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CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY SERVING AS THE MEETING OF THE PARTIES TO THE CARTAGENA PROTOCOL ON BIOSAFETY

First meeting

Kuala Lumpur, 23-27 February 2004

Agenda item 6.5 of the provisional agenda*

COMPLIANCE (ARTICLE 34)

Compilation of views on draft procedures and mechanisms on compliance under the Biosafety Protocol

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* UNEP/CBD/BS/COP-MOP/1/1.

SUBMISSIONS FROM GOVERNMENTS

ARGENTINA

[3 OCTOBER 2003]
[SUBMISSION: ENGLISH]

Pursuant to ICCP decision 3/2 on procedures and mechanisms on compliance in the Cartagena Protocol on Biosafety we are pleased to submit preliminary considerations on the text contained between brackets which will be negotiated at the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

Regarding the general nature of the regime, Argentina considers the compliance regime should be facilitative in nature and oriented towards encouraging and assisting Parties to comply rather than punishing them for lack of compliance.

Accordingly, the following considerations should be taken into account regarding the text currently under brackets:

Section I. Including the principle of common but differentiated responsibilities is favoured.

Section II.2. A balance between importer and exporter countries is favoured.

Section II.3. If the final regime were to retain the punitive focus that currently Section VI reflects, then the members of the Committee should represent their governments and be nominated regionally.

Section IV.1 (b). Should be deleted. Parties can have recourse to dispute settlement procedures if they have a specific dispute regarding activities performed by other parties.

Section V (b). The compliance committee should have wide access to all information available as long as it is sound from a scientific and technical perspective.

Section VI.2 (b),(c). These options would only be acceptable if the committee has a link with the Parties and enough legitimacy and balance to issue such recommendations.

Section VI.2(d). As in the previous bullet, a compliance committee that is balanced and responsive to the Parties should be able to "take in cases of repeated or continued non-compliance, additional stronger measures, excluding trade-related measures, within the framework of the Protocol and in accordance with international law." (option 4).

AUSTRALIA

[22 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

Australia first submitted views on compliance in 2001. The following comments are resubmitted as they contain additions based on discussions at the third meeting of the ICCP.

Australia reserves the right to discuss the whole of the draft compliance text. The comments offered below do not imply acceptance of the un-bracketed text.

Australia's view remains that the Protocol's compliance procedures and mechanisms should be essentially facilitative, rather than judicial or adversarial in nature, designed to assist those Parties which, in spite of best endeavours, are experiencing difficulty in meeting their obligations under the Protocol and to work constructively with these individual Parties to assist them in achieving compliance.

Australia would offer the following comments relevant to the draft compliance text in brackets:

Differentiated responsibilities

- Australia does not consider it acceptable, or consistent with the text of the Biosafety Protocol, that any group of countries receive differentiated treatment under compliance procedures and mechanisms. The special needs of developing countries are recognized and addressed in the Protocol through the provisions on capacity-building and information exchange. The Protocol's compliance procedures and mechanisms should apply and be available in equal measure to all Parties.

Compliance Committee

- Australia's view, should a Compliance Committee be formed, is that it should be a small committee appointed by the meeting of Parties and drawn from a list of experts nominated by member governments.
- The Committee's role should be twofold: to assist a Party (or a group of Parties) concerned about their compliance to develop a voluntary compliance programme to ensure compliance is maintained or restore compliance as soon as possible; and to consider general (non-Party specific) issues of compliance under the Protocol and provide recommendations to the Conference of the Parties serving as the meeting of the Parties on those matters.
- The Compliance Committee's programme of work must be reviewed regularly by the Conference of the Parties serving as the meeting of the Parties to ensure that it can be evaluated in the context of the Protocol's overall resources and priorities.

Compliance trigger

- Australia's view is that the Party which is having difficulty in complying with Protocol procedures should be responsible for raising its problem, that is, self-trigger. The provision of assistance and advice by the Compliance Committee, if coupled with a genuinely non-adversarial no-blame compliance-building procedure, should be sufficient to induce Party/Parties on their own volition to seek the assistance of the Compliance Committee when experiencing potential compliance difficulties.

- Australia does not consider it appropriate for compliance procedures and mechanisms to be invoked by non-State Parties, such as non-governmental organizations or the Secretariat.
 - The Secretariat's work collating and overseeing the information flow between Parties and assisting Parties in implementation of the Protocol will be invaluable in helping a Compliance Committee in its work. However, the Secretariat should not be empowered to initiate any aspect of the compliance procedures and mechanisms or initiate work on general issues of non-compliance. Work by the Secretariat should be undertaken only at the request of the Conference of the Parties serving as the meeting of the Parties or a Compliance Committee under its terms of reference, as agreed by the Conference of the Parties serving as the meeting of the Parties.
 - Non-State trigger options would be unnecessarily complicated and costly and could be potentially highly politicized, confrontational or adversarial, creating disincentives for Parties experiencing compliance difficulties to be open about their difficulties and seek advice.
- Australia does not consider it appropriate at this stage to provide for one Party to invoke compliance procedures and mechanisms for another Party. It could be suggested that egregious and deliberate non-compliance would warrant an injured party being able to complain. However, Australia considers that any such complaint could be taken up through the dispute settlement mechanism. It must be remembered that the compliance procedures and mechanisms are "separate from, and without prejudice to, dispute settlement procedures and mechanisms".

Non-Compliance

- Australia does not support sanctions as part of the Protocol's compliance mechanism. As stated above, Australia supports facilitative, non-confrontational procedures and mechanisms which would promote participation and transparency. Non-compliance sanctions are not consistent with this.
 - Furthermore, the nature of any sanctions envisaged is unclear. Denial of access to technical assistance/Global Environment Facility support would be counterproductive to the compliance mechanism's objective of assisting countries to meet their obligations. There are no other "rights" conferred by the Protocol that could be suspended.
 - Australia would appreciate clarification of what is envisaged by sanction supporters.

Australian views on the current square-bracketed text (Annex I) and proposed options (Annex II)

I. Objective, nature and underlying principles

Australia's strong preference remains Option 2, to delete the entire bracketed text. Australia opposes the notion of differentiated responsibilities, *inter alia*, because compliance procedures and mechanisms should apply and be available in equal measure to all Parties.

II. Institutional mechanisms

In both instances Australia's preference is Option 2. Australia would retain the bracketed text which would allow for a balance between importing and exporting countries on the Committee. Australia would delete the bracketed text which provides that members of the Committee should serve in their own capacity.

IV. *Procedures*

Australia would delete the bracketed text in both instances (Option 1, then Option 2). It is Australia's strong view that any compliance mechanism should be non-adversarial and that compliance submissions should only be made by a Party in respect of its own compliance.

V. *Information and consultation*

For the reasons noted above, Australia's preference is that a Party should only present information relevant to its own compliance (Option 2).

Under paragraph 2 of part V, Australia would prefer to delete the word *including* and the two sub-paragraphs (c) and (d), for the reasons noted above.

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

Australia strongly opposes the establishment of a punitive compliance regime and therefore prefers Option 2 (to delete the bracketed text) in all three instances of this part.

CANADA

[14 OCTOBER 2003]
[SUBMISSION: ENGLISH]

I. Objective, nature and underlying principles

Paragraph 3

Approach: Canada would end paragraph 3 after "predictability".[‡]

Rationale: Neither the expression "common but differentiated" nor a reference to Article 7 are included in the Biosafety Protocol. Further, the Protocol itself does not create any differentiated obligations. To include either reference in the compliance mechanism would mean that a new element, not in the Protocol, is being included. Finally, recognizing that there is a desire by a number of countries to reflect lack of capacity in Part VI (measures), Canada proposed at the third meeting of the ICCP to address their concerns in a more concrete manner in Part VI, and this change is now reflected in the chapeaux to Part VI.1 and VI.2.

Part II: Institutional mechanisms

Paragraph 2

Approach: Canada would remove the brackets and modify the words currently in brackets as follows: "ensuring a balance between import and export perspectives".

Rationale: While conceptually we have no difficulty in trying to differentiate between importing and exporting Parties where relevant, it is our view that all Parties either are currently, or will be, both importing and exporting countries, so this type of distinction is probably not helpful when establishing institutions of the Protocol. Furthermore, it could lead countries to think that they have no obligation to

[‡]/ For grammatical reasons, we would add "and" before "predictability".

implement export obligations, when these clearly apply to each Party. However, keeping in mind the value of taking different perspectives into account as the work of the committee proceeds, we would prefer at this time to suggest a balance between importing and exporting countries.

Paragraph 3

Approach: we would delete the words currently in square brackets, “and they shall serve in their individual capacity”, and replace them with: “, and they shall serve objectively and in the best interests of the Protocol”.

Rationale: the debate here centres around whether members of the Committee should represent Governments or serve in their individual capacity. We believe that the necessary level of accountability is served through nomination by governments and election by the Conference of the Parties serving as the meeting of the Parties in paragraph 2. However, individuals who come forward have to act objectively and in the best interests of the Protocol, not on behalf of any other interest. A recent precedent for this language is found in the recently adopted compliance procedures for the Basel Convention at paragraph 4.

IV. Procedures

Paragraph 1(b)

Approach: Canada would remove the square brackets and retain the text of (b).

Rationale: Given the transactional nature of the Protocol, it is our view that to constitute a compliance mechanism, there must be a right for one Party to trigger the compliance procedure with respect to another Party.

Paragraph 1(c)

Approach: Canada would remove the square brackets and retain the text of (c).

Rationale: Canada supports the retention of paragraph (c) as we are of the view that the Conference of the Parties serving as the meeting of the Parties, as the supreme authority of the Protocol, should be in a position to refer to the Committee any instance of non-compliance that it finds to be of sufficient concern to do so. This is a logical extension of the Party to Party trigger, enabling the Parties collectively to trigger the compliance procedure.

V. Information and Consultation

Paragraph 1(b)

Approach: Canada would remove the square brackets and retain the text of paragraph (b).

Rationale: The chapeau of paragraph 1 requires the Committee in its deliberations to consider information from the Party against whom the complaint is made (paragraph (a)). However, we think, once again, that it is a logical extension of the trigger in IV.1(b) above, that in any case of a Party triggering the mechanism against another Party, information from the complaining Party must be considered.

Paragraph 2(c)

Approach: Canada would support removal of the square brackets and retention of the text, but would amend it as follows: “Non-governmental organizations, civil society, industry and academia”.

Rationale: We consider that a wide range of sources may have relevant information for the Committee, and the Committee should be able to seek or receive it when it considers it to be appropriate.

Paragraph 2(d)

Approach: we would delete the brackets and keep “The Secretariat”. We would also add after those words, “and any Party to the Protocol.”

Rationale: Although we think that it is not necessary to name the Secretariat as its administrative role is well understood, we would have no objection to doing so. However, we feel it is quite important to list “any Party” as a source of information, because even if they are not involved in the initial complaint, once they hear about it, they may have relevant information for the Committee.

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

Chapeau to Paragraph 1

Approach: We would add at the beginning of the chapeau to paragraph 1: “Upon request of a Party who has triggered the procedures with respect to itself in accordance with IV.1(a)”.

Rationale: The addition of “Upon request of a Party etc.” in the chapeau to paragraph 1 would make it clear that the Committee is only allowed to make *decisions* on measures (rather than *recommendations* to the Conference of the Parties serving as the meeting of the Parties) where they have been requested to do so by a Party that has self-triggered, as decisions about action plans, for example, can be very costly for countries to implement. This would not preclude the Committee from also making recommendations of the nature listed in paragraph 2 in cases of self-triggering. The Basel Convention compliance mechanism allows the Committee “to provide a Party, after coordination with that Party, with advice, non-binding recommendations and information.... Advice, non-binding recommendations and information other than those listed...above should be provided in agreement with that Party” (paragraph 19).

Paragraph 2(b)

Approach: Canada can agree to the deletion of the square brackets.

Rationale: for other compliance procedures, such as the Montreal Protocol, this has been included as one of the “measures” available. It is simply a written censure to the Party concerned. If this language is not agreeable to all, perhaps use of the Basel solution at paragraph 20 utilizing a “cautionary statement” might be of assistance.

Paragraph 2(c)

Approach: Canada supports retention of the concept of publication, but would phrase it differently: “Make reports of cases of non-compliance available to the public.” In addition, we think that this is not a “measure” and would prefer to include it in a general provision after Part VI as “*The meeting of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety shall make reports of the meetings of the Compliance Committee and the COP/MOP available to the public,*” as set out in Option 4 of UNEP/CBD/ICCP/3/10.

Rationale: at the meeting of the Open-ended Group on Compliance, some countries did not like the “publish cases” approach in the context of “measures” in Part VI. Two possible fixes might help forge a compromise. Language closer to current practices in other fora might be acceptable. For example, other environmental agreements, like the Montreal Protocol, make available to the public on its website copies of both the reports of the Implementation Committee and the Meeting of the Parties. Secondly, this is not really a measure, so it might be less of a concern if it was moved to its own paragraph.

Paragraph 2(d)

Approach: Paragraph (d) must remain bracketed. Canada cannot agree to discuss paragraph (d) until the scope of this option has been clarified. For example, Canada could not support the use of trade sanctions in this Protocol. Finally, Canada would require any provision eventually agreed upon to be framed in a manner that is consistent with, and includes a reference to consistency with, international law.

Items not covered in the procedures

As was noted in paragraph 175 of the report of the second meeting of the ICCP, and paragraph 86 of the report of the third meeting of the ICCP, all elements of the draft procedures remain subject to further discussion. While we would not want to prolong discussions too much, we see some small gaps that should be filled.

(i) The Committee may hold open meetings

Approach: Canada would like to suggest an additional paragraph, as follows:

The Committee may make its meetings open to all Parties where it considers it appropriate for

(a) discussions of general issues of compliance

(b) individual cases, where the Party concerned and the Party making the submission so request.

Rationale: As we noted at the meeting of the Open-ended Group on Compliance, it is our view that there should be an opportunity for the Committee to open meetings to all Parties where it considers it appropriate in order to enhance transparency, and in individual cases, where the Party concerned and the Party making the submission so request. We would prefer this to be clear in these procedures and not left to the rules of procedure of the Committee. We are flexible as to where it should be located in the procedures, but Part II or Part IV may be appropriate.

(ii) Committee may initiate review of general issues of compliance

Approach: In Part IV, Procedures, Canada would add an additional trigger through a new paragraph 1*bis*:

The Committee may initiate a review of general issues of compliance referred to in paragraph III.1(d).

Rationale: The additional trigger in IV.1*bis* is to enable the Committee itself to initiate an examination of general/systemic issues of non-compliance that become evident as a result of the review of national reports.

(iii) Committee to monitor progress on all cases

Approach: We would suggest in a new Part “VIII. General Provisions” that we add, in addition to what was suggested above regarding publication of reports, another provision that would require the

Committee to follow up on the decisions of the Conference of the Parties serving as the meeting of the Parties on compliance.

It could read as follows:

The Committee will monitor efforts by a Party to return to compliance and maintain this as an agenda item until adequately resolved.[‡]

Rationale: Currently, there is provision in VI.1(d) for the Committee to invite the Party concerned to submit compliance progress reports to the Committee, but paragraph 1 deals only with matters that stay with the Committee and are not recommended to the Conference of the Parties serving as the meeting of the Parties for decision. In our view there is a need for a broader provision for all cases. We are flexible as to its location in a new VIII or in existing III on Functions.

EUROPEAN UNION

[9 OCTOBER 2003]
[SUBMISSION: ENGLISH]

With reference to paragraph 3 of the Recommendation ICCP3/2, concerning Procedure and Mechanisms on Compliance, which requests to submit views or understandings with respect to the contents that are in square brackets in the annex of the same Recommendation, we would like to stress that, for such issues the EU submission dated 21 January 2002 remains valid.

[21 JANUARY 2002]
[SUBMISSION: ENGLISH]

Paragraph I. 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]

The EU wants to point out that the Biosafety Protocol does not provide for common but differentiated responsibilities. Introducing the principle of common but differentiated responsibilities in this general section thus deviates from the legal structure of the Protocol. Such deviation may undermine the fundamental notion that compliance should be measured against the content of the obligations that a Party has taken upon itself. Also the envisaged UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (MEAs) only refer to common but differentiated responsibility as an approach to encourage participation in MEAs negotiations and not as one of the underlying principles of compliance regimes. Specific circumstances of individual cases of non-compliance should indeed be taken into account, but not in this section, through a general reference to the principle of common but differentiated responsibilities. This should be done in the specific section VI on 'measures', via the formula referring to "cause, type, degree and frequency" of non-compliance. The EU supports the deletion of the bracketed wording.

[‡]/ The Montreal Protocol takes a slightly different approach, which is to say in paragraph 12 that: "The Parties involved in a matter...shall inform, through the Secretariat, the Meeting of the Parties...about implementation of any decision of the parties pursuant to paragraph 9." We could be flexible on the type of approach used.

Paragraph II. 2**[ensuring a balance between importing and exporting countries]**

The Biosafety Protocol provides no justification to differentiate between importing and exporting countries. Moreover, and as a practical matter, the criterion of importing/exporting cannot be made operational, as 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. The EU supports the deletion of the bracketed text.

Paragraph II. 3.**[and they shall serve in their individual capacity].**

To promote addressing compliance issues outside a political context and in an impartial and independent manner, the members of the Committee should serve in their personal capacity. Hence, the EU supports the bracketed text.

Paragraph IV. 1. b.**[Any Party with respect to another Party; or]**

The EU supports the Party-to-Party trigger. A Party-to-Party trigger of the compliance mechanism may help prevent confrontations by identifying and dealing with compliance problems at a very early stage. This trigger however, should be complemented by a procedural safeguard: a submission from a Party with respect to non-compliance of another Party should be supported by corroborating information. The EU supports deletion of the brackets. As a logical consequence of the EU position on the Party-to-Party trigger, the EU supports the bracketed text of paragraph V. 1. b.

Paragraph IV. 1. c.**[The Conference of the Parties serving as the meeting of the Parties to the Protocol].**

The EU doubts whether the Conference of the Parties serving as the meeting of the Parties to the Protocol as a trigger, adds anything to the compliance procedure. It might even be odd that the Conference of the Parties serving as the meeting of the Parties is also a trigger since it normally takes decisions upon recommendations of the compliance committee. The EU does not have strong feelings on the possibility for the Conference of the Parties serving as the meeting of the Parties to trigger the procedure and can support the deletion of the bracketed wording.

Paragraph V. 1. b.**[The Party that has made a submission with respect to another Party.]**

The EU supports the bracketed text, given our position on paragraph IV.1.b.

Paragraph V. 2. a. [and other bodies of the Convention on Biological Diversity and the Protocol];**Paragraph V. 2. b.[Non-governmental organizations, the private sector and other civil-society organizations and relevant intergovernmental organizations;] and****Paragraph V. 2.c. [The Secretariat.]**

In relation to all three sections, the EU considers it very important to keep the list of sources of information non-exhaustive (see the words "including from"). We cannot understand how the Committee could accomplish its task if it were to disregard available compliance-related information, and why the Secretariat, other bodies or non-governmental organizations should be prevented from transmitting such information to the Committee. This would clearly put in question the very reason for the existence of the Committee. The Compliance Committee should be able to use the information it considers relevant. The

EU prefers here to keep the wording as open-ended as possible. Therefore, the EU would prefer to replace the existing paragraphs V. 2. a-c with the words: *"The Committee may seek or receive and consider relevant information from other sources."*

Paragraph VI. 1.c.

[taking into account its existing capacity to comply];

The text can be deleted once the chapeau is changed as suggested under paragraph VI.2. in the following point.

Paragraph VI. 2. chapeau

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

The need to take into account all relevant circumstances before taking compliance-related measures applies to both the Compliance Committee (under subparagraph 1) and the Conference of the Parties serving as the meeting of the Parties (under subparagraph 2). Moreover, reference should also be made to parties with economies in transition. Hence, both the chapeau of subparagraphs 1 and 2 should include the following wording: *"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."*

Paragraph VI. 2. b.

[Issue a caution to the concerned Party;]

The EU supports retaining this measure.

Paragraph VI. 2. c.

[Publish cases of non-compliance; or]

Having in mind that the reports of the Conference of the Parties serving as the meeting of the Parties are adopted by the Conference of the Parties and fall into the public domain, save to the extent that confidential information is involved, a publication of non-compliance as a particular measure seems to have no added value. This wording should be changed to *"publish a declaration of non-compliance"*. Furthermore, it should be moved to paragraph VI.1, to be included in the list of measures to be taken by the Compliance Committee.

Paragraph VI. 2. d.

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

The EU wants to keep the possibility to take strong measures to 'suspend rights and privileges'. Therefore the EU supports keeping the bracketed text. The EU however does not consider it necessary to specify that suspension of rights and privileges must be "consistent with international law". Consequently, the EU supports deleting the last four words of this bracketed text.

The EU is willing to elaborate and/or specify which measures may fall within the scope of this category, as well as the conditions for their application. The following list of examples and other measures which the Compliance Mechanism could adopt, may contribute to the discussion on the issue:

- To decide that a Party shall be regarded as an observer, by suspending specific procedural rights and benefits under the Protocol, whether or not subject to time limits, concerned with the right to vote,

nominate and elect, or be nominated and elected;

- As regards flagrant, repeated or continued non-compliance with Article 8 of the Protocol, to decide to permit Parties of import to suspend imports from the Party of export concerned until that Party has demonstrated to the satisfaction of the Compliance Committee that it will comply with Article 8 in the future;
- As regards flagrant, repeated or continued non-compliance with Article 10, paragraph 3 of the Protocol, to decide to permit Parties of export to also address notifications referred to in Article 8 of the Protocol to the Compliance Committee, which will then be authorized to contact the Party of import concerned on behalf of the Conference of the Parties serving as the meeting of the Parties, and to require that Party to apply paragraph 6 of decision --/CMP.1 (decision-making under Article 10, paragraph 7, of the Protocol);
- As regards flagrant, repeated or continued non-compliance with Article 10, to decide that the costs of a particular risk assessment referred to in Article 15, paragraph 3, of the Protocol, shall be borne, or repaid, by the Party of import;
- To decide to authorize the undertaking of a verification mission in the territory of the Party concerned;
- As regards flagrant, repeated or continued non-compliance with Article 24 of the Protocol, to decide that future agreements and arrangements referred to in Article 24 of the Protocol, will have to be reviewed by the Compliance Committee, before these agreements and arrangements come into effect;
- In case a flagrant, repeated or continued non-compliance with Article 8, paragraph 1, of the Protocol finds its cause in the conduct of the same company, to decide to “grey-list” the exporter, including through the Biosafety Clearing-house.

PARAGUAY

[22 SEPTEMBER 2003]
[SUBMISSION: SPANISH]

Borrador de documento a ser presentado a la Secretaría del Convenio para el 22 de septiembre de 2003, para la preparación de la reunión de la Conferencia de las Partes en el Protocolo de Cartagena sobre Seguridad de la Biotecnología.

Elementos considerados del Informe del Comité Intergubernamental para el Protocolo de Cartagena sobre Seguridad de la Biotecnología documento UNEP/CBD/ICCP/3/10 :

Pág. 16 4.1.2. Cumplimiento (Art. 34)

El Protocolo de Cartagena sobre Seguridad de la Biotecnología entra en vigor el 11 de Septiembre de 2003, el mismo es vinculante al Convenio sobre Diversidad Biológica pero jurídicamente independientes, que los procedimientos y mecanismos sobre el cumplimiento se adoptarían mediante una decisión de la reunión de la Conferencia de las Partes que actúa como reunión de las Partes en el Protocolo, y que dichas decisiones por lo general no son de carácter vinculante.

En Paraguay nos encontramos con las gestiones de ratificación del Protocolo de Cartagena, asumiendo a su vez que las leyes nacionales actuales y vigentes se encuentran poco ajustadas a lo establecido en el Protocolo.

Estamos conformes con el Anexo I Pág. 38, 39 Por lo que será de suma importancia la promoción, el asesoramiento, la facilitación, de carácter cooperativo y no contenciosos, orientado por los principio de transparencia, equidad, rapidez, y previsibilidad los procedimientos y mecanismos para atender el cumplimiento.

Se considera importante el la sección VI Pág. 47 del Anexo II Medidas para promover el cumplimiento y tratar los casos de incumplimiento ítem 1 párrafos (a),(b),(c) y (d) .

Ítem 2 párrafo (a) Se considera que prestar asistencia en casos de incumplimiento debe ser prioridad antes de emitir una advertencia, a menos que esos casos de incumplimiento cause daños concretos a otra Parte y tomar conocimiento de las causas para proceder al respecto.

REPUBLIC OF KOREA*

[17 JANUARY 2002]
[SUBMISSION: ENGLISH]

I. Objective, Nature and Underlying Principles

A. Brackets Part

The operation of the compliance procedures and mechanisms and [common but differentiated responsibilities] and [and take into account principle 7 of the Rio Declaration on Environment and Development, that states have common but differentiated responsibilities.]

B. Comment

The Republic of Korea is of the view that there should be a consideration for the capacity of developing countries and different treatments with regard to the compliance issues to promote the effectiveness of the compliance procedures. In this context, the Republic of Korea believes that the first bracket phrase better reflects Korea's view.

II. Institutional mechanisms

A. Brackets Part

2. The Committee shall ..., and,[ensuring a balance between importing and exporting countries.]

B. Comment

Considering the fact that the Protocol aims to ensure the safety with regard to the international trade of LMOs among Parties, the Republic of Korea believes that the Committee shall take into full account the voices of all Parties. In this regard, it is more pertinent to compose the Committee on a geographically balanced representation. A balance between importing and exporting countries is not necessarily required in the composition of the Committee.

C. Brackets Part

*/ The submission was originally made for the purpose of the third meeting of the Intergovernmental Committee for the Cartagena Protocol on Biosafety.

3. Members of the Committee shall ..., and [they shall serve in their individual capacity.]

D. Comment

When we set up the Committee on a geographically balanced representation, it has been already assumed that the Committee members shall take into account and consider the position of the regional countries. Therefore, the Republic of Korea prefers deleting this brackets phrase.

III. Procedures

A. Brackets Parts

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

- a)
- b) [Any Party with respect to another Party]
- c) [The Conference of the Parties serving as the meeting of the Parties to the Protocol]

B. Comment

The compliance regime is one of the most important elements of the Protocol. In order for the Committee to make its decision-making process more trans-parent and each Party more responsible, the information submitted by Parties directly should play a leading role. In consequence, we prefer deleting the brackets phrase of b). In particular, it is desirable, as a complementary step, to review the information provided by the Conference of the Parties serving as the meeting of the Parties, as the Conference of the Parties serving as the meeting of the Parties is considered a objective and well balanced organization body which is objective and well balanced.

IV. Information and Consultation

A. Brackets Parts

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

- a) The Biosafety Clearing-House and [the bodies of the Convention on Biological Diversity and the Protocol)
- b) [Non-governmental Organizations,]
- c) [The Secretariat]

B. Comment

The Republic of Korea is of the view that all information relating to compliance and non-compliance shall be provided through official diplomatic channels. The information provided by from non-governmental organizations, and other civil society organizations can be made available only through the Parties directly concerned, or through the secretariat and other official bodies in accordance with the Convention or the Protocol. Therefore, we find that the bracket phrase b) should be deleted.

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

A. Brackets Parts

1. c) Request or assist, as appropriate, ...[taking into account its existing capacity to comply] ;
2. [and the capacity of the Party concerned, in particular of developing Parties]

B. Comment

In order for the Protocol to be a reliable tool in ensuring human and environmental safety, it is essential that the capacities of all Parties concerned be taken into account in developing an action plan. In light of the Article 22 of the Protocol stipulating that developed countries shall provide assistance to developing countries to enhance their compliance capacity, the Republic of Korea believes that those brackets phrases should be kept as they are.

C. Brackets Part

2. The Conference of the Parties serving as the meeting of the Parties may,, and the capacity of the party concerned, in particular of developing country Parties in complying with the Protocol, also decide upon

- a)
- b) [Issue a caution to the concerned Party;]
- c) [Publish cases of non-compliance ; or]
- d) [Suspend the specific rights and privileges of the concerned Party under the Protocol [consistent with international law]]

D. Comment

In order for the compliance regime to become effective, the Republic of Korea believes that the compliance regime requires a set of enforcement mechanisms, including issuing a caution (b), publishing cases of non-compliance (c) and suspending the specific rights and privileges (d).

SLOVENIA*

[18 JANUARY 2002]
[SUBMISSION: ENGLISH]

Art. 34 of the Protocol takes the form of a so-called enabling provisions, and it does not establish a compliance mechanism, but provides a basis framework for its establishment by the Conference of the Parties serving as the meeting of the Parties. Indeed, this is a common way of approaching the issue of compliance in recent multilateral environmental agreements, such as the Montreal Protocol, PIC Convention, Kyoto Protocol, etc.

Having considered the provisions of the Protocol, the core of the compliance work and mechanisms shall be a body to which questions and problems regarding individual compliance can be referred. Therewith, self-monitoring and regularly reporting to the Conference of the Parties serving as the meeting of the Parties on countries' progress in implementing their obligations under the Protocol are likely to provide an essential and valuable basis for the work of future compliance mechanisms.

*/ The submission was originally made for the purpose of the third meeting of the Intergovernmental Committee for the Cartagena Protocol on Biosafety.

Taking together the mentioned two mechanisms should support the effective implementation of the Protocol and also provide basis for amendments and additions to the Protocol in the future.

SWITZERLAND

[26 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

4.1.2 Compliance

Switzerland supports all efforts to establish a strong and effective regime for compliance for the Cartagena Protocol. The regime should be primarily facilitative. It should help Parties to the Protocol to comply with the requirements of the Protocol. We hope that the negotiations on this instrument can be finalized at the first meeting of the Parties and a well-balanced Compliance Committee be elected.

UNITED STATES OF AMERICA

[22 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

General Comments

- During the UNEP process on International Environmental Governance, many countries raised concerns about the crowded calendar of international environmental meetings and the importance of creating new institutions and scheduling additional meetings only where absolutely necessary. As such, the United States is concerned about the presumption in section II.5 that the Compliance Committee should meet twice a year. It should not be presumed that compliance problems under the Protocol will warrant such a schedule. Instead the Committee should meet on an *ad hoc* basis in response to specific issues of non-compliance raised under the Protocol, at least in the initial stages.
- An additional general point, which has been recognized in the development of several other MEA compliance regimes, is that a multilateral compliance process is to be distinguished from bilateral State-to-State dispute settlement. Even where a multilateral compliance process permits a Party to submit information with respect to another Party's compliance, the first Party's involvement in the case should end at the point when the compliance institution decides to take up the case. Thus, section IV.4 should be amended as follows: "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."

Comments on the Bracketed Text

Section I.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].

- The U.S. supports deleting the text in both sets of brackets (option 2 in Annex II of ICCP-3 recommendation 3/2) (UNEP/CBD/ICCP/3/10, pp. 37-43)
- The compliance regime must reflect the rights and responsibilities delineated in the Protocol itself. All Parties under the Protocol have identical responsibilities and therefore the compliance regime may not differentiate among Parties. We recognize that Parties may have different

capacity-building needs and consider that such differences could be taken into account by the Committee in developing a plan to assist a Party's compliance. Such differences do not, however, affect a Party's responsibilities under the Protocol.

Section II.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].

- The U.S. supports retention of the text in the brackets (Option 2). The protocol poses different compliance problems for Parties that are primarily either importers or exporters of LMOs. In order to be prepared to analyse the full range of compliance issues presented by the Protocol, it would be useful to have representatives with expertise in all aspects of Protocol implementation.

Section II.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].

- The United States supports deletion of the bracketed text. (Option 2). Given the facilitative nature of the compliance regime, it is appropriate for the members of the committee to be representatives of governments.
- As an alternative to deletion of the bracketed text, the United States proposes a hybrid of Options 3 and 4 that would replace the bracketed text with "and in representing their governments, they shall serve objectively and in the best interests of the Protocol."

Section IV (1) The Committee shall receive, through the Secretariat, any submissions relating to compliance from:

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

- We note that Options 1-4 actually address two different issues. The first is the level of involvement the submitting Party should have with the Party it is reporting upon. On this issue the U.S. supports Option 3, which would amend the bracketed text to read "Any Party, if directly involved, with respect to another Party."
- The second issue is how much information would be required to support a submission on a Party's compliance. On this issue we are open to considering Option 2 or 4 or some other option. Option 2 would amend the bracketed text to state "Any Party with respect to another Party, supported by corroborating information; or". Option 4 would add to the end of paragraph 1 "The Committee may reject to consider any submission made pursuant to paragraph 1(b) of this section that is *de minimis* or ill-founded."

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

- The United States supports retaining the bracketed text. (Option 1).

Section V(1). Information and consultation

The Committee shall consider relevant information from:

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

- The United States supports retaining the text but changing “a” to “the” to make clear that we are referring here to the Party who has made the submission referred to in Article IV(1)(b).

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

[(c) Non-governmental organizations, or]

[(d) The Secretariat.]

- The United States supports retaining the text in the brackets, but it should be noted that we understand that section V(2) refers to information that may be sought or received on a compliance case that has already been triggered, i.e. V(2) does not provide an alternative means of triggering a case.

Section VI (2) The Conference of the Parties serving as the meeting of the Parties may, upon the recommendations of the Committee, taking into account the capacity of the Party concerned, especially developing country Parties, in particular the least developed and small island developing States amongst them, and Parties with economies in transition, to comply, and such factors as the cause, type, degree and frequency of non-compliance, also decide upon one or more of the following measures:

(b) [Issue a caution to the concerned Party;]

- The U.S. supports deleting the bracketed text. (option 2).

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

- The U.S. supports deleting the bracketed text. (option 2)
- We also note that option 4 might be worth pursuing, however the Conference of the Parties serving as the meeting of the Parties should not be *required* to make reports available to the public and instead should have the *discretion* to make the reports available in whole or in part. A requirement that the reports be made public may discourage Parties to self-report and may hinder the facilitative process the compliance mechanism is intended to foster. Therefore the following modifications are needed:

The Conference of the Parties serving as the meeting of the Parties to the Protocol ~~shall~~ may make reports, *in whole or in part*, 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].].

- The U.S. supports deletion of the bracketed text and could support replacing it with either Option 3 or Option 4.

Option 3 states “In appropriate cases, take additional measures consistent with international law as reflected in Article 60 of the Vienna Convention on the Law of Treaties.”

Option 4 states “May take, in cases of repeated or continued non-compliance, additional stronger measures, excluding trade-related measures within the framework of the Protocol and in accordance with international law.”

Technical edits

Section III.1(e) Take measures, as appropriate, *consistent with Section VI(1)*, or make recommendations, to the Conference of the Parties serving as the meeting of the Parties to the Protocol.

Section VI.1(b) Make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol regarding the provision, *consistent with Articles 22 and 28 of the Protocol*, of financial and technical assistance, technology transfer, training and other capacity-building measures.

Section VI.2(a) *Consistent with Articles 22 and 28 of the Protocol*, provide financial and technical assistance, technology transfer, training and other capacity-building measures.

- The addition of these references to the Protocol and compliance mechanism will provide clarity to the meaning of these sections.

SUBMISSIONS FROM ORGANIZATIONS

GLOBAL INDUSTRY COALITION (GIC)

[22 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

CONTEXT

ICCP-3 Recommendations: At the third meeting of the ICCP, substantial progress was made in agreeing upon proposed measures and mechanisms to promote compliance with the Cartagena Protocol on Biosafety and to address cases of non-compliance. Several sections of the ICCP-3 recommendations on compliance, however, remain bracketed and will be discussed at the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

Submissions to the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol: The Executive Secretary of the Convention on Biological Diversity invited Parties and governments to submit views with respect to the contents that remain in square brackets in the ICCP-3 recommendations on compliance. While the private sector agrees that the remaining bracketed areas in the Compliance text are largely a matter for Parties and governments, we do wish to provide comments on one outstanding issue concerning the standing or qualification of persons/organizations to supply information and be included in consultation in the proposed compliance process as noted in UNEP/CBD/ICCP/3/10 on page 36:

Information should come only from those with direct involvement

In order to ensure the most streamlined and expedient process possible for resolving possible cases of non-compliance, the private sector believes ***it is critical to ensure that only those that are directly involved in a case may provide information for the consideration of the Compliance Committee.*** “Direct involvement” should be defined as the importer, exporter and

two countries involved in the case of non-compliance. Those without any direct involvement in a particular request for approval under the AIA or a country's domestic measures by definition will lack any factual information about the case. If information were to be submitted by organizations without direct involvement, the Compliance Committee would find itself overloaded with information that may not be based on the facts of the case. The Committee also is likely to receive a large quantity of information relating to broader political interests in support or opposition to proposed imports that will have no relevance to the particular compliance issue under consideration.

Other relevant information should be provided through Government channels

Organizations not directly involved in a case can always provide their views on compliance matters to government officials, regardless of the mechanism for compliance established under the Protocol. That information can be taken into consideration and introduced into the compliance process by the governments involved in a case, if it is deemed to be pertinent and factually correct. By limiting information supply only to those directly involved in a case – whatever their identity – and requiring those without direct knowledge to provide information via official government channels (where governments find the information to be relevant and useful), it can be ensured that the Compliance Committee is not overwhelmed by irrelevant information or politics and that it has a manageable amount of information to expeditiously process each alleged case in an effort to resolve situations and promote full compliance with the Protocol as quickly as possible.

WWF INTERNATIONAL

[30 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

WWF regards development of effective procedures for compliance and dispute resolution as a high priority for the Protocol. These procedures will help to ensure that any disputes regarding the Protocol and its implementation are resolved within the framework of the Protocol rather than being transferred to other international fora.

WWF suggests that financial assistance may be necessary and important for developing countries and countries in transition to be able to monitor and verify content in shipments, but while it is still up to the exporter to provide specific information on LMOs that any shipment may contain.

WWF welcomes the ICCP's recommendation to the first meeting of the Parties, as set out in decision 3/2 and decision 3/2 Annex I, for establishment, of a Compliance Committee, based on facilitative and cooperative procedures, with the following functions:

- Promote and periodically monitor compliance with the Protocol's provisions by Parties and by exporters of LMOs and LMO intended for food, feed or processing (LMO-FFPs);
- Address individual cases of non-compliance;
- Offer advice and assistance;
- Propose remedies for non-compliance, for example, provision of advice and technical or financial assistance to help Parties comply;
- Make recommendations to the Meeting of the Parties.

WWF recommends that:

- the functions of the Compliance Committee should also specifically include the undertaking of on-site inspections and monitoring where necessary;
- the Compliance Committee be allowed to consider information from NGOs and civil society, in relation to both general issues and specific cases. Consideration of such information in relation to the Protocol's compliance procedures could build on successful experience with submissions in other international fora.
- the operation and effectiveness of the compliance mechanism should be subject to review. In cases where non-compliance persists in spite of provision of advice and assistance, the Parties to the Protocol should consider how to impose sanctions for non-compliance, particularly for non-compliance by Parties of Export.

Taking these points into account, WWF's views on the options indicated in Annex II of decision 3/2 are set out in the following box:

BOX: WWF's Comments on Annex II of decision 3/2 concerning Draft Procedures and Mechanisms for Compliance under the Cartagena Protocol

I. Objective, nature and underlying principles

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].

WWF supports **Option 4:** Combine options 1 and 3 above. (i.e. Retain the first bracketed text as it is, delete the second bracketed text, and reflect the concept envisaged in the chapeau of paragraphs 1 and 2 of section VI).

II. Institutional mechanisms

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].

Regarding the bracketed text, if it is to be retained (**Option 2**), then what is meant by 'balance' should be defined. WWF suggests that an appropriate balance for the committee would be a balance of representation based on the numbers of net exporting Parties and the numbers of net importing Parties. If balance is left undefined, then WWF would support **Option 1** to delete the bracketed text.

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].

WWF supports **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."

IV. Procedures

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

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

WWF supports **Option 1:** Delete the bracketed text.

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

WWF supports **Option 1:** Retain the bracketed text as it is. This would enable any serious problems on compliance by a Party to be brought to the meeting of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety and thence addressed by the Committee.

V. Information and consultation

1. The Committee shall consider relevant information from:

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

WWF supports **Option 2:** Delete the bracketed text.

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

[(c) Non-governmental organizations, or], [(d) The Secretariat.]

WWF supports retention of the bracketed text 2 (c) and 2(d).

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

2. The Conference of the Parties serving as the meeting of the Parties may, upon the recommendations of the Committee, taking into account the capacity of the Party concerned, especially developing country Parties, in particular the least developed and small island developing States amongst them, and Parties with economies in transition, to comply, and such factors as the cause, type, degree and frequency of non-compliance, also decide upon one or more of the following measures:

(b) [Issue a caution to the concerned Party;]

WWF supports **Option 2:** Delete the bracketed text.

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

WWF supports **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].]

WWF supports **Option 2:** Delete the bracketed text. The purpose of the Protocol is to ensure biosafety at all stages, and it provides the minimum basis for this: to remove the specific rights and privileges from any Party would risk reducing the level of biosafety in the Party concerned, and neighbouring Parties might also be affected as a result.