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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
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Item 4 of the provisional agenda*

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

Compilation by the Compliance Committee

I. INTRODUCTION

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

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

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

4. To this end, the Compliance Committee considered further information on experience regarding cases of repeated non-compliance under the compliance mechanisms of other multilateral environmental agreements at its third and fourth meetings and prepared the present compilation.

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5. From the experiences reviewed in the following section, these observations may be derived:

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

(b) When setting out measures that may be taken in respect of a Party's non-compliance with the requirements of the instrument in question, not only is it frequently required to take into account certain factors as mentioned above, but the measures are also frequently listed in an order of increasing severity, implying that repeated non-compliance will result in the application of more severe measures. In this regard, the Committee observes that it may not be advisable to expect the Committee or the Conference of the Parties serving as the meeting of the Parties to the Protocol be obliged to apply measures in the order in which they appear in the compliance procedures;

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

(d) It appears that the availability of stringent measures with economic or trade consequences and the application of such measures to practical cases of non-compliance are situations mostly limited to multilateral environmental agreements such as CITES and the Montreal Protocol where direct trade measures, in the form of the prohibition or restriction of international trade in listed substances or materials, are central to the purpose of the instrument. Stringent measures are also, however, part of compliance mechanisms in some multilateral environmental agreements which do not directly regulate trade in certain goods or substances;

(e) The stringent measures that exist in most of the compliance systems reviewed have rarely been invoked or applied. This could be due to the mere existence of such measures resulting in the prevention of cases of non-compliance. Based upon its discussion at its third meeting, the Compliance Committee tends to believe that the inclusion of stringent measures in compliance mechanisms may provide a strong incentive for Parties to comply;

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

(g) In certain instances, consideration has been given to replacing the identification of specific measures that may be applied in response to repeated cases of non-compliance with mandating the governing body, upon recommendation from the compliance mechanism, to apply more stringent measures provided they are consistent with applicable international law including Article 60 of the Vienna Convention on the Law of Treaties.

6. The review of compliance mechanisms under different multilateral environmental agreements in the following section is only illustrative and is not exhaustive of all such mechanisms. It should be noted that each of the regimes was negotiated and adopted under specific circumstances which may justify the existence or use of different response measures for similar situations such as measures prescribed in cases of repeated non-compliance.

7. The consideration of the capacity of the Party concerned and such factors as the cause, type, degree and frequency of non-compliance when deciding upon one or more measures in a case of repeated non-compliance by the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety may be understood to include (i) the appropriateness of the measure(s) to ensure they are commensurate with the gravity of the compliance matter; (ii) the possible impact of measure(s) on the conservation and sustainable use of biological diversity with a view to avoiding negative results

and encouraging positive outcomes. Such understanding may be supplemented by questions such as whether: (i) the non-compliance has been wilful; and (ii) whether the Party concerned has not demonstrated any efforts to comply. The Committee is of the view that measures intended to address cases of repeated non-compliance should not usually be pursued in the event the Party concerned has been working and continues to work towards compliance.

8. Section II of this document contains a compilation of further information on experiences from other multilateral environmental agreements regarding repeated cases of non-compliance. Section III contains an indicative list of measures that may be taken in cases of repeated non-compliance as derived from the experiences reviewed in section II. The indicative list of measures should not necessarily be considered as proposals on measures that may be adopted pursuant to paragraph 2 (d) of section VI to the annex of decision BS-I/7.

9. Finally, it is noted that the purpose of the above observations as well as the indicative list in section III is intended to further facilitate consideration of the issue of repeated cases of non-compliance by the Conference of the Parties serving as the meeting of the Parties to the Protocol.

II. EXPERIENCES FROM OTHER MULTILATERAL ENVIRONMENTAL AGREEMENTS REGARDING REPEATED CASES OF NON-COMPLIANCE

10. The information on experiences from other multilateral environmental agreements regarding repeated cases of non-compliance, as presented below, is drawn from these agreements' provisions on compliance, their compliance mechanisms and experiences therewith as well as some draft compliance mechanisms that are under development. The text focuses in particular on the aspects of the agreements, mechanisms and experiences that concern repeated cases of non-compliance. All the compliance mechanisms reviewed below are presented in chronological order of the date of adoption of the instrument under which they have been created or are being considered.

A. The 1946 International Convention for the Regulation of Whaling (IWC)

11. The 1946 International Convention for the Regulation of Whaling does not include provisions that speak specifically to compliance or repeated cases of non-compliance. Article IX requires each Contracting Government to "take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction." In general, responsibility for ensuring compliance is left to States although each Contracting Government is also required to transmit to the International Whaling Commission information on each infraction of the provisions of the Convention by persons or vessels under its jurisdiction (Article IX(4)).

12. The International Whaling Commission, which administers the treaty, established an Infractions Sub-committee which "considers matters and documents relating to the International Observer Scheme and Infractions insofar as they involve monitoring of compliance with the Schedule and penalties for infractions thereof". 1/ The International Observer Scheme involved the nomination of observers by Governments to monitor infractions of the IWC and its Schedule. Once nominated, observers were appointed by the Commission to every whaling expedition. The International Observer Scheme lapsed when the Commission adopted the moratorium on commercial whaling in 1986. The Infractions Sub-committee also reviews the infraction reports submitted in accordance with Article IX(4), described above.

1/ International Whaling Commission, "Chair's Report of the 58th Annual Meeting" (January 2007) at p. 1 of Annex H, "Report of the Infractions Sub-committee".

13. In 1995, the Parties to the Convention initiated the negotiation of a Revised Management Scheme (RMS). It has not yet been agreed what the content of the RMS will be but one possible element is compliance. An RMS Small Drafting Group met in December 2004 and April 2005 and developed draft text on compliance. The result was a paragraph with the title "Oversight". The paragraph would see the establishment of a Compliance Review Committee "to review and report on the compliance of all whaling operations with the provisions of the Schedule and penalties for infractions thereof."2/ The text includes a list of activities to be undertaken by the Compliance Review Committee, including reviewing infraction reports and other reports; reviewing actions taken by a Contracting Government in response to violations and reviewing actions taken, including progress made, by Contracting Governments in response to previous violations considered by the Commission; and making recommendations to the Commission on actions to be taken to improve compliance. 3/ The paragraph also includes text in square brackets that would require the Compliance Review Committee to develop and maintain a list of matters that would constitute serious infractions. 4/ A final provision in the paragraph requires the Committee to report on infringements and their seriousness to the Commission and advise the Commission on what actions, if any, should be taken. 5/ A note accompanying this provision states that the United Kingdom "would enter a reservation to the effect that any RMS text not providing for the automatic operation of penalties fails to meet the objectives set by [the Commission], i.e. that the rules are obeyed and seen to be obeyed."6/

14. A Compliance Working Group was established at the 57th meeting of the Commission in 2005 with the mandate to "(1) explore ways to strengthen compliance by analysing the range of possible legal, technical, and administrative measures available to the Commission which are consistent within the IWC; and (2) to explore possible mechanisms to monitor and possibly address non-compliance of Contracting Governments consistent with the IWC and international law." 7/ The Group was not active between the 57th and 58th meetings of the Commission although the United Kingdom prepared a paper that identifies, amongst other things, specific proposals for the coordination of national/international measures to secure compliance. 8/ These include: withdrawal of Parties' right to vote where a Party fails to act to regularise an established violation of the Convention; withdrawal of a Party's right to participate in the work of Committees and sub-Committees; blacklisting illegal, unreported and unregulated vessels; withdrawal of fishing licenses or registrations; trade restrictions; reduction or cessation of catch quota; publication of parties in a non-compliance list and public notification of non-compliance; organization of missions to assess compliance; and financial penalties.

15. More broadly, in his Report of the Revised Management Scheme Working Group to the 58th meeting of the Commission, the Chair of the Working Group noted that in the two previous meetings of the Working Group, while there was agreement to further work in relation to compliance and the code of conduct for whaling under special permit, the Working Group had agreed that it had reached an impasse and further collective work should be postponed. 9/ The United Kingdom, in reporting on its work on compliance including the aforementioned paper, stated that it believed non-compliance to be an integral component of any RMS package and so work on compliance could not really progress without better knowledge of the structure of any such future RMS. 10/ Given the impasse, the Working Group agreed

2/ "Chairs' Report of the meeting of the RMS Small Drafting Group", doc. IWC/57/RMS 4 at p. 34. The text is contained in draft paragraph 31(a).

3/ *Ibid.* at draft para. 31(b).

4/ *Ibid.* at draft para. 31(b)(i).

5/ *Ibid.* at draft para. 31(c).

6/ *Ibid.* at footnote 44.

7/ International Whaling Commission, "Chair's Report of the 57th Annual Meeting" (March 2006) at p. 39.

8/ "Options for Compliance Mechanisms, Including Enforcement, Under the RMS: Submitted by the UK", doc. IWC/58/RMS 6 included as Appendix 5 to Annex F of "Chair's Report of the 58th Annual Meeting", *supra* note 1.

9/ *Supra* note 1 at p. 4 of Annex F.

10/ *Ibid.*

not to spend further time discussing the United Kingdom's document and overall, the Working Group agreed that no future work on the RMS could be recommended to the Commission. 11/

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

16. While the word 'compliance' does not appear in the text of CITES itself, measures to achieve compliance have been developed by the Parties over a number of years and continue to evolve. The compliance system includes treaty text, resolutions and decisions of the Conference of the Parties, decisions and recommendations of CITES subsidiary bodies and historical practice. 12/

17. Relevant treaty provisions include articles VIII, IX, XI, XII, XIII and XIV. In particular, Article XIII on 'International measures' contains cooperative procedures and institutional mechanisms for dealing with possible non-compliance. The Article "provides the Conference of the Parties with authority to make "whatever recommendations it deems appropriate" in relation to allegations of unsustainable trade or ineffective implementation."13/ This text is further elaborated by resolutions and decisions of the Conference of the Parties and specific cases of application. Article XIV on the "Effect on domestic legislation and international conventions" recognizes the right of Parties to adopt stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof. This provision has been used on occasion to support Parties' implementation of a recommendation to suspend trade. 14/

18. A range of sequential and graduated responses to non-compliance are available to CITES Parties as identified in the document on "Possible Measures for Non-Compliance" prepared for the forty-sixth meeting of the Standing Committee. 15/ The most serious of these include the suspension of rights and privileges including "recommended suspension of trade in specimens of one or more CITES species or for all CITES species, restriction of the right to vote at one or more meetings of the Conference of the Parties, ineligibility of a Party to be a member of the Standing Committee, loss of the right of a Party and its experts to receive documents for meetings", 16/ and financial penalties, i.e., "ineligibility of a Party to have its participation in a meeting of the Conference of the Parties funded by the Convention, ineligibility of a Party to receive other financial assistance from the Convention". 17/ While perhaps not explicitly stated in this document, these more serious responses are only put into effect when other efforts (such as advice, assistance, informal warnings, public notification of non-compliance and a compliance action plan) to bring a Party into compliance have failed. These measures can thus be understood as responses to repeated cases of non-compliance. In addition, it was indicated that "Parties often consider the cause, nature, degree and frequency of non-performance before making a formal determination of non-compliance" and that the more serious measures, such as the suspension of rights and privileges and the suspension of trade, are warranted where a Party's non-compliance is wilful and persistent. 18/

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

11/ *Ibid.* The report of the 59th meeting of the Commission was unavailable at the time of writing.

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

13/ *Ibid.*, para. 13.

14/ *Ibid.*, para. 10.

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

16/ *Ibid.*

17/ *Ibid.*

18/ "Compliance with the Convention", *supra* note 12 at paras. 36 and 42.

> "While initially justified case-by-case in terms of non-compliance with specific substantive requirements of the Convention, inadequate domestic implementing legislation has since 1999 become the most frequently cited cause (on the basis of systematic country-by-country reviews of national law and administration), followed since 2002 by cases of persistent non-compliance with reporting requirements." 19/

20. More specifically, Sand lists four categories of non-compliance in which the suspension of trade has been recommended: for Parties with major implementation problems, blacklisted Non-Parties (or 'Non-Parties with which Parties have been recommended not to trade'), Parties with inadequate national legislation, and Parties with inadequate reporting. 20/ Between 1985 and 2004, trade suspensions under these four categories were recommended against 37 countries. Each meeting of the Standing Committee generally reviews existing recommendations to suspend trade and such a recommendation is withdrawn as soon as the compliance matter has been resolved or sufficient progress has been made.

21. A Working Group on Compliance was established at the fiftieth meeting of the Standing Committee, held in March 2004. 21/ The Working Group prepared a "Guide to CITES compliance procedures" which was noted by the Conference of the Parties at its fourteenth meeting held in June 2007 and annexed to decision Conf. 14.3. The Guide is intended to be descriptive of current procedures and not prescriptive (i.e., it is not intended to establish a new compliance system) and it is not legally-binding. The provisions in the Guidelines include an objective and scope, general principles, a description of various CITES bodies and their compliance-related tasks, a description of the handling of specific compliance matters and a section on reporting and reviews.

22. The section on the handling of specific compliance matters is divided into three sub-sections on the identification of potential compliance matters, consideration of compliance matters, and measures to achieve compliance. Following the identification of potential compliance matters, "[i]f the Party fails to take sufficient remedial action within a reasonable time limit, the compliance matter is brought to the attention of the Standing Committee by the Secretariat, in direct contact with the Party concerned." 22/ The Standing Committee may gather further information on a compliance matter and, if a compliance matter has not been resolved, the Standing Committee is to decide to take one or more measures from a list of measures. The list includes providing advice, information and appropriate facilitation of assistance and other capacity-building support; requesting special reporting from the Party concerned; issuing a written caution; requesting a response and offering assistance; recommending specific capacity-building actions; providing in-country assistance, technical assessment and a verification mission, upon the invitation of the Party concerned; sending a public notification of a compliance matter through the Secretariat to all Parties advising that compliance matters have been brought to the attention of a Party and that, up to that time, there has been no satisfactory response or action; issuing a warning; and requesting the Party concerned to submit a compliance action plan to the Standing Committee. 23/

23. The sub-section on measures to achieve compliance also includes a description of the circumstances under which the Standing Committee may decide to recommend the suspension of commercial or all trade in specimens of one or more CITES-listed species:

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

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

20/ *Ibid.* at 261-262.

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

22/ "Guide to CITES compliance procedures" being the Annex to decision Conf. 14.3 at para. 21.

23/ *Ibid.* at para. 29.

compliance or a State not a Party is not issuing the documentation referred to in Article X of the Convention. Such a recommendation is always specifically and explicitly based on the Convention and on any applicable Resolutions and Decisions of the Conference of the Parties" 24/

24. Paragraph 31 indicates that the list of measures is not necessarily an exhaustive list of measures applied to date. There is also a list of factors for the Standing Committee to take into account when deciding on measures to achieve compliance (the capacity of the Party concerned; the cause, type, degree and frequency of the compliance matters; the appropriateness of the measures to ensure they are commensurate with the gravity of the compliance matter; and the possible impact on conservation and sustainable use with a view to avoiding negative results).

25. The final sub-section addresses monitoring and implementation of measures to achieve compliance. The Standing Committee, with the assistance of the Secretariat, is to monitor the actions taken by the Party concerned to implement the measures taken. The Standing Committee may request progress reports from the Party concerned and arrange for an in-country technical assessment and verification mission, upon the invitation of the Party concerned. Also, in light of progress, the Standing Committee decides whether to adjust the measures it has taken or to take other measures. 25/

26. According to paragraph 34 and as described above, existing recommendations to suspend trade are generally reviewed at each meeting of the Standing Committee and are monitored by the Secretariat. A recommendation to suspend trade is withdrawn as soon as the compliance matter has been resolved or sufficient progress has been made. The Secretariat notifies Parties of any such withdrawal as soon as possible.

27. Finally, the general guidelines on monitoring and implementation of measures to achieve compliance are sometimes supplemented by more precise provisions regarding specific categories of compliance matters. 26/

C. 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution / 1995 Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean ("Barcelona Convention")

28. In Barcelona in February 1976, the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region on the Protection of the Mediterranean Sea adopted the Convention for the Protection of the Mediterranean Sea against Pollution. The Convention entered into force in February 1978 and the 21 countries plus the European Union that participate in the Mediterranean Action Plan (MAP) are party to the Convention. The Convention includes Article 21 on "Compliance Control" by which the Parties agree to cooperate in developing "procedures enabling them to control the application of this Convention and the Protocols."

29. The Convention was revised in Barcelona in June 1995 and re-named the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean. The amended text entered into force on 9 July 2004. Article 27 of the revised Convention now speaks to "Compliance Control". It requires the meetings of the Contracting Parties, on the basis of periodic reports required under Article 26 and any other reports submitted by Parties, to assess compliance with the Barcelona Convention and its Protocols as well as the measures and recommendations. The Meeting of the Parties is

24/ *Ibid.* at para. 30.

25/ *Ibid.* at para. 33.

26/ *Ibid.* at para. 35.

to recommend, where appropriate, the necessary steps to bring about full compliance and promote the implementation of the decisions and recommendations.

30. To this end, the 13th Ordinary Meeting of the Contracting Parties to the Barcelona Convention recommended the establishment of a Working Group of legal and technical experts to devise a platform for the purpose of promoting the implementation of and compliance with the Convention. The Working Group is developing a compliance mechanism which may be adopted by the 15th Meeting of the Contracting Parties to be held in January 2008. The Working Group has met four times to date although the discussion below is based on the draft text for a compliance mechanism as it stood after the third meeting of the Working Group. 27/

31. The draft text for a compliance mechanism establishes a Compliance Committee whose role is to consider, *inter alia*, "at the request of the meeting of the Contracting Parties, general compliance issues, such as recurrent non-compliance problems, including in relation to reporting, taking into account the reports referred to in Article 26 of the Convention and any other report submitted by the Parties". 28/

32. Paragraph 34 of the draft text sets out the measures that the Committee may take to promote compliance and address non-compliance. The Committee must take into account the capacity of the Party concerned to comply, in particular developing countries, as well as factors such as the cause, type, degree and frequency of non-compliance. The measures include providing advice or facilitating assistance; requesting or assisting the Party concerned to develop a compliance action plan; inviting the Party concerned to submit progress reports; and making recommendations to the Meeting of the Contracting Parties on cases of non-compliance if the Committee finds that these cases should be handled by the Meeting. Paragraph 35, in turn, lists the measures that the Meeting of the Contracting Parties may take. The Meeting of the Contracting Parties must also take into account the capacity of the Party concerned, in particular developing countries, to comply as well as the factors listed above. The list of possible measures includes providing advice and facilitating assistance; making recommendations; requesting progress reports; issuing declarations of non-compliance; issuing a caution; and publishing cases of non-compliance.

33. Part VI of the draft text addresses "Review of the procedures and mechanisms" and requires the Meeting of the Contracting Parties to review the effectiveness of the compliance procedures and mechanisms, address repeated cases of non-compliance and take appropriate action.

D. The 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP)

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

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

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

27/ See "Report of the Third Meeting of the Working group on Implementation and Compliance under the Barcelona Convention" (29 December 2006) doc. UNEP(DEPI)/MED WG.300/4. The report of the fourth meeting of the Working Group was not available at the time of writing.

28/ *Ibid.* at para. 21(b) of Annex III.

(c) Preparing reports on compliance with the obligations in a given Protocol. 29/

35. The discussion that established the Committee makes no mention of measures to be taken in repeated cases of non-compliance. That said, the Committee has faced instances of repeated cases of non-compliance (under all three of its functions). For example, the Committee has considered a submission by Norway concerning that country's obligations to reduce emissions under the 1991 Protocol Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes. In 2005, the Committee observed that under Norway's timetable for meeting its national emissions targets, the country would have been in non-compliance for six years, and for seven years in the case of its tropospheric ozone management area. The Committee recommended that the Executive Body adopt a decision wherein it, *inter alia*, remained concerned by the continuing failure of Norway to fulfil its obligations and expressed its disappointment in Norway's inability to shorten the seven years it anticipated it will remain in non-compliance. 30/ The Executive Body duly adopted the recommended decision at its twenty-third session, in December 2005. 31/

36. It has been observed that "the Committee and the Executive Body have used different nuances of language in their reports. For instance, their recommendations "express disappointment", "note with concern", "remain concerned", "urge" or "strongly urge" in order gradually to increase the pressure on Parties in breach. 32/ Beyond using language to increase pressure on Parties in continuous non-compliance, each Party found in breach is called on to report by a specified date on the steps it has taken to achieve compliance, to set out a timetable that specifies the year by which it expects to be in compliance, to list the specific measures taken, or scheduled to be taken, to fulfil its emission-reduction obligations under the Protocol and to set out the projected effects of each of these measures up to and including the year of compliance. The purpose of such requirements is to place pressure on the Parties in question to bring about full compliance as quickly as possible. The Committee has placed a heavy emphasis on the preparing of timetables and on offering practical suggestions to accelerate emission reductions. Each year it has reviewed the steps taken by those parties to which Executive Body decisions have been addressed and, as necessary, made recommendations for follow-up decisions by the Executive Body until the Parties concerned have achieved compliance. 33/

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

E. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to the 1985 Vienna Convention on the Protection of the Ozone Layer ("Montreal Protocol")

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

29/ See decision 1997/2, as amended.

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

31/ Decision 2005/2.

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

33/ *Ibid.* at 46.

39. The proposals to amend the non-compliance procedure that were received as part of its review included a suggestion to empower the Meeting of the Parties to the Montreal Protocol to declare a Party to be a "non-Party" in cases of persistent non-compliance. This proposal was ultimately rejected and, as it stands now, the non-compliance procedure creates a system for receiving and considering submissions on non-compliance and allows the Parties to the Protocol to "decide upon and call for steps to bring about full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objectives." 34/ The Fourth Meeting of the Parties, in 1992, also adopted the "Indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Protocol". 35/ The measures that might be taken are:

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

(b) Issuing cautions;

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

40. The compilation of decisions of individual Parties' non-compliance with the Montreal Protocol (as contained in the sixth edition of the *Handbook on the International Treaties to Protect the Ozone Layer*) illustrates that there have been cases of repeated non-compliance with the Montreal Protocol, e.g. Belize, Cameroon and Ethiopia. Decisions on non-compliance generally note in what manner the Party is in non-compliance with the Protocol and state that, "[to] the degree that the Party is working towards and meeting the specific Protocol control measures, it should continue to be treated in the same manner as a Party in good standing." 36/ These decisions also caution the Party in non-compliance, "in accordance with item B of the indicative list of measures, that, in the event that it fails to remain in compliance, the Parties will consider measures consistent with item C of the indicative list of measures. Those measures may include the possibility of actions available under Article 4, such as ensuring that the supply of (…) the substance that is the subject of non-compliance is ceased so that exporting Parties are not contributing to a continuing situation of non-compliance". 37/

41. An analysis of experience with the non-compliance procedure of the Montreal Protocol discusses compliance by three categories of countries: Article 5 Parties (i.e. developing countries); Parties that are countries with economies in transition (CEIT Parties); and industrialized Parties. The analysis states that up to and including the Sixteenth Meeting of the Parties, in November 2004, while a number of Article 5 Parties were found to be in non-compliance, none were deprived of assistance nor were any steps taken to suspend rights and privileges as provided by item C of the list of indicative measures. 38/

42. Concerning compliance by countries with economies in transition, the Russian Federation and some Parties from Eastern Europe and the former Soviet Union made a statement at the Sixth Meeting of the Parties in 1994 that they would be unable to comply with the control measures on certain

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

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

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

37/ *Ibid.*

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

ozone-depleting substances (ODS) in the prescribed time due to their domestic conditions. As this situation persisted, these countries were, in effect, in a situation of repeated non-compliance with the Protocol. At their Seventh Meeting, in 1995, the Parties adopted a decision recommending international assistance to the Parties in question. They also "allowed" the Russian Federation to export to non-Article 5 Parties of the former Soviet Union that traditionally depended on Russia for all their supply of ozone-depleting substances. This implicitly suspended the right of the Russian Federation to export to other non-Article 5 Parties as also to Article 5 Parties to meet their basic domestic needs as provided in Articles 2A-2F and 2H. 39/

43. Overall, the analysis lists 14 countries with economies in transition Parties that came to notice as being in non-compliance in the period up to and including the Sixteenth Meeting of the Parties, in 2004. According to the former Executive Secretary of the Vienna Convention and its Montreal Protocol, for each Party, "the Implementation Committee pursued its course of obtaining data, identifying actual or potential non-compliance, obtained plans of action and benchmarks to return to compliance and monitored every year their performance in relation to the benchmarks. The Parties recommended assistance by the GEF in each case. They called for explanations when benchmarks were not met." 40/

44. By the Sixteenth Meeting of the Parties, in 2004, all but two of the 14 Parties had returned to compliance with the control measures. One Party, Armenia, had been reclassified as an Article 5 Party and so was no longer bound by the same timeframe for control measures. The other Party, Azerbaijan, was noted for non-compliance. 41/

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

> "[I]n the light of Azerbaijan's recurrent inability to return to compliance with the Protocol in accordance with the decisions of the Meetings of the Parties and the Party's reservations as to its capacity to enforce its newly introduced ban on the import of controlled substances in Annex A, Group I (CFCs), to request exporting Parties to assist Azerbaijan implement its commitment by ceasing export of those controlled substances to that Party, and to further caution Azerbaijan in accordance with item B of the indicative list of measures that, in the event that the Party does not achieve total phase-out of Annex A, Group I, controlled substances (CFC) by 1 January 2006, the Eighteenth Meeting of the Parties shall consider implementation of item C of the indicative measures, which could include action available under Article 4 to cease supply of Annex A, Group I, controlled substances (CFCs) to Azerbaijan." 42/

46. This was the first time that a trade ban was put into effect against a Party to the Montreal Protocol. At its thirty-eighth meeting in June 2007, the Implementation Committee of the Protocol adopted recommendation 38/2 in which it congratulated Azerbaijan on its return to compliance in 2006 with the consumption control measures for Annex A, Group I, controlled substances. 43/ No mention is made of whether the trade ban from decision XVII/26 is rescinded. The Eighteenth Meeting of the Parties was held in October-November 2006 and the Nineteenth Meeting of the Parties was held in September 2007. No further decisions on Azerbaijan were taken and no other trade bans against other Parties were adopted.

39/ *Ibid.* at 35-36.

40/ *Ibid.* at 36.

41/ *Ibid.* at 36.

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

43/ See the report of the Implementation Committee under the Non-compliance Procedure for the Montreal Protocol on the work of its thirty-eighth meeting (22 June 2007) (UNEP/OzL.Pro/ImpCom/38/5 (advance copy), para. 41).

F. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("Basel Convention")

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

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

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

(b) Issuing a cautionary statement and providing advice regarding future compliance in order to help Parties to implement the provisions of the Basel Convention and to promote cooperation between all Parties.

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

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

G. The 1991 Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention")

50. The Convention on Environmental Impact Assessment in a Transboundary Context does not mandate the creation of a compliance mechanism but its Article 11(2) does require the Parties to keep the implementation of the Convention under continuous review and further mandates a number of activities with this purpose in mind. In this light, the Parties at their second Meeting adopted decision II/4 on "Review of Compliance" in which they agreed to establish an Implementation Committee under the Convention. The structure and functions of the Implementation Committee were subsequently amended by decision III/2 adopted during the third Meeting of the Parties. The amended structure and functions of the Implementation Committee do not make reference to measures regarding repeated cases of non-compliance.

51. In May 2004, the Implementation Committee received a submission from Romania expressing concerns about the compliance of the Ukraine under the Convention with respect to the Danube-Black Sea Navigation Route at the border of the two countries. In August 2004, Romania requested the establishment of an inquiry commission under the Convention with respect to the same project. The Implementation Committee, at its sixth meeting in November 2004 noted that under its amended structure and functions, a matter being considered by an inquiry commission cannot also be the subject of a submission to the Implementation Committee. The Committee was therefore not in a position to consider the submission.

52. The Inquiry Commission presented its final report in July 2006. The report included findings that the construction work authorized by the Ukraine on the Navigation Route was likely to have a number of significant adverse transboundary impacts. The Inquiry Commission recommended the organization of a Bilateral Research Programme within the framework of bilateral cooperation under the Espoo Convention. According to a review of the inquiry procedure that was prepared for the tenth meeting of the Convention's Working Group on Environmental Impact Assessment, the opinion of the Inquiry

Commission required Ukraine to send a notification about the canal project to Romania, that there was to be consultation between the Parties, Romania was to be given an opportunity to comment on the project, and public participation in the two countries should be ensured. The final decision about the project should also be sent to Romania. 44/

53. The review of the inquiry procedure states that Ukraine had yet to send a notification. In January of this year, Romania made another submission to the Implementation Committee of the Espoo Convention expressing concerns about Ukraine's compliance with its obligations under the Convention, in light of the construction projects on the Navigation Route and the opinion of the Inquiry Commission. At its eleventh meeting, the Implementation Committee agreed that the January 2007 submission by Romania superseded the country's May 2004 submission and that the latter was considered closed. The Committee also agreed to consider Romania's submission at its twelfth meeting held in June 2007. 45/ The provisional agenda for the 13th meeting of the Implementation Committee, to be held in October-November 2007, includes an item on the submission by Romania and the preparation of draft findings and recommendations in that regard.

54. Finally, it should be noted that at their third meeting in June 2004, the Parties to the Espoo Convention adopted the second amendment to the Convention (decision III/7). Amongst other things, the second amendment will introduce a new Article 14 *bis* on "Review of compliance". Paragraph 1 of the new article requires the Parties to review compliance with the provisions of the Convention "on the basis of the compliance procedure, as a non-adversarial and assistance-oriented procedure adopted by the Meeting of the Parties." The second amendment will enter into force for Parties having ratified, accepted or approved it on the ninetieth day after the receipt by the Depository (the Secretary-General of the United Nations) of notification of ratification, approval or acceptance by at least three-fourths of the Parties (Article 14(4)). To date, the second amendment has been ratified or accepted by seven countries of the 31 required for it to enter into force.

H. The 1993 North American Agreement on Environmental Cooperation (NAAEC)

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

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

44/ "Inquiry Procedure: Review of the first inquiry procedure: Note by the secretariat" prepared for the Working Group on Environmental Impact Assessment of the Convention on Environmental Impact Assessment in a Transboundary Context, doc. ECE/MP.EIA/WG.1/2007/5 (12 March 2007) at para. 12.

45/ "Activities Relating to the Convention Listed in the Workplan (Decision III/9): Compliance with and implementation of the Convention: Report of the eleventh meeting of the Implementation Committee: Note by the secretariat" (12 March 2007), doc. ECE/MP.EIA/WG.1/2007/4 at para. 23. The report of the twelfth meeting was not available at the time of writing.

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

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

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

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

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

I. The 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter ("London Protocol")

60. The 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter was intended to modernize the Convention and eventually to replace it. The Protocol entered into force on 24 March 2006. Article 11.1 of the London Protocol provides that "No later than two years after the entry into force of this Protocol, the Meeting of Contracting Parties shall establish those procedures and mechanisms necessary to assess and promote compliance with this Protocol. Such procedures and mechanisms shall be developed with a view to allowing for the full and open exchange of information, in a constructive manner."

61. Further to this provision, an Ad Hoc Working Group on Reporting and Compliance was established by the Consultative Meeting under the London Convention and worked to draft procedures and mechanisms to implement Article 11 of the London Protocol. The 1st Meeting of Contracting Parties to the London Protocol (held 30 October-3 November 2006) made further progress on the base text developed by the Ad Hoc Working Group for compliance procedures and mechanisms. This base text was sent back to the Ad Hoc Working Group which met on 1 and 2 November 2007 just prior to the 2nd Meeting of Contracting Parties to the London Protocol.

62. The base text as forwarded to the November 2007 meeting included section 5 on 'Measures'. Paragraph 5.1 included a list of measures that the Compliance Group created under the mechanism could recommend be taken by the Meeting of Contracting Parties after considering or assessing an issue regarding a Party's possible non-compliance and taking into account the capacity of the Party concerned and factors such as the cause, type, degree and frequency of any non-compliance.46/ The list of measures includes the provision of advice and recommendations; the facilitation of cooperation and assistance; the elaboration, with the cooperation of the Party or Parties concerned, of compliance action plans, including targets and timelines; and the issuing of a formal statement of concern regarding a Party's compliance. Furthermore, in paragraph 5.3, the base text provided that:

> The Meeting of Contracting Parties shall make the final decision regarding any measures to be taken in response to a Party's non-compliance. [On the basis of the recommendation by the Compliance Group,] the Meeting of Contracting Parties may also consider additional more stringent measures in accordance with applicable international law [and Article 60 of the Vienna Convention on the Law of Treaties.]

63. The compliance procedures and mechanisms were finalized and adopted during the November 2007 meeting of the Ad Hoc Working Group on Reporting and Compliance and the subsequent 2nd Meeting of Contracting Parties to the London Protocol. The list of measures from paragraph 5.1 as outlined above was retained. Paragraph 5.3 became paragraph 5.4 and reads in its final form: "The Meeting of Contracting Parties shall make the decision regarding any measures proposed by the Compliance Group to be taken in response to a Party's possible non-compliance. The Meeting of Contracting Parties may also consider additional measures within its mandate, as appropriate, to facilitate compliance by the Party concerned."

J. The 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change ("Kyoto Protocol")

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

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

66. From section XV, the consequences to be applied by the enforcement branch depend upon which parts of the Protocol a Party is not complying with. In paragraph 1, where the enforcement branch has determined that a Party is not in compliance with Article 5(1) or (2), or Article 7(1) or (4) of the Protocol, it shall apply two consequences, taking into account the cause, type, degree and frequency of the non-

46/ "Compliance Issues: Development of Compliance Procedures and Mechanisms under Article 11: Amended base text: Note by the Secretariat", second meeting of Contracting Parties to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, 5-9 November 2007, doc. LC 29/5 at para. 5.1 of Annex 1.

compliance of the Party. These two consequences are a declaration of non-compliance and the development of a plan in accordance with paragraphs 2 and 3 of the section. Other consequences relating to other parts of the Protocol include the suspension of the eligibility of a Party to participate in the Clean Development Mechanism and emissions trading, the deduction of tonnes from the Party's assigned emissions in the second commitment period, and the development of a compliance action plan.

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

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

68. The third meeting of the Conference of the Parties was held in October 2006. The Parties made progress in reaching consensus on the procedures and institutional mechanisms for determining non-compliance but some text still remains in square brackets. As it stands now, the draft text of the procedures and mechanisms on compliance with the Rotterdam Convention includes a facilitation procedure to help a Party with compliance concerns. 47/ Paragraph 19 goes further and provides possible measures to address compliance issues. It would allow the Compliance Committee to recommend to the Conference of the Parties that measures be taken to achieve compliance but only after the Committee has undertaken the facilitation procedure and has taken "into account the cause, type, degree and frequency of compliance difficulties, including financial and technical capacities of the Parties whose compliance is in question". The list of possible measures that could be recommended includes facilitation, access to financial resources, technical assistance and capacity-building; the provision of advice regarding future compliance; issuing a statement of concern regarding possible future or current non-compliance; and requesting the Executive Secretary to make public cases of non-compliance. The text of two further possible measures includes square brackets. They currently read:

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

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

70. The next Conference of the Parties to the Rotterdam Convention is scheduled to take place in October 2008.

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

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

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

72. The Compliance Committee of the Aarhus Convention has addressed a number of submissions regarding the compliance of specific countries with the Convention. 48/ In 2004, both Romania and a Ukrainian non-governmental organization made submissions to the Committee regarding public participation in the decision-making associated with the work on the Danube-Black Sea Navigation Route. As a result, the second meeting of the Parties to the Aarhus Convention adopted decision II/5b which, *inter alia*, finds that the Ukraine was not in compliance with the Convention.

73. At the thirteenth meeting of the Compliance Committee in October 2006, the Ukraine presented draft elements of a strategy pursuant to paragraph 3 of decision II/5b and expressed its intent of finalizing the strategy and submitting it to the Compliance Committee by the end of 2006. At its fourteenth meeting held in December 2006, the Compliance Committee was informed that no further information had been received from Ukraine regarding its implementation strategy for decision II/5b. The Government of Ukraine had earlier requested to delay the submission of the strategy until the end of 2006. The Government of Romania informed the Committee of a recent bilateral meeting between Romanian and Ukrainian authorities during which the latter had indicated that work on the canal had resumed and would be finished by February 2007. The Government of Romania was of the opinion that the Ukraine "had failed to demonstrate that it intended to act on the findings of the Espoo Convention Inquiry Commission" and that Romania was not aware of any public consultations having been carried out, as had been recommended by the Compliance Committee of the Aarhus Convention, in connection with the preparation of Ukraine's strategy for the implementation of decision II/5b. 49/

74. At the fifteenth meeting of the Compliance Committee in March 2007, the Committee "noted with regret that the Government of Ukraine had not provided the strategy for implementing the

48/ For further information on the compliance mechanism of the Aarhus Convention see, Veit Koester, "Compliance Review under the Aarhus Convention: A Rather Unique Compliance Mechanism" (2005) 2 Journal for European Environment and Planning Law, pp. 31-44; Veit Koester, "The Compliance Committee of the Aarhus Convention: An Overview of Procedures and Jurisprudence" (2006) 37 Environmental Policy and Law, issue 2-3, pp. 83-95; Veit Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Geir Ulfstein *et al.* (eds.) *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge: Cambridge University Press, 2007) pp. 179-217.

49/ Report of the fourteenth meeting of the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1 February 2007) (ECE/MP.PP/C.1/2006/8, para. 21).

Convention requested by the Meeting of the Parties through decision II/5b". 50/ The sixteenth meeting of the Compliance Committee was held in June 2007 but this issue does not appear to have been discussed. The seventeenth meeting of the Compliance Committee was held in September 2007 but the report of the meeting was not available at the time of writing.

75. The Compliance Committee frequently includes an item on "follow-up on specific cases of non-compliance" as part of its agenda. On this item, at its sixteenth meeting, the Committee "requested the secretariat to analyse the outstanding issues contained in the findings and recommendations adopted by the Committee since the second meeting of the Parties and where appropriate, to send reminders to the concerned Parties inviting them to submit their progress reports on time." 51/

76. At an extra-ordinary meeting of the Parties to the Aarhus Convention in May 2003, the Parties adopted the *Protocol on Pollutant Release and Transfer Registers* ("Kiev Protocol") as a Protocol to the Aarhus Convention. The Kiev Protocol includes Article 22 on 'Review of compliance' wherein the Meeting of the Parties to the Protocol is required at its first session to "establish cooperative procedures and institutional arrangements of a non-judicial, non-adversarial and consultative nature to assess and promote compliance with the provisions of this Protocol and to address cases of non-compliance." To this end, while the Protocol has not yet entered into force (as of 27 November 2007, it has five instruments of ratification, acceptance, approval or accession of the sixteen required for entry into force), a Working Group of the Protocol has begun preparing for the Protocol's entry into force and the first session of its Meeting of the Parties including by drafting a decision on review of compliance.

77. The Working Group of the Protocol held its fifth meeting from 22 to 24 October 2007 and its agenda included an item on a draft decision on a compliance mechanism. The text of the draft decision as it stood before the October 2007 meeting included an annex with the structure and functions of the Compliance Committee and procedures for the review of compliance. 52/ The annex, in turn, contained section XII on 'Measures to promote compliance and address cases of non-compliance'. Paragraph 40 included a list of measures that the Compliance Committee established under the decision could decide to take. The list of measures included providing advice and facilitating assistance to the Party concerned; requesting or assisting the Party concerned to develop an action plan to achieve compliance with the Protocol within a specific time frame; requesting the Party concerned to submit progress reports on its efforts to comply; requesting the Party concerned to appear before the Meeting of the Parties and make a presentation concerning the matter raised; and making recommendations to the Party concerned on specific measures to address the matter raised. 53/

78. Paragraph 41 of the draft decision would allow the Meeting of the Parties to the Kiev Protocol, upon consideration of the report and any recommendations of the Compliance Committee, "depending on the particular question before it and taking into account the cause, type, degree, duration and frequency of the non-compliance," to decide upon one or more of a list of measures. The measures include those listed in paragraph 40; recommending to Parties to provide or the Meeting of the Parties itself facilitating financial and technical assistance, training and other capacity-building measures; issuing declarations of non-compliance; issuing cautions; giving special publicity to cases of non-compliance; suspending, in

50/ "Report of the Fifteenth Meeting of the Compliance Committee" of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (15 May 2007), doc. ECE/MP.PP/C.1/2007/2 at para. 24.

51/ "Report of the Compliance Committee on its Sixteenth Meeting" of the Convention on Access to Information Public Participation in Decision-Making and Access to Justice in Environmental Matters (31 July 2007), doc. ECE/MP.PP/C.1/2007/4 at para. 25.

52/ The report of the fifth meeting of the Working Group of the Protocol was not available at the time of writing.

53/ "Draft Decision on Review of Compliance: Draft decision prepared by the Contact Group for the Compliance Mechanism and Rules of Procedure", 5th meeting of the Working Group on Pollutant Release and Transfer Registers, 22-24 October 20007, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, doc. ECE/MP.PP/AC.1/2007/L.10.

accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Protocol; or taking other such non-confrontational, non-judicial and consultative measures as may be appropriate.

M. The 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("Protocol on Water and Health")

79. In June 1999, Parties to the United Nations Economic Commission for Europe's Convention on the Protection and Use of Transboundary Watercourses and International Lakes adopted a Protocol on Water and Health. Article 15 of the Protocol covers "Review of Compliance". It requires the Parties to review the compliance of the Parties with the provisions of the Protocol on the basis of the reviews and assessments of progress referred to in Article 7. Article 15 also requires the Parties, at their first meeting, to establish "[m]ultilateral arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance" and these arrangements are to allow for appropriate public involvement.

80. Accordingly, at their first meeting in January 2007, the Parties to the Protocol adopted decision I/2 on "Review of Compliance". The decision creates a Compliance Committee for the Protocol and the annex to the decision contains the compliance procedure. The procedure includes a section on measures to promote compliance and address cases of non-compliance, including measures that may be taken by the Compliance Committee and/or by the Meeting of the Parties.

81. Paragraph 34 contains the list of measures that the Committee may decide to take to promote compliance and address cases of non-compliance. This includes providing advice and facilitating assistance to individual Parties; requesting or assisting the Party concerned to develop an action plan to achieve compliance; inviting the Party concerned to submit progress reports; and issuing cautions. After considering the report and any recommendations of the Committee, depending on the particular question before it and taking into account the cause, type, degree and frequency of non-compliance, the Meeting of the Parties may also decide to take measures. The list of measures includes those from paragraph 34 as well as recommending to Parties to provide assistance and capacity-building; itself facilitating and providing assistance and capacity-building; issuing declarations of non-compliance; publicising cases of non-compliance; suspending, "in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Protocol"; or taking other non-confrontational, non-judicial and consultative measures as may be appropriate. 54/

82. The compliance procedure will be reviewed at the third meeting of the Parties to the Protocol, with special regard to the provisions on communications from the public and on the basis of the experience gained by the Compliance Committee. 55/

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

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

> "[C]onsider and approve cooperative and effective procedures and operational mechanisms to promote compliance with the provisions of this Treaty and to address issues of non-compliance. These procedures and mechanisms shall include monitoring, and offering advice or assistance, including legal advice or legal assistance, when needed, in particular to developing countries and countries with economies in transition."

54/ Para. 35 of the Annex to dec. I/2.

55/ Dec. I/2 at para. 4.

84. To this end, an Open-Ended Working Group on the Rules of Procedure and the Financial Rules of the Governing Body, Compliance and the Funding Strategy was established. The Working Group developed a set of "Draft Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance" which was considered by the Governing Body at its first meeting in June 2006. The Governing Body adopted a resolution on compliance (resolution 3/2006) in which it established a Compliance Committee which will commence its work "following the approval of cooperative and effective procedures and operational mechanisms on compliance". 56/ The Governing Body also decided "to consider and approve procedures and operational mechanisms on compliance at its second session, on the basis of the draft procedures and operational mechanisms to promote compliance and address issues of non-compliance, which are contained in Appendix I to this Report, and the submissions made by Parties and observers". 57/ It was also decided that compliance will be included in the agenda of the Governing Body.

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

86. The second meeting of the Governing Body was held from 29 October to 2 November 2007. There were no substantive discussions on compliance during the meeting but the Governing Body did adopt a resolution on compliance in which the Governing Body, *inter alia*, decided to consider and approve procedures and operation mechanisms to promote compliance and address issues of non-compliance at its third meeting on the basis of the text contained in Appendix I to the report from its first meeting and submissions made by Parties and observers. The third meeting of the Governing Body is tentatively scheduled for the first quarter of 2009.

O. The 2001 Stockholm Convention on Persistent Organic Pollutants ("Stockholm Convention")

87. Article 17 of the Stockholm Convention on Persistent Organic Pollutants requires the Conference of the Parties to, "as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance". At their first Conference, the Parties agreed to convene an open-ended ad hoc working group on non-compliance, which met immediately prior to the second meeting of the Conference of the Parties, in May 2006. The Working Group considered a compilation of views and proposals on a non-compliance mechanism under the Convention. The Working Group made progress in its deliberations but nothing was concluded. The Parties thus decided at their second Conference to convene a second meeting of the Working Group immediately prior to the third Conference of the Parties to be held in April 2007 (decision SC-2/14). The Working Group duly met in April 2007 prior to the third Conference of the Parties and made significant progress on the draft text on proposed non-compliance procedures. A contact group also met during the Conference of the Parties and made further progress although some text remained in square brackets. The Parties adopted decision SC-3/20 on "Non-compliance" in which they decided to negotiate further and consider for adoption at their fourth meeting the procedures and institutional mechanisms required under Article 17 of the Convention. The draft text annexed to the decision will be the basis for the further work, bearing in mind the proposal of the Chair of the contact group which is contained in the appendix to the draft text. The fourth Conference of the Parties is scheduled to take place in May 2009.

56/ Resolution 3/2006 at para. 1.

57/ *Ibid.* at para. 2.

88. As it stands now, bracketed text in the section on the objective, nature and underlying principles to the compliance procedure states, *inter alia*, that all obligations under the Convention are subject to the non-compliance procedures and mechanisms. 58/ The non-compliance procedure is to take into account the special needs of developing country Parties and Parties with economies in transition and the specific characteristics of the Convention, such as Articles 12, 13 and 7. Additional text in square brackets would also have the non-compliance procedure take into account all principles of the Convention.

89. Paragraph 26 of the draft text provides for a facilitation procedure that may be taken by the Compliance Committee. By this procedure, the Committee is first to consider submissions made to it and, after consultation with the Party whose compliance is in question, the Committee may take a number measures. This can include providing advice; issuing non-binding recommendations; facilitating technical and financial assistance; requesting the Party concerned to develop a voluntary compliance action plan; and providing assistance, upon request, in the review of the action plan. Where the Committee has requested the development of a voluntary compliance action plan, the Committee may also report to the Conference of the Parties on efforts made by the Party concerned to return to compliance and the Committee should maintain the case as an item on its agenda until the matter is adequately resolved.

90. The draft text also provides for the possibility of the Conference of the Parties to take action:

> "If, after undertaking the facilitation procedure set forth in paragraph 26 above and taking into account the cause, type, degree, duration and frequency of compliance difficulties, including the financial and technical capacities of a Party whose compliance is in question and the extent to which financial or technical assistance has been previously provided, the Committee considers it necessary to pursue further action to address a Party's compliance problems, it may recommend to the Conference of the Parties that it consider one or more of the following actions [, to be taken in accordance with international law]". 59/

The actions listed in paragraph 27 include providing further support for the Party concerned and providing advice regarding future compliance in order to help Parties implement the Convention and avoid non-compliance. Other actions are also included in square brackets in sub-paragraphs (c) to (e) of paragraph 27. These are: issuing a statement of concern regarding current non-compliance; requesting the Executive Secretary to make public cases of non-compliance; and "In case of repeated or persistent non-compliance, [as a last resort,] suspending rights and privileges under the Convention, in particular rights under Articles 3, 4, 12 and 13 of the Convention [undertaking any final action that may be required to achieve the objectives of the Convention;]]". 60/ A final sub-paragraph (f) states that one of the actions that may be recommended is that the "Conference of the Parties considers and undertakes any additional action that may be required for the achievement of the objectives of the Convention under Article 19(5)(d)." The section concludes with text in square brackets addressing the particular situation of a developing country found to be non-compliance because of a lack of technical and financial assistance, in which case the sub-paragraphs 27 (c)-(f) are not to apply.

91. The draft text also includes a provision on monitoring. It states that the Committee should monitor the consequences of action taken in pursuance of the Committee's facilitation procedure and by the Conference of the Parties, including efforts made by the Party concerned to return to compliance; maintain the case on its agenda until the matter is adequately resolved; and report on it to the Conference of the Parties. 61/ It should be noted that the entire draft text on compliance as contained in the annex to decision SC-3/20 is within square brackets.

58/ Para. 4 of the Annex to dec. SC-3/20.

59/ Para. 27 of the Annex to dec. SC-3/20, square brackets in original.

60/ Square brackets in original.

61/ Para. 29 of the Annex to dec. SC-3/20.

92. The Chair's proposal contained in an appendix to the decision and which is to be borne in mind during the future work on compliance also includes provisions related to repeated cases of non-compliance. The Chair's proposal also provides for possible action to be taken by the Conference of the Parties following the facilitation procedure undertaken by the Compliance Committee. The Chair's proposal would see the deletion of some of the actions that the Compliance Committee can recommend to the consideration of the Conference of the Parties, namely the making public of cases of non-compliance and the action specifically addressed to repeated cases of non-compliance as quoted above. The Chair's proposal would also delete the exemption for developing countries from certain possible actions.

III. INDICATIVE LIST OF MEASURES THAT MAY BE TAKEN IN CASES OF REPEATED NON-COMPLIANCE

93. From its discussion and review of this matter, the Compliance Committee noted that no case of non-compliance had been brought to its attention since it officially began its functions and it might, therefore, be helpful to consider the question of cases of repeated non-compliance in that context.

94. When deciding on measures to take with a view to promoting compliance and addressing cases of non-compliance, the Compliance Committee and the Conference of the Parties serving as the meeting of the Parties to the Protocol are already authorized to take into account the capacity of the Party concerned to comply and such factors as cause, type, degree and frequency of non-compliance (section VI, paragraphs 1 and 2 of the annex to decision BS-I/7). The Compliance Committee and the Conference of the Parties serving as the meeting of the Parties to the Protocol are also already authorized to take a number of the measures that are also included in some of the compliance mechanisms outlined in section II of this document. The implication, therefore, is that the measures to be taken in cases of repeated non-compliance under the Protocol would go beyond those already contained in paragraphs 1 and 2 of section VI of the annex to decision BS-I/7, although this is not necessarily the case.

95. Based on the review in section II of this document, it is possible to identify the following measures that are available or may be available 62/ to other compliance mechanisms that go beyond those in paragraphs 1 and 2 of section VI of the annex to decision BS-I/7:

(a) Providing in-country assistance, technical assessment and a verification mission, upon the invitation of the Party concerned (see, e.g., the IWC, CITES);

(b) Calling for explanations when the timeframe in a compliance action plan is not met (see, e.g., the Montreal Protocol);

(c) Issuing a statement of concern regarding the non-compliance of the Party concerned (see, e.g., the Rotterdam Convention, the Stockholm Convention);

(d) Issuing a warning (see, e.g., CITES);

(e) Issuing a declaration of non-compliance (see, e.g., the Barcelona Convention, the Kyoto Protocol, the Aarhus Convention, the Protocol on Water and Health);

(f) Sending a public notification of a compliance matter through the Secretariat to all Parties advising that compliance matters have been brought to the attention of a Party and that, up to that time, there has been no satisfactory response or action (see, e.g., CITES);

62/ This refers to those compliance procedures and mechanisms cited in the list below that are at a draft stage, i.e. those under the IWC, the Rotterdam Convention, the Stockholm Convention, the Barcelona Convention.

(g) Suspension of specific rights and privileges (see., e.g., the IWC, CITES, the Montreal Protocol, the Aarhus Convention, and the Protocol on Water and Health), e.g. restriction of the right of the Party concerned to vote at the meeting of the governing body, ineligibility of the Party concerned to serve as a member of the Bureau, loss of the right of the Party concerned to receive documents for meetings;

(h) Financial penalties (see, e.g., the IWC, CITES, the Montreal Protocol, the NAAEC, and the Kyoto Protocol), e.g. ineligibility of the Party concerned to receiving funding for its participation in meetings under the agreement; ineligibility of the Party concerned to receive other financial assistance from the agreement, including transfer of technology;

(i) Trade restrictions (see, e.g., the IWC, CITES, the Montreal Protocol);

(j) Considering and undertaking any additional action that may be required for the achievement of the objective of the agreement (see, e.g., the Stockholm Convention); or

(k) Considering additional measures within the mandate of the governing body of the agreement to facilitate compliance of the Party concerned (see, e.g., the Protocol to the London Convention).
