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INTERGOVERNMENTAL COMMITTEE FOR THE
CARTAGENA PROTOCOL ON BIOSAFETY
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Item 4.1.6 of the provisional agenda*

COMPLIANCE (ARTICLE 34)

Summary of views or understandings on the contents in square brackets in the text of the draft procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety

Note by the Executive Secretary

I. INTRODUCTION

1. At its second meeting, the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) invited Parties to the Convention and other States to submit to the Executive Secretary their views or understandings with respect to the contents that are in square brackets in the text of draft procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety annexed to recommendation 2/11. It requested the Executive Secretary to compile the views submitted and make them available for the first meeting of the Conference of the Parties serving as the meeting of the Parties. The present note has been prepared in response to that request.
2. The Executive Secretary had received, as of 10 February 2002, submissions from Australia, Canada, the European Union, the Republic of Korea, Slovenia and the United States of America. The full text of the views submitted is being made available as an information document (UNEP/CBD/ICCP/3/INF/3).
3. The present note summarizes the views submitted relating to the contents in square brackets in the compliance text. The annex to the note contains the summary of the substantive proposals made by countries regarding the bracketed text. The comments submitted with regard to texts that are not in square brackets are available in the information document referred to in paragraph 2 above.

* UNEP/CBD/ICCP/3/1.

II. SUMMARY OF THE VIEWS OR UNDERSTANDINGS ON THE CONTENTS IN SQUARE BRACKETS IN THE COMPLIANCE TEXT

4. Following the request of IC CP, most submissions were limited to comments on the contents that are in square brackets in the compliance text. The present report follows the same structure as that of the annex to recommendation 2/11. Where specific wording was proposed to revise the bracketed text, the revised parts are highlighted and in italic.

I. Objective, nature and underlying principles

Paragraph 3

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

5. Paragraph 3 specifies the guiding principles for the operation of the compliance procedures and mechanisms. Divergent views have been expressed on whether “common but differentiated responsibility” should be included as one of these principles. Most of the submissions pointed out that the Biosafety Protocol does not provide for common but differentiated responsibilities; nor does the Protocol create any differentiated obligations among Parties to the Protocol. The special needs of developing countries are recognized and addressed in the Protocol through the provisions on capacity building and information exchange. The compliance procedures and mechanisms should apply and be available in equal measures to all Parties. They suggested, accordingly, that the entire bracketed text be deleted.

6. Despite their objection, a number of these submissions, however, recognized the need to take into account, in this compliance procedure, the specific circumstances of individual cases of non-compliance and the capacity of countries, in particular developing countries as well as countries with economic in transition. It was recommended that these concerns be addressed in section VI, concerning measures to promote compliance and address cases of non-compliance. One submission indicated that the language in the paragraph seemed misplaced in the operative compliance text, and would be more appropriately placed in a preamble.

7. One submission, however, emphasized that consideration should be given to the capacity of developing countries and different treatments must be made with regard to their compliance. In view of this submission, the text contained in the first bracket should be retained.

II. Institutional mechanisms

Paragraph 2

“...[, and ensuring a balance between importing and exporting countries]”

8. With respect to the composition of the Compliance Committee (the Committee), most submissions felt that the distinction of importing and exporting countries is difficult to define in practice. For example, a country can be both an importing and exporting country or a country can be an importing country at a given time and become an exporting country later on or vice versa. It is more pertinent to compose the Committee on a geographically balanced representation. Therefore, they endorsed the deletion of the text in the brackets.

9. Some countries, however, preferred the composition of the Committee based on the balance between importing and exporting countries rather than the five United Nations regional groups.

Paragraph 3

“...[and they shall serve in their individual capacity].”

10. The main issue surrounding the bracketed text is whether members of the Committee should represent Governments or serve in their individual capacity. Different views have been expressed. Those who supported the idea of members serving in their individual capacity maintained that members of the Committee must act objectively and in the best interests of the Protocol, not on behalf of any other interest. It was proposed that, to ensure independence and impartiality of the members of the Committee, the bracketed text may be amended as follows:

“...[and they shall serve in their individual capacity *objectively and in the best interests of the Protocol*].”

11. Those who were not in favour of the idea of having the members of the Committee acting on their individual capacity suggested either to delete the entire bracketed text or to replace it with:

[and they shall represent their Governments]

IV. Procedures

Paragraph 1 (b)

“[Any Party with respect to another Party; or]”

12. The majority of the submissions favoured that a Party is entitled to trigger the compliance procedure with respect to another Party. However, such a trigger, as proposed by some countries, may be complemented by a procedural safeguard. For example, a submission from a Party with respect to non-compliance of another Party should be supported by corroborating information. Or, some constraints should be placed when invoking the compliance procedure against another Party: the submitting Party is directly involved with or affected by the alleged non-compliance of the Party on which it is reporting. The bracketed part may thus be amended as follows:

“[Any Party with respect to another Party, *supported by corroborating information*; or]”

or

“[Any Party, *if directly involved*, with respect to another Party; or]”

13. Some submissions raised objection to this Party-to-Party trigger. They indicated that the complaint of one Party against another could be taken up through the dispute settlement mechanism under the Protocol.

Paragraph 1 (c)

“[The Conference of the Parties serving as the meeting of the Parties to the Protocol]”

14. With respect to whether the Conference of the Parties serving as the meeting of the Parties can trigger the compliance procedure, some submissions were of the view that the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol, as a supreme body of the Protocol, should be in a position to refer any instance of non-compliance to the Committee should there be a sufficient concern to do so. It was pointed out that the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol is a logical extension of the Party-to-Party trigger envisaged in paragraph 1 (b) of section IV, which enables Parties collectively to trigger the compliance procedure. Some doubts were expressed, however, regarding the desirability for the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol to play a role in this matter

as the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol would normally take decisions upon the recommendation of the Committee.

V. Information and consultation

Paragraph 1 (b)

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

15. The brackets around this subparagraph are consequential to the different views on paragraph 1 (b) in section IV concerning whether a Party can initiate the compliance procedure with respect to another Party. Positions remain divided among the same group of countries as indicated in paragraph 1 (b) of section IV.

16. Regarding the information to be considered by the Committee, one submission highlighted the importance of receiving the information both from the Party against whom the complaint is made as well as the information from the complaining Party.

Paragraph 2 (a)

“...[and other bodies of the Convention on Biological Diversity and the Protocol]”

Paragraph 2 (b)

“[Non-governmental organizations, the private sector and other civil-society organizations and relevant intergovernmental organizations;]”

Paragraph 2 (c)

“[The Secretariat.]”

17. These three subparagraphs are related to the sources of information from which the Committee may seek. A number of the submissions generally supported a non-exhaustive list of sources, which, as pointed out by some countries, has already been envisaged in the chapeau of paragraph 2 by the terms “including from”. It was proposed, while retaining subparagraphs (a) to (c), an additional source, “any Party”, be included in this list on the ground that Parties, though not involved in the initial complaint, may also have relevant information to submit to the Committee. Then paragraph 2 (c) could read:

“[The Secretariat **and any Party to the Protocol.**]”

18. Alternatively, the words “[any Party to the Protocol]” could be placed as subparagraph (d) of paragraph 2.

19. The controversy focuses on paragraph 2 (b) regarding the information from civil society and international organizations. While some favoured its retention, in order to allow for an important source of information, others, felt that this subparagraph was not necessary as all the information relating to compliance including the one from the civil society should be provided through official diplomatic channels. One Government believed that the entity that submits the information to the Committee should be directly involved with or affected by the alleged non-compliance of the Party on which it is reporting. It was proposed that the following words be inserted into paragraph 2 (b):

“[Non-governmental organizations, the private sector and other civil-society organizations and relevant intergovernmental organizations, *if directly involved*;]”

20. To stress the open-ended nature of the sources of information, one submission suggested replacing the existing three subparagraphs (a) to (c) including chapeau by the following words:

“[The Committee may seek or receive and consider relevant information from other sources.]”

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

Paragraph 1 (c)

“...[taking into account its existing capacity to comply]”

21. Paragraph 1(c) identifies development of a compliance action plan as one of the measures the Committee may take in promoting and addressing cases of non-compliance. Several submissions, in general, supported that, in developing such plan, the Committee should consider a Party’s capacity and other factors or circumstances. However, they felt that such consideration should be applied to all the compliance related measures specified in paragraph 1, rather than confining it to subparagraph (c). Therefore, they proposed removing the bracketed text with some modification to the chapeau of paragraph 1 to govern all the measures taken by the Committee. It was indicated that this is consistent with the approach used in the chapeau of paragraph 2 of section VI. The revised text to be included in the chapeau would read as follows:

*“[Taking into account **such factors as the cause, type, degree and frequency of non-compliance, including the capacity of the Party concerned, in particular of developing country Parties and Parties with economies in transition, to comply**]”*

22. It was also suggested to replace the bracketed text with the following:

*“[taking into account **any other compliance assistance being provided to the Party through the committee or the Conference of the Parties serving as the meeting of the Parties**]”*

23. Some submissions expressed a preference for retaining the bracketed text and keeping it as and where it is.

Paragraph 2. chapeau

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

24. Paragraph 2 provides measures to be taken by the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol in response to non-compliance. The bracketed text in chapeau is of a similar nature as that elaborated under paragraph 1 (c) of section VI. Substantive proposals include:

(a) Retain the bracketed text as it is;

(b) Modifying the bracketed text as follows: “...[**including** the capacity of the Party concerned, in particular of developing country Parties **and Parties with economies in transition, to comply,**]...”

(c) Replace the bracketed text with: “**[and the efforts of the Party concerned to comply either on its own or, where capacity is lacking, with assistance from the Committee],...**”

Paragraph 2 (b)

“[Issue a caution to the concerned Party;]”

25. Most submissions supported to retain the bracketed text as one of the measures that may be taken by the Committee in response to non-compliance. It was indicated that issuing a caution is simply a written censure to the Party concerned.

Paragraph 2 (c)

“[Publish cases of non-compliance; or]”

26. The majority of the submissions generally favoured the concept of publication of cases of non-compliance. But they pointed out that if the bracketed text remained as it stands there actually would be no added value since the reports of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol are published documents. The following amendments to re-phrase the bracketed item were proposed:

“[Publish *a declaration* of non-compliance; or]”

or

“[Publish cases of *possible* non-compliance; or]”

or

“[*Make reports of cases of non-compliance available to the public*; or]”

27. In one submission, it was stated that the right place for such a provision would be in paragraph 1 of section VI, to be included in the list of measures to be taken by the Committee.

28. Alternatively, it was suggested that, since “publishing cases” is not really a measure to address non-compliance but a normal practice to make the reports of the Committee or of the Conference of the Parties serving as the meeting of the Parties to the Protocol publicly available, the language in this subparagraph could be merged into a general provision to be placed after section VI, which would read:

“*[The COP/MOP shall make reports of the meetings of the Compliance Committee and the COP/MOP available to the public.]*”

Paragraph 2 (d)

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

29. The submissions revealed very different views or understandings on whether non-compliance should lead to suspension of rights and privileges under the Protocol. Some commented that such consequence is not consistent with the facilitative nature of this compliance mechanism in that denial of access to technical assistance would be counterproductive to the objective of assisting countries to meet their obligations. The question was raised as to what specific rights and privileges envisaged in the Protocol that could be suspended.

30. One submission tried to identify the specific procedural and substantive rights and privileges embodied in the Protocol. This submission and some others endorsed the possibility of taking strong measures to respond to non-compliance, especially in cases of flagrant, repeated or continued non-compliance. They therefore supported retaining the bracketed text, “suspend the specific rights and privileges of the concerned Party under the Protocol”.

31. Regarding the bracketed text, “consistent with international law”, some considered it is not necessary to specify such reference and thus proposed to delete it. Others, however, stressed the imperative to retain this phrase.

32. It was also suggested to replace the entire paragraph 2 (d) with the following:

“[In appropriate cases, take additional measures consistent with international law as reflected in Article 60 of the Vienna Convention on the Law of Treaties.]”

III. RECOMMENDATIONS

33. Article 34 of the Protocol requires that the Conference of the Parties serving as the meeting of the Parties shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Protocol and to address cases of non-compliance. In developing this compliance procedures and mechanisms, the ICCP has made significant progress. However, much work remains to be done. The ICCP must therefore intensify its efforts to further advance the preparation for the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

34. While all the elements of the draft procedures and mechanisms on compliance may be subject to further discussion, the ICCP, at its third meeting, may wish focus on the contents that are in square brackets in the compliance text, with a view to reaching consensus on the unresolved issues. A summary of the proposals comprising of different options suggested for the text in square brackets is attached as an annex to this note to facilitate the discussion by the ICCP at its third meeting.

Annex

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

Summary of the proposals on the contents in square brackets

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

I. Objective, nature and underlying principles

1. The objective of the compliance procedures and mechanisms shall be to promote compliance with the provisions of the Protocol, to address cases of non-compliance by Parties, and to provide advice or assistance, where appropriate.
2. The compliance procedures and mechanisms shall be simple, facilitative, non-adversarial and cooperative in nature.
3. The operation of the compliance procedures and mechanisms shall be guided by the principles of transparency, fairness, expedition, predictability, *[and common but differentiated responsibilities] [and take into account principle 7 of the Rio Declaration on Environment and Development, that States have common but differentiated responsibilities]*.

Option 1

Retain the first bracketed text as it is, delete the second bracketed text.

Option 2

Delete the entire bracketed text.

Option 3

Delete the entire bracketed text in this section, but reflect the concept envisaged in the bracketed text in the chapeau of paragraphs 1 and 2 of section VI (see option 3 on paragraph 1 (c) and option 2 on the chapeau of paragraph 2 in section VI).

Option 4

Delete the bracketed text in this section; remove it to the preamble.

II. Institutional mechanisms

1. A Compliance Committee, hereinafter referred to as “the Committee”, is hereby established pursuant to Article 34 of the Protocol to carry out the functions specified herein.
2. The Committee shall consist of 15 members nominated by Parties and elected by the Conference of Parties serving as the meeting of the Parties to the Protocol on the basis of three members from each

of the five regional groups of the United Nations [, *and ensuring a balance between importing and exporting countries*].

Option 1

Delete the bracketed text.

Option 2

Retain the bracketed text as it is.

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

Option 1

Retain the bracketed text as it is.

Option 2

Delete the bracketed text.

Option 3

Amend the bracketed text as follows:

and they shall serve in their individual capacity *objectively and in the best interests of the Protocol*.

Option 4

Replace the bracketed text with:

and they shall represent their Governments

4. Members shall be elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol for a period of four years, this being a full term. At its first meeting, the Conference of the Parties serving as the meeting of the Parties to the Protocol shall elect five members, one from each region, for half a term, and ten members for a full term. Each time thereafter, the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol shall elect for a full term, new members to replace those whose term has expired. Members shall not serve for more than two consecutive terms.

5. The Committee shall meet twice a year, unless it decides otherwise. The Secretariat shall service the meetings of the Committee.

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

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

III. Functions of the Committee

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

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

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

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

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

(e) Take measures, as appropriate, or make recommendations, to the Conference of the Parties serving as the meeting of the Parties to the Protocol;

(f) Carry out any other functions as may be assigned to it by the Conference of the Parties serving as the meeting of the Parties to the Protocol.

IV. Procedures

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

(a) Any Party with respect to itself;

(b) [*Any Party with respect to another Party; or*]

Option 1

Retain the bracketed text as it is.

Option 2

Delete the bracketed text.

Option 3

Amended the bracketed text as follows:

Any Party with respect to another Party, *supported by corroborating information*; or

Option 4

Amend the bracketed text as follows:

Any Party, *if directly involved*, with respect to another Party; or

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

Option 1

Retain the bracketed text as it is.

Option 2

Delete the bracketed text.

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

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

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

V. *Information and consultation*

1. The Committee shall consider relevant information from:

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

Option 1

Retain the bracketed text as it is.

Option 2

Delete the bracketed text.

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

- (a) The Biosafety Clearing-House [*and other bodies of the Convention on Biological Diversity and the Protocol*];

/...

Option:

Retain the bracketed text as it is.

- (b) *[Non-governmental organizations, the private sector and other civil-society organizations and relevant intergovernmental organizations;]*

Option 1:

Retain the bracketed text as it is.

Option 2:

Delete the bracketed text.

Option 3:

Amend subparagraph (b) as follows:

- (b) Non-governmental organizations, the private sector and other civil-society organizations and relevant intergovernmental organizations, *if directly involved*;
- (c) *[The Secretariat.]*

Option 1:

Retain the bracketed text in subparagraph (c); add a new paragraph (d) as follows:

- (d) *Any Party to the Protocol*

Option 2

Replace the three subparagraphs (a) to (c) including chapeau of this paragraph with the following:

The Committee may seek or receive and consider relevant information from other sources.

3. The Committee may seek expert advice from the biosafety roster of experts.
4. The Committee, in undertaking all of its functions and activities, shall maintain the confidentiality of any information that is confidential under Article 21 of the Protocol.

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

1. The Committee may take one or more of the following measures with a view to promoting compliance and addressing cases of non-compliance:
- (a) Provide advice or assistance to the Party concerned, as appropriate;
- (b) Make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures;

- (c) Request or assist, as appropriate, the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a timeframe to be agreed upon between the Committee and the Party concerned, [*taking into account its existing capacity to comply*]; and

Option 1

Retain the bracketed text as it is.

Option 2

Amend the bracketed text as follows:

taking into account *any other compliance assistance being provided to the Party through the committee or the Conference of the Parties serving as the meeting of the Parties*;

Option 3

Remove the bracketed text to the chapeau of this paragraph with the following amendment:

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

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

2. The Conference of the Parties serving as the meeting of the Parties may, upon the recommendations of the Committee, and taking into account such factors as the cause, type, degree and frequency of non-compliance, [*and the capacity of the Party concerned, in particular of developing country Parties in complying with the Protocol*], also decide upon one or more of the following measures:

Option 1

Retain the bracketed text as it is.

Option 2

Amend the bracketed text as follows:

including the capacity of the Party concerned, in particular of developing country Parties *and Parties with economies in transition, to comply,*

Option 3

Replace the bracketed text with:

and the efforts of the Party concerned to comply either on its own or, where capacity is lacking, with assistance from the Committee,

- (a) Provide financial and technical assistance, technology transfer, training and other capacity-building measures;
- (b) [*Issue a caution to the concerned Party;*]

Option 1

Retain the bracketed text as it is.

Option 2

Delete the bracketed text.

- (c) [*Publish cases of non-compliance; or*]

Option 1

Retain the bracketed text as it is.

Option 2

Delete the bracketed text.

Option 3

Amend the bracketed text as follows:

Publish *a declaration* of non-compliance; or

or

Publish cases of *possible* non-compliance; or

or

Make reports of cases of non-compliance available to the public; or

Option 4

Change the bracketed text into a general provision and place it after section VI, which reads as follows:

The Conference of the Parties serving as the meeting of the Parties to the Protocol shall make reports of the meetings of the Compliance Committee and the Conference of the Parties serving as the meeting of the Parties to the Protocol available to the public.

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

Option 1

Retain the bracketed text but delete the words “consistent with international law”.

Option 2

Delete the bracketed text.

Option 3

Replace the bracketed text with:

In appropriate cases, take additional measures consistent with international law as reflected in Article 60 of the Vienna Convention on the Law of Treaties.

VII. Review of the procedures and mechanisms

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