

1. Introduction

1. At its 4th meeting, held on 5 and 6 July 2011, the Compliance Committee had before it a proposal by its Chair with the objective of introducing a new article into the Barcelona Convention concerning the role and operation of the Compliance Committee. The meeting requested the Secretariat to prepare a working document on the proposal to be considered at the Committee's 5th meeting.

2. Legal background

2. The Barcelona Convention only devotes one Article to the issue of compliance, namely, Article 27, entitled "Compliance Control".

The meetings of the Contracting Parties shall, on the basis of periodical reports referred to in Article 26 and any other report submitted by the Contracting Parties, assess the compliance with the Convention and the Protocols as well as the measures and recommendations. They shall recommend, when appropriate, the necessary steps to bring about full compliance with the Convention and the Protocols and promote the implementation of the decisions and recommendations.

3. This Article is the result of an amendment adopted in 1995 modifying the former Article 21 of the Barcelona Convention adopted in 1976, which briefly provided that "The Contracting Parties undertake to co-operate in the development of procedures enabling them to control the application of this Convention and the Protocols."

4. The new wording of Article 27 sets out two clear principles: on the one hand, it establishes a direct link between compliance and the obligation incumbent on the Contracting Parties to submit regular reports in line with Article 26 of the Convention and, on the other, it recognizes that the Meeting of the Contracting Parties has full competence to define the measures required to ensure that there is proper compliance with the Convention and the Protocols. In this respect, Article 27 constitutes a framework provision laying down the basic principles but leaving the task of providing the operational content to the Meeting of Contracting Parties.

5. This is common practice in conventions. Almost all multilateral environmental agreements contain such a general provision concerning compliance, entrusting the Meeting of the Contracting Parties with responsibility for defining the content.¹ These various agreements, like the Barcelona Convention, are framework agreements, with decisions of Meeting of the Contracting Parties defining the compliance procedures applicable.

3. Amendment procedure in the Barcelona Convention framework

6. The procedure for amending the provisions of the Barcelona Convention is defined in Article 22 thereof, which sets out a detailed and lengthy procedure with precise steps to be followed. Only Contracting Parties may propose amendments, which are adopted at a diplomatic conference convened by the Secretariat at the request of two thirds of the Contracting Parties. A three-quarters majority of the Contracting Parties to the Convention and represented at the diplomatic conference is required for adoption of an amendment.

¹ Cf. in particular: **Article 8 of the Montreal Protocol** on ozone-depleting substances (1989); **Article 18 of the Kyoto Protocol** on climate change (1997); **Article 17 of the Stockholm Convention** on persistent organic pollutants (2001); **Article 17 of the Rotterdam Convention** on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade (2005); **Article 34 of the Cartagena Protocol** on biosafety (2003); **Article 30 of the Nagoya Protocol** on access and benefit-sharing (2010).

Adoption alone does not suffice, however, because for a draft amendment to become definitively valid, the Depositary must transmit it to all the Contracting Parties to the Convention for acceptance.

7. Lastly, an amendment only enters into force the 30th day after the Depositary has received written notification of its acceptance by at least three-quarters of the Contracting Parties. The amendment procedure under the Barcelona Convention, as set out in the aforementioned Article 22, is therefore time-consuming and subject to strict rules, particularly concerning observance of the time limits for the procedure.

4. Background to the proposed amendment to include the Compliance Committee in the Barcelona Convention

8. The Compliance Committee was created by Decision IG.17/2, adopted by the 15th Meeting of the Contracting Parties in 2008. Pursuant to Articles 18 and 27 of the Barcelona Convention, this Decision defines the procedures and mechanisms for compliance that govern the Committee's activities. This Decision has been supplemented by Decision IG.19/1 containing the Committee's Rules of Procedure.

9. In this institutional mechanism, the main issue is to determine what might be the added value of specific recognition of the Compliance Committee in the body of the Barcelona Convention. The main advantage of this proposal would unquestionably be to place the Compliance Committee on the same level as other bodies of the Convention such as the Bureau, which is itself governed by a specific Article in the Convention (Article 19). The adoption of such an amendment would undoubtedly reaffirm the importance of the Compliance Committee's role in the Barcelona institutional system by making it more visible and giving increased authority vis-à-vis the Contracting Parties.

10. Two options can be envisaged for the text of the amendment:

- The first would be to include a new article in the Barcelona Convention entitled "Compliance Committee". This could be very brief and worded as follows:

Article XX: Compliance Committee

1. Without prejudice to the provisions of Article 27, a Compliance Committee shall be entrusted with responsibility for assessing the compliance of Contracting Parties with their obligations under the Convention and its Protocols.
2. The functions of the Compliance Committee and the terms and conditions for its operation shall be defined by the Meeting of the Contracting Parties.

Paragraph 1 of this article deals with the formal recognition of the Compliance Committee, while at the same time still giving the Meeting of the Contracting Parties the relevant prerogatives provided by Article 27. Paragraph 2 lays down the principle that the terms and conditions for the Committee's operation are defined by the Meeting of the Contracting Parties and implicitly refers back to the aforementioned Decisions IG.17/2 and IG.19/1 adopted in 2008 and 2009, respectively.

- The second option would be to link the amendment to Article 27 of the Barcelona Convention, which could be amended as follows:

Article 27: Compliance Control

1. Without prejudice to Article 18, on the basis of the periodical reports submitted by the Contracting Parties pursuant to Article 26 of the Convention, the Compliance Committee shall assess compliance by the Contracting Parties with the Convention and its Protocols.
2. The composition, functions and terms and conditions for the operation of the Compliance Committee shall be defined by the Meeting of the Contracting Parties.

11. The second option has the undoubted advantage of consistency, clarity and, consequently, legibility because it summarizes in a single article of the Convention the basic principles concerning compliance. Paragraph 1 lays down the principle that, subject to the prerogatives belonging to the Meeting of the Contracting Parties under Article 18 with regard to reporting, it is the Committee's responsibility to carry out this assessment of compliance by Contracting Parties with their obligations under the Convention and its Protocols. Paragraph 2 of the article makes the definition of the composition, functions and terms of operation of the Committee subject to decisions by the Meeting of the Contracting Parties. In this respect, this article constitutes a judicious balance between the overall role of assessing compliance incumbent upon the Committee and the precise terms under which this role is fulfilled, which are governed by Decisions IG.17/2 and IG.19.1.

5. Feasibility of the proposed amendment

12. The considerations above show clearly the legal feasibility of the proposed amendment to introduce the Compliance Committee into the body of the Barcelona Convention. Nevertheless, this proposal needs to be considered in the light of the practice for amending the Barcelona Convention, on the one hand, and the Compliance Committee's activities, on the other.

13. Since it came into force in 1976, the Barcelona Convention has only been amended once, in 1995. On that occasion, no less than 20 Articles in the original Convention were amended, making it a full-scale clean-up of the text as a whole. These various amendments to the text of the Convention were necessary and justified at the time, notably the references to the progress in environmental law that followed the United Nations Convention on the Law of the Sea (1982) but, above all, the United Nations Conference on Environment and Development held in Rio in 1992. The proposed amendment, although it only concerns one article of the Convention, can easily be envisaged simply from the legal point of view, even if in terms of the appropriate juncture the complexity of the amendment procedure to be followed pursuant to Article 22 of the Convention should not be under-estimated.

14. The compliance mechanism in the Barcelona Convention and its Protocols, as set out in Decisions IG.17/2 and IG.19/1, is a recent mechanism that has not yet proved its worth. Many Contracting Parties still only have a limited view as yet of the role the Compliance Committee will be called on to play in the future in implementation of the Convention and its Protocols. They may consider this proposed amendment to be premature and that the Committee should be given the time to find its feet. To date, no case of non-compliance has been brought before the Committee and for many Contracting Parties, as for the Secretariat, it is too early to make an assessment of the Committee's action and so decide whether the compliance procedures and mechanisms adopted by Decision IG.17/2 are effective and fully operational. On the other hand, after the Committee's apprenticeship has ended, it will be up to the Meeting of the Contracting Parties, pursuant to paragraph 35 of the Procedures and mechanisms, to examine the

implementation and effectiveness of the compliance mechanism and to take the appropriate measures on the basis of the recommendations in the Compliance Committee's report.

6. Prospects for implementation of the proposed amendment

15. With a view to letting this proposed amendment "mature" and to facilitating broader acceptance of this proposal by the Contracting Parties in the long term, it would be in the Compliance Committee's interest to include this proposal in general consideration of ways of improving its terms of operation. Such consideration could be based on the following outline:

1. In the biennial report to the 17th Meeting of the Contracting Parties, the Chair of the Compliance Committee could refer to paragraph 35 of the Procedures and mechanisms on compliance in order to draw the attention of the Meeting of the Contracting Parties to the need to review the operation of these procedures and mechanisms.

In the proposals in the report, the Chair of the Compliance Committee could request that the Compliance Committee be entrusted by the Meeting of the Contracting Parties with conducting a review of the implementation and effectiveness of the Procedures and mechanisms on compliance with a view to proposing appropriate measures to improve their operation and, at the same time, strengthening the Committee's role within the Barcelona institutional system. This general review of the operation of the compliance mechanism would be the subject of a Compliance Committee working document to be submitted for consideration and follow-up to the 18th Meeting of the Contracting Parties.

2. In the report to the 18th Meeting of the Contracting Parties, the Chair of the Compliance Committee could, at the same time, broaden the review to include certain terms of operation defined in the Committee's Rules of Procedure and propose amendments thereto in accordance with the terms of reference given to it by Decision IG.19/1 adopted by the 16th Meeting of the Contracting Parties.

This two-stage process is intended to be both pragmatic and educational. It has the dual advantage of preventing the discussion from focalizing only on the proposed amendment to the Barcelona Convention, for the reasons explained above, and, in addition, of facilitating a better understanding by all Contracting Parties of the need to make progress with the functioning of the compliance mechanism in order to reinforce the Committee's means of action and its position in the Barcelona Convention framework.