communicate their views in writing regarding the elements and options for a compliance regime under the Cartagena Protocol on Biosafety on the basis of the questionnaire annexed to this note; and

(c) Request the Executive Secretary to compile a synthesis report of the views of Parties and to submit the same for consideration at the second meeting of the ICCP.

Annex

QUESTIONNAIRE REGARDING THE DEVELOPMENT OF COMPLIANCE PROCEDURES AND MECHANISMS UNDER THE CARTAGENA PROTOCOL ON BIOSAFETY:

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?

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?

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?

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?

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?

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

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

Consequences of non-compliance

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

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?

Other issues

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