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MEDITERRANEAN ACTION PLAN

Second Meeting of the Working Group on Implementation
and Compliance under the Barcelona Convention

Athens (Greece), 11-12 April 2005

**REPORT OF THE SECOND MEETING OF THE WORKING GROUP
ON IMPLEMENTATION AND COMPLIANCE
UNDER THE BARCELONA CONVENTION**

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Introduction

1. At their 13th Ordinary Meeting (Catania, Italy, 11-14 November 2003), the Contracting Parties to the Barcelona Convention recommended the establishment of a Working Group, composed of legal and technical experts, entrusted with devising a platform for the purpose of promoting the implementation of and compliance with the Barcelona Convention.
2. The Working Group held its first meeting in Athens on 8 and 9 November 2004 and agreed to meet again in Spring 2005 in order to pursue the elaboration of the main elements for a possible compliance mechanism and to take note of the preliminary report on the implementation of the Barcelona Convention and its Protocols in the biennium 2002-2003.
3. The second meeting of the Working Group was held on 11 and 12 April 2005 at the Holiday Inn hotel, Athens (Greece).

Participation

4. The meeting was attended by experts representing the following Contracting Parties to the Barcelona Convention: Albania, Croatia, European Commission, France, Greece, Israel, Libyan Arab Jamahiriya, Morocco, Serbia and Montenegro, Syrian Arab Republic, Tunisia and Turkey. The WWF represented MAP partners.
5. Two MAP consultants also took part in the meeting. The Secretariat, represented by the MAP Coordinator, the MED Unit Programme Administrator, the MED POL Coordinator and the MED POL Programme Administrator, acted as the Secretariat of the meeting.
6. The full list of participants is attached as **Annex I** to the present report.

Agenda item 1: Opening of the meeting

7. Mr. Paul Mifsud, MAP Coordinator, welcomed participants to Athens. He reminded the Working Group that it had held its first meeting in November 2004 and had reached a number of specific conclusions on a compliance mechanism regarding obligations under the Barcelona Convention, establishing the broad outline of its legal basis, the size and composition of the Compliance Committee, and its rules of procedure. The second meeting was consequently intended to examine the matter in greater depth, on the basis of the working document drafted by the consultant, Professor Loibl, in the light of those findings. It was also called upon, in accordance with another recommendation made at Catania, to provide indications for the elaboration of a preliminary report on implementation of the Convention and its Protocols, as a regional summary of the national reports sent to the Secretariat on the biennium 2002-2003.
8. The MAP Coordinator said that, following informal consultations held before the meeting, the Secretariat proposed that Mr. Alex Lascaratos, representative of Greece, chair the proceedings of the second meeting as he had done at the first, in the interest of continuity. The proposal was accepted by the Working Group.

15. As far as Committee composition was concerned, an agreement was quickly reached on the figure of seven members, or one-third of the total number of Contracting Parties to the Convention, and on the need to elect one alternate for each member, in order to ensure continuity of the mechanism should a member be absent or relinquish membership. Fourteen persons would be elected, therefore, or rather more than half the number of Parties. Since, furthermore, it had been proposed that there should be a Bureau, with a Chair and Vice-Chair, the figure seven seemed more rational than four. The proposal to have two Vice-Chairs, one for the North and one for the South, made by one representative, was initially dismissed as it might introduce an imbalance in term of the number of members, but was subsequently adopted, provided that the posts were not divided equally in geographical terms, a criterion to be established in view of the Committee membership as a whole.

16. On the subject of the duration of the members' term of office, the meeting came out in favour of the principle of staggered membership. The meeting of the Parties would elect three members and their alternates who would remain in office until the end of the next meeting, and four more members and their alternates for a complete term of two biennia or four years. It also approved the criteria for designating candidates by the Parties, in other words members should be of a high moral calibre and should have competences in scientific, technical, socio-economic and legal fields; nominations should be accompanied by a CV and other supporting material. It was the majority view that more specific criteria need not be set, and that the designation of members and their alternates should be the responsibility of each Contracting Party.

17. On the other hand, one representative felt that they should insist on more detailed criteria for designating candidates. Those criteria should be set out in a separate section, if only to specify what was meant by the principles of fair geographical distribution, of rotation and of balance of competences.

18. Consideration was also given to the principle of "shared and differentiated responsibility", according to which assistance to the developing countries with financial difficulties in implementing the Convention and the Protocols, broadly agreed to at the first meeting of the group, should also apply to the committee role and procedures. Another representative asked that the southern shore in the strict sense of the term, or the five Arab States of the Maghreb-Mashreq, should be represented by a permanent member of the Committee. Or one of the Vice-Chair posts should be reserved for a southern shore country. It was further requested that the rotation principle should be mentioned with the comment: "in order to guarantee the participation of all countries on a reasonable time scale".

19. At the request of the Secretariat, the representative who raised the question of assistance for developing countries announced that he would make a written proposal on the subject.

20. The Chair said that, on the basis of his ten years' experience of MAP, he felt it was preferable to avoid any over-specific criteria concerning the representation of a given part of the Mediterranean or any notion of rotation. For the election of all MAP bodies - Bureau of the Parties, MCSD Steering Committee, Bureaux of the main technical meetings, the creation of task forces or working groups - the same rules of fair geographical distribution and rotation had been applied to date without posing any problems or causing any arguments. All decisions had been taken on the basis of consensus, without it being necessary to set any strict provisions. It was preferable to trust in the wisdom of the Parties when they elected the members and alternates. The MAP Coordinator and three other participants agreed, one of them pointing out the possibility of having a northern Chair and two southern Vice-Chairs, or quite possibly the opposite, or other permutations over time.

21. The MED POL Programme Coordinator said that the document made no mention of external technical assistance, something to be seriously envisaged, in view of the great variety of non-compliance issues that might be referred to the Committee in a whole range of fields and the fact that the seven committee members could obviously not be expected to be competent to address all of them. The Consultant, Mr. Loibl, said that he had considered that possibility but preferred to leave it to the group to decide, since there were financial implications. The meeting took note of the matter for later discussion.

22. Following a request that the phrase "Contracting Parties shall give consideration to the nomination of candidates who are members of the civil society" be reworded, less strictly, referring simply to the "the possibility to nominate", there was a lengthy exchange of views on the role of civil society in the Committee and outside. Two members of the group felt that the compliance mechanism had been set up by the Contracting Parties and that, consequently, members of civil society had no role to play. Another two were of the opinion that "the possibility to nominate" was an acceptable wording but that they could go no further or they would risk conveying the message that the group opposed any presence of civil society, which ran counter to the policy of partnership with civil society adopted by MAP and materialized in the creation of the Mediterranean Commission on Sustainable Development (MCSD). The representative of civil society in the group said that he saw little difference between the two wordings under discussion and suggested that the Contracting Parties should be given full leeway to reach the final decision.

23. The MAP Coordinator said that the exchange of views on the matter had been useful and that, from the Secretariat's viewpoint, bearing in mind the way in which MAP had evolved since 1995, there was no apparent contradiction in MAP's being the first to reserve a place for civil society in a compliance mechanism. The MAP Consultant added that the new wording - "the possibility to nominate" – satisfied everyone and left the final say to the Contracting Parties. Moreover, when discussing who should intervene in initiating a procedure, the meeting would have ample time to return to the issue of civil society's role.

24. When one member requested the deletion of the clause stating that members' transport expenses would be met on the basis of United Nations rules, since that matter was for the Committee to decide in its own rules of procedure, two participants said that to delete the clause might prove an obstacle to the participation of certain countries since declaring explicitly that the Secretariat would defray expenses would encourage countries to attend.

25. With regard to the CV and supporting material to accompany each nomination, several proposals and counter-proposals were made and the meeting finally decided to keep the wording as it was, it being understood that the CV should be no longer than 600 words or three pages, without setting an overly strict rule, and that the CV but not the supporting material should be translated for the meeting of the Parties.

26. Returning to the issue of Committee composition, the meeting unanimously decided that, with the figure of seven members confirmed, it was for the committee itself and not the meeting of the Parties to elect its Bureau, of one Chair and two Vice-Chairs. The election of a rapporteur, one participant's proposal, was rejected as it might upset the balance of the Committee's composition, in view of the fact that in a body of its kind it was for all members to draft their conclusions and recommendations together.

Meetings

27. The meeting decided to replace the "Meetings" section with another entitled "Committee Role", while retaining the first sentence on the annual meetings but moving the second sentence to the later section on the "Secretariat". The Consultant pointed out that the provision calling for an annual meeting was apparently a requisite, even if the Committee

received no submission at the beginning of its mandate, in order to create a sense of committee membership that would prepare it for action at any moment.

Procedure

28. While approving the spirit of the provisions set forth by the Consultant, which tallied with the conclusions reached at the first meeting, one representative proposed rearranging the "Procedure" section, subdividing it into "Submissions", "Body" and "Measures", since there seemed to be some confusion over the different sequences. Two differing positions were then expressed on the subject. Some members of the group argued in favour of a fairly restrictive mechanism, with a wide-ranging submission procedure that could be initiated by various bodies, groups or individuals, including the Secretariat and civil society, who could make their submissions directly or indirectly through the Secretariat. Others argued for a softer approach, literally interpreting Article 27 of the Barcelona Convention. Procedures would be initiated on the basis of periodic reports by the Parties, assessing their respect of the Convention and its Protocols along with measures and recommendations. That would exclude civil society unless the Convention were to be amended. One member said that the discussion had already taken place at the first meeting at which it had been concluded that the Committee would initiate a procedure "on the basis of national reports and other sources"; the Consultant had rightly included that in his draft paper, while retaining a clause that guaranteed the due process.

29. The Secretariat, without wishing to take sides, recalled that some 50 non-governmental organizations (NGOs) were MAP partners, that their role was increasingly acknowledged and made official by the Parties and that they could not be brusquely prevented from taking part in the mechanism, if only to respect Article 15 of the Convention on public participation, which explicitly made that participation possible. One participant supported that position, referring moreover to the Aarhus Convention.

30. Another proposal was made by two representatives to confer upon the Secretariat the role of "filtering" submissions made by NGOs, individuals or other bodies. Apart from cases of non-compliance that it would convey directly to the Committee on the basis of the periodic reports addressed to it, the Secretariat would examine the submissions received from various sources to determine their validity and decide whether they should be referred to the Committee. One representative said that she had studied the mechanisms of various other treaties and had found no such mechanisms in favour of civil society, even via the convention secretariat; Article 27 of the Barcelona Convention expressly linked the Parties' reports to compliance. The WWF representative, on the other hand, said that there had been cases of proceedings initiated by civil society, for example in the mechanisms of the Berne Convention. Civil society should not be seen as a scarecrow but as a guarantee for the Contracting Parties. If civil society were excluded from the mechanism it might instead turn to the media to alert public opinion, which might prove far more of a nuisance for the country in question. Another participant said that civil society did have a role to play but not to denounce; its main concern should be to help a country facing difficulties to meet its obligations. There should be no confusion between the possibility of initiating a procedure and the measures that procedure might lead to, which was for the Committee alone to decide and, by extension, for the Contracting Parties that had elected it.

31. The Coordinator said that there seemed to be a majority in favour of offering civil society a role, via the Secretariat. It also seemed that Articles 27 and 15 of the Convention were to be read jointly in order to have a feeling for how the new Convention had been drafted. The Chair noted the agreement on that element of the procedure, adding that whether or not it was true that civil society was absent in compliance mechanisms of other conventions was not an argument since, otherwise, it would be impossible to make any progress.

32. The Consultant presented the points of procedure concerning the "measures", as approved at the first meeting: in other words, a facilitation stage to help a Party solve its problem and, if non-compliance persists, a recommendation stage, in which recommendations would be addressed by the Committee to the Parties for them to decide on tougher measures.

33. One representative said that the two stages should be placed in a separate section entitled "measures", specifying that, following the "filtering" of submissions by the Secretariat, the Committee would autonomously examine what could be done to solve each individual case and, if that failed, refer the case to the meeting of the Parties for it to decide more restrictive measures. One representative said that the first stage should be based on a diagnosis of the cause of non-compliance (legal, financial, etc.), an idea that gave rise to other proposals: opinions issued by a committee of experts, the requirement by the Committee that the Party concerned apply a plan of action to achieve compliance. But several participants said that those proposals would have financial implications, as would the measures themselves, be they facilitating or binding. The meeting of Parties would probably have to decide to award the mechanism a budgetary envelope. One representative raised the question of the definition of "non-compliance".

34. On that score, the Secretariat said that, to help the group with its deliberations, it had drawn up an indicative list of cases of non-compliance, on the basis of the national reports for the biennium 2002-2003. It was distributed to the participants. The cases referred to compliance with the Convention and the Protocols. But, according to the Secretariat, one of the problems raised by the list was that of knowing whether compliance should also refer to strategic documents such as SPA MED and SPA BIO, which set specific objectives and schedules and had been adopted by the meetings of the Parties.

35. The Consultant said that compliance with the officially adopted strategic documents – or any other plans or programmes – was only binding if the meeting of Parties itself specified that through a decision or recommendation, and that the adoption and implementation of those documents were laid down as a legal obligation under the terms of the Convention and its Protocols. The Chair read out the second sentence of Article 27 of the Convention and pointed out that the text made a clear distinction in the degree of constraint: in it the Parties were to recommend "the necessary steps to bring about full compliance with the Convention and the Protocols and promote the implementation of the decisions and recommendations".

36. The MED POL Programme Coordinator said that SPA MED, mentioned in the discussion, could not be described as complementary to or illustrative of the "land-based" Protocol but was a full part of the Protocol and would soon give rise to a reporting system for which the forms were already being produced.

37. The meeting asked those participants who had made oral proposals for reworking the document to form a group in order to decide upon the exact wording of changes for submission to the meeting, so that the debate could be pursued.

Examination of new wordings proposed

38. The meeting took note of a draft paper, still at the outline stage, produced by a select drafting team, aimed at restructuring the working document in seven sections. Three sections had changed their titles in accordance with the conclusions of the earlier discussions, in order to subdivide the "Procedure" section into "Submissions" and "Measures to promote compliance and cases of non-compliance", to reflect the two stages decided upon: facilitation measures and more binding measures taken by the meeting of the Parties following examination of a report or Committee recommendations.

Submissions

39. A debate ensued on the subject of "*Submissions*". One representative expressed reservations about the notion of "Party to Party" submissions; the Consultant said that the idea was to be interpreted as a reference to the common interest of Parties, and two other representatives called for the provision to be maintained since it might refer to cases of transfrontier pollution and would undeniably be dissuasive. On the subject of submissions made by the Secretariat, on the basis of national reports and other sources (which could include civil society and the public), the meeting failed to reach agreement on the wording and decided instead that three options in square brackets would be submitted to the meeting of Focal Points in September, leaving them to decide.

Measures

40. With regard to the facilitation measures decided upon by the Committee, the meeting quickly reached an agreement. On the other hand, when it discussed the measures likely to be adopted by the meeting of the Parties should compliance persist, the Working Group was again split between those favouring assistance measures alone and those calling for coercion and some kind of penalties. One participants asked for the introduction of the notion of "proportionality" of such measures, according to the ability of the Party in question to meet its obligations and approved the possibility of demanding the implementation of an action plan and a timetable, and even the publication of a case of non-compliance (declaration of the meeting of the Parties). One member of the group spoke of "moral sanctions" in cases of repeated violations which led another to respond that MAP should not be turned into "a battlefield between the good and that bad", which would destroy the spirit of "camaraderie" that had always characterized it. A Party that declined to meet its obligations would punish itself by isolating itself from the others and would also trigger negative reactions in the press and public opinion, a moral sanction in itself.

41. While he understood the objections, the MAP Coordinator said that for some time the Barcelona Convention had been facing a serious credibility problem: public opinion and the media especially felt that non-compliance with the Convention's legal provisions was of no consequence for Mediterranean States and raised the question why they should bother to apply them at all. Now that a decision was being taken to create a compliance mechanism, any move to exclude practical enforcement measures would only worsen that lack of credibility. The exact wording obviously needed careful thought, but to rule out any form of enforcement would be a serious mistake.

42. In reply to the request of one participant to leave it for the meeting of Contracting Parties to decide the detail of the measures, the Chair pointed out that, for several years, the meeting of the Parties had not discussed the substance of issues and instead concentrated on debating matters of general policy, adopting in a final form what had already been discussed and approved by the meeting of MAP Focal Points. Mr. Mifsud added that, accordingly, specific proposals had to be put to the Focal Points meeting, since it was not for the Focal Points to invent procedures and decisions, the very task that had been assigned to the Working Group. Otherwise the establishment of a mechanism that had already taken too long would be delayed by another two years. One participant proposed that, in addition to one or two moral sanctions to be applied in persistent cases of non-compliance, it might be useful to publish annual files on the state of implementation and progress made in each country, as the European Union did for the Natura 2000 Directive; that would improve transparency and credibility among the public and the media.

43. The meeting decided that, the following day, a new version of the document would be presented to it, reworked and expanded on the basis of its deliberations and that it would consider the issue one more time.

Agenda item 4:

Presentation of a preliminary draft of the report on the implementation of the Barcelona Convention on the regional level for the biennium 2002-2003

44. The Secretariat presented document UNEP(DEC)/MED WG.272/4, reminding the group that it was being submitted in accordance with a recommendation of the Parties at their Catania meeting in 2003 asking the Working Group to give indications as to how the regional report on the implementation of the Barcelona Convention and the Protocols for the biennium 2002-2003 should be drafted. The summary of national reports had been produced by two consultants. To date 16 national reports had been received and 13 taken into account in the summary; three had arrived too late for inclusion while another three were expected by the end of April. As a result the existing report was very much a preliminary version. Presentation of the report therefore enabled the Working Group to see an indicative list of cases of non-compliance on the basis of the national reports for the biennium 2002-2003 and to have an idea of implementation and any related problems. The Secretariat expected the meeting to give its opinion on the document's structure, form and style. It was planned to hold a meeting in June 2005, exclusively dedicated to the issue, with the MAP Focal Points and/or national contacts, in particular on the problems of reporting. The document contained an anonymous general part on the legal and administrative implementation of the Barcelona Convention, and a technical part on the application of the Protocols. In view of the tight schedule, the Secretariat had been unable to finalize the legal and administrative part on the Protocols and it was therefore omitted from the document. A summary table had also been included to give an idea of the informative coverage given by each Party to each section of the report form with regard to the technical aspects of each Protocol.

45. All speakers praised the report for its quality and depth – it was described as a veritable "mine of information" with regard to many issues linked to the compliance mechanism. Some representatives pointed out erroneous details concerning their countries and it was agreed that their remarks should be addressed in writing to the Secretariat. One representative noted overlaps between the general part and the technical part. Another said that the report was meant to enable an appraisal of the degree of compliance by the various Parties and that that aspect was lacking; the recommendations were connected too much with the improvement of the reporting system and not enough with the actual implementation. Several members of the group requested that the report set forth more of its data and findings in the more user-friendly form of tables and diagrams. That would make the substance easier to assimilate whereas the current textual presentation was less legible and was time-consuming. The very fact that the document's only table had been the subject of most of the interventions was proof in itself of the advantage of this kind of format.

46. Referring to the table, Mr. Louis Saliba, one of the two consultants who had drafted the report, remarked that it seemed to have been misinterpreted by the meeting: the report did not sum up the degree of implementation and certainly did not reflect the degree of compliance, but registered the extent to which the countries had reported on or supplied information about the various sections of the forms they had had to complete. The regional report would be revised on the basis of the national reports that remained to be analysed: Accordingly, the picture that it would eventually give might differ sharply from what it currently conveyed. The main problem concerning the drafting of the report was that they needed to receive data that would permit a genuine assessment of implementation.

47. The Coordinator declared that there was a problem regarding the supply of relevant and reliable information enabling them to make a serious analysis of implementation. For that reason the recommendations had urged that reporting be improved.

48. Three participants expressed the opinion that the lesson to be learned from the single table was that the quality of information was not guaranteed and that a form of reporting needed to be found that enabled an assessment to be made of the state of implementation in

all countries, while establishing a readable report; otherwise, there would be no follow-up. A possible solution might be to establish a direct link between the questions in the forms and the degree of compliance, in order to avoid vagueness. One participant remarked that the Convention could be described as "soft law", which made it difficult to determine compliance; it was pointed out, in response, that with the revised Protocols there now existed, in the context of the strategic documents, specific objectives and application timetables such as the SAP MED for the "landbased" Protocol and the SAP BIO for the "SPA" Protocol, which therefore meant that relevant assessment methods existed in accordance with specific criteria.

Agenda item 5: **Discussion and adoption of the recommendations**

49. The Chair pointed out that the drafting team, in consultation with Mr. Loibl, had produced a complete version of the working document, reworked and expanded in the light of the deliberations, and that the Working Group was invited to examine it and amend it one last time, if necessary, for transmission to the meeting of the MAP Focal Points in September.

50. The group examined the text submitted to it, section by section and point by point. A few changes, additions and deletions were agreed upon. The final text, as approved at the meeting, can be found in **Annex III** to the present report.

51. During the final examination of the "*draft elements for a possible compliance mechanism*", several points were the subject of extensive exchanges of viewpoints. For example, it was proposed that the Contracting Parties be granted full leeway in the designation of their candidates, on the basis of some very general criteria set forth in the document, and that, as was the case for the election of the Bureau of the Parties, there should be informal consultations before the meeting of the Parties on the basis of the list of candidates, so that the Secretariat might propose the members and their alternates for whose election there should emerge a consensus.

52. To the question put by one participant on the difference between the designation of the national focal points and the process of designating members of the Compliance Committee by the Contracting parties, and on the possible role of the Secretariat in the process, it was replied that the procedure comprised the election, on the basis of fixed criteria, of seven members and seven alternates from the candidates proposed by the Parties. The Secretariat explained that, in the context, it would be in the interest of the Contracting Parties to propose candidates who met the criteria for election by the meeting of the Contracting Parties.

53. Since the meeting had decided to retain the three options in square brackets for submissions and to leave the decision to the meeting of the MAP Focal Points, the Secretariat suggested that they should remain as neutral as possible on the issue of transmitting submissions to the Committee. On that point, one participant said that if they asked the Secretariat to act as an active "filter", as had been suggested on several occasions, it might be subjected to various pressures and might find itself in a difficult situation. The meeting agreed that the Secretariat needed overall to be neutral in triggering the mechanism.

54. The meeting decided to delete the reference to Parties' entitlement to appeal against the Committee's findings since no such provision existed in other mechanisms and it would risk prolonging any procedures, since the Party concerned might simply indulge in delaying tactics. It would be for the meeting of the Parties to decide whether, in serious cases, an accused Party might be entitled to a rehearing. It was also decided to delete the mention of suspending the rights and privileges of a Party since that might lead to resentment. The Party might defect from MAP and its activities, which would prove counterproductive.

55. On the last two points, the MAP Coordinator reminded the Working Group that, at the Catania meeting in 2003, it had received the mandate to "*devise a platform for the purpose of promoting the implementation of and compliance with the Barcelona Convention and its Protocols*" and that it was not possible to go too far beyond that recommendation and enter into all the legal details. Only the Parties could decide if that were called for and would have to adopt relevant recommendations.

Agenda item 6: **Other business**

56. The Secretariat specified the following stages. The working document, as it had just been examined and reworked at the meeting, would be attached as an annex to the meeting report, which participants would be receiving in a fortnight's time for their approval and remarks. The regional report on the implementation of the Convention and Protocols would be finalized on the basis of the new information supplied by the pending national reports and also on the basis of remarks made in writing as soon as possible by the members of the group, as it had been agreed. The report should be ready by 15 May 2005. In the meantime, the Secretariat would advise the group of the date of the June meeting, at which the regional report would be under consideration.

Agenda item 7: **Closure of the meeting**

57. Following the customary exchange of courtesies, the Chair declared the meeting closed on Tuesday, 12 April 2005 at 1.35 p.m.

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Annex II

PROVISIONAL AGENDA

1. Opening of the meeting
2. Adoption of the Provisional Agenda and organization of work
3. Presentation of the report on the main elements for a possible compliance mechanism under the Barcelona Convention and its protocols.
4. Presentation of a preliminary draft of the report on the implementation of the Barcelona Convention on the regional level for the biennium 2002-2003.
5. Discussions and adoption of recommendations
6. Any other business
7. Closure of the meeting

Annex III

DRAFT PAPER ON THE MAIN ELEMENTS FOR A POSSIBLE COMPLIANCE MECHANISM

Introduction

1. Based on the findings and conclusions of the first meeting of the Working Group on Implementation and Compliance under the Barcelona Convention, the Coordinating Unit was asked to elaborate a draft paper on the main elements for a possible compliance mechanism. The draft paper draws upon the experience of international and regional international agreements addressing environmental issues, which have established compliance mechanisms and procedures. Attention was focused on international agreements to which Parties to the Barcelona Convention and its Protocols are parties. In particular, the compliance mechanisms and procedures established under the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal, the Cartagena Protocol on Biological Safety and the Kyoto Protocol to the United Nations Framework Convention on Climate Change served as sources for the elaboration of elements for a compliance mechanism under the Barcelona Convention and its Protocol. Furthermore, implementation and compliance procedures established under the Berne Convention for the Conservation of European Wildlife and Natural Habitats, the Convention on Long-Range Transboundary Air Pollution, the Espoo Convention, the Aarhus Convention, the Protocol on Water and Health under the Convention on the Protection of Transboundary Water Courses and International Lakes and the OSPAR Convention were taken into consideration. Moreover, the experience gained by international organisations, such as IMO and WHO, in dealing with issues of implementation of and compliance with international agreements, was considered in the elaboration of the elements of a compliance mechanism under the Barcelona Convention and its Protocols.

Main elements

2. The following elements for a compliance mechanism, based on the findings and conclusions of the first meeting of the Working Party on Implementation and Compliance under the Barcelona Convention, were discussed and elaborated by the second meeting of the Working Group and are submitted for further consideration. The elements set out below follow the structure of already established compliance mechanisms and procedures under other multilateral environmental agreements. They reflect the current status of the discussions and indicate issues which need further scrutiny. They should be read together with the report of the second meeting of the Working Group containing the discussions on the main elements. The main elements leave open a number of issues which need to be addressed in the elaboration of a "full compliance" mechanism (see the document "Setting up an implementation and compliance mechanism under the Barcelona Convention and its Protocols", (see Annex IV).

I. Objective (of the compliance mechanism)

The objective of the compliance mechanism is to facilitate and promote compliance with the commitments under the Barcelona Convention and its Protocols, taking into account also the specific needs of developing countries.

II. Compliance Committee

1. A compliance committee, hereafter referred to as “the Committee”, is hereby established.
2. The Committee shall consist of seven members elected by the meeting of the Contracting Parties. For each member of the Committee, the meeting of the Contracting Parties shall elect an alternate member. The members and the alternates are elected for a term of four years.
3. The Meeting of the Contracting Parties shall at its meeting establishing the compliance mechanism elect three members and three alternates to serve until the end of its next meeting and four members and four alternates for a full time of office. A full term of office commences at the end of the ordinary meeting of the Contracting Parties and runs until the second ordinary meeting of the Contracting Parties thereafter.
4. The members of the Committee shall be nationals of the Parties to the Barcelona Convention. The Committee may not include more than one national of the same State.
5. Members of the Committee and their alternates shall serve in their personal/individual capacities.
6. The members and their alternates shall be elected from among candidates nominated by the Contracting Parties. Contracting Parties shall consider the nomination of candidates who are members of the civil society.
7. Candidates nominated shall be persons of high moral character and shall have recognized competence relating to the matters dealt with by the Barcelona Convention and its Protocols as well as in relevant fields such as the scientific, technical, socio-economic or legal fields. Each nomination shall be accompanied by a curriculum vitae (CV) of the candidate not exceeding 600 words and may include supporting material.
8. In electing members and their alternates of the Committee, the Meeting of the Contracting Parties is to be guided by equitable geographic representation and by rotation in order to ensure participation by nominated individuals of all Contracting Parties as members of the Committee within a reasonable period of time as well as balance among scientific, legal and technical expertise.
9. The Committee shall elect its officers – a Chairperson and two Vice-Chairpersons – based on equitable geographic representation and rotation.
10. Members of the Committee may be re-elected for one consecutive term.

III. Role of the Committee

The Committee shall, unless it decides otherwise, meet at least once a year.

[More to be added]

IV. Procedure

1. Submissions

Submissions may be made by

- a. a Party in respect of its own situation of compliance;
- b. a Party in respect of another Party's situation of compliance;

Option 1

C. [The Secretariat on the basis of the national reports and other sources.]

Option 2

C. [The Secretariat on the basis of national reports]

D. [Other sources]

Option 3

C. [Other sources]

2. Proceedings

1. Submissions concerning the alleged non-compliance of a Party shall be addressed in writing to the Committee through the Secretariat, supported by information setting out the matter of concern and the relevant provisions of the Barcelona Convention and its Protocols.
2. The Secretariat shall, within two weeks of its receiving a submission, send a copy of that submission to the Party whose compliance is at issue.
3. The Committee may determine not to proceed with a submission that it considers is
 - anonymous,
 - de minimis, or
 - manifestly ill founded.

The Secretariat shall inform the Party concerned about such [a determination] [findings] taken by the Committee within two weeks of the date of [the determination] [the findings].

4. The Party concerned may present information on the issue in question, present responses and/or comments at every step of the proceedings [described in this decision]. Upon the invitation of the Party concerned, the Committee may undertake on site appraisals.
5. The Committee may ask the Party concerned to provide further information and may, with the consent of any Party concerned, gather information in the territory of that Party, including on site appraisals.

6. In its deliberations the Committee shall take into account all the available information concerning the issue in question.
7. The Party concerned is entitled to participate in the discussions of the Committee and present its observations. The Party concerned shall not take part in the preparation and adoption of any findings, any measures or any recommendation of the Committee.
8. The Committee shall be guided by the principle of "due process" in order to ensure fairness and transparency.

V. Measures

The Committee may take one or more of the following measures with a view to promoting compliance and addressing cases of non-compliance taking 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:

1. provide advice or facilitate assistance to the Party concerned, as appropriate;
2. request or assist, as appropriate, the Party concerned to develop a compliance action plan to achieve compliance within a time frame to be agreed upon between the Committee and the Party concerned.
3. invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Barcelona Convention and its Protocols;
4. make recommendations to the Meeting of the Contracting Parties on cases of non-compliance, if it finds that these cases should be handled by the Meeting of the Contracting Parties.

The Meeting of the Contracting Parties may, upon consideration of a report and any recommendations of the committee, taking into account the capacity of the Party concerned, in particular developing countries, to comply, as well as factors such as the cause, type, degree and frequency of non-compliance, decide upon appropriate measures to bring full compliance with the Convention and its Protocols:

- a. provide advice and facilitate assistance to individual Parties;
- b. make recommendations to the Party concerned;
- c. request the Parties concerned to submit progress reports regarding the achievement of compliance with the Convention and its Protocols;
- d. issue declarations of non-compliance;
- e. issue a caution to the Party concerned;
- f. publish cases of non-compliance.

VI. Review of the procedures and mechanisms

The Meeting of the Contracting Parties shall review the effectiveness of these procedures and mechanisms, address repeated cases of non-compliance and take appropriate action.

VII. Secretariat

The Coordinating Unit shall serve as the Secretariat of the Committee. It shall, inter alia, arrange and service the meetings of the Committee.

Annex IV

SETTING UP AN IMPLEMENTATION AND COMPLIANCE MECHANISM UNDER THE BARCELONA CONVENTION AND ITS PROTOCOLS

I. Introduction

1. Since 1976 the Mediterranean region possesses a legal system (the Barcelona Convention and its Protocols) for the protection of the sea and its coastal zones. An update of the text of the Convention was adopted by the Contracting Parties in 1996, followed by the update of the text of other Protocols and development of new Protocols.

2. Article 27 of the revised Convention provides for:

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. The Contracting Parties in 1996 committed themselves to set up a reporting system under the Barcelona Convention and its Protocols. In Catania, at their 13th meeting, the Contracting Parties decided to start implementing Article 26 of the revised Convention by promoting the preparation and submission of the national reports on the implementation of the Barcelona Convention and its Protocols.

4. They also decided to establish a Working Group of Legal and Technical experts on Compliance (here in after called "Working Group") for preparing a document-platform related to a possible compliance mechanism under the Barcelona Convention. The Working Group held its first meeting on 8 and 9 November 2004 in Athens. It discussed a document prepared by the Secretariat entitled "Setting up an implementation and compliance mechanism under the Barcelona Convention and its Protocols". The Working Group asked the Secretariat to revise this document based on the discussion at its first meeting and to submit a revised document to its second meeting. Furthermore it asked the Secretariat to prepare "a draft paper on the main elements for a possible compliance mechanism on the basis of its findings and conclusions", including "draft criteria to be applied by the CPs in proposing candidates for membership in the Compliance Committee". At its second meeting (held on 11 and 12 April 2005 in Athens) the Working Group of Legal and Technical experts on Compliance discussed the revised document on "setting up an implementation and compliance mechanism under the Barcelona Convention and its Protocols" as well as a "draft paper on the main elements for a possible compliance mechanism". The documents are to be submitted to the 14th Meeting of the Contracting Parties in 2005 for follow-up.

II. Review of the legal basis for the establishment of a compliance mechanism under the Barcelona Convention and its protocols

5. Some of the international environmental agreements contain specific provisions that authorise the Conference of the Parties to adopt compliance mechanisms. E.g. Article 8 of the Montreal Protocol on Substances that deplete the Ozone Layer entitled “non-compliance” reads as follows: “The Parties, at their first meeting, shall 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.”

6. Similar provisions authorising the Conference of the Parties to establish compliance mechanisms may be found e.g. in Article 13 UNFCCC¹, Article 18 of the Kyoto Protocol, Article 34 of the Cartagena, Article 17 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Article 17 of the Stockholm Convention on Persistent Organic Pollutants, Article 15 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and Article 14bis of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.

7. Although the LRTAP Convention does not contain a specific provision authorising the Executive Body to establish a compliance mechanism, the Protocols to the Convention provide specifically for the establishment of a compliance mechanism. The Executive Body based its decision 1997/2 concerning the Implementation Committee, its structure and functions and procedures for review of compliance on these specific provisions of the Protocols and on Article 10 paragraph 2 of the Convention which states that the Executive Body shall review the implementation of the Convention, establish working groups to consider matters related to the implementation and development of the Convention and fulfil such other functions as may be appropriate under the provisions of the Convention.

8. Other international environmental agreements do not contain such specific provisions on the establishment of compliance mechanisms. E.g. the Basel Convention does not provide specific authorisation for the establishment of a compliance mechanism. At its sixth session the Conference of the Parties established a compliance mechanism by Decision VII/12 entitled “Establishment of a mechanism for promoting implementation and compliance”. The decision was based on Article 15, paragraph 5 (e) of the Basel Convention that reads as follows: “The Conference of the Parties shall keep under continuous review and evaluation the effective implementation of the Convention, and, in addition, shall: [....]

(e) Establish such subsidiary bodies as are deemed necessary for the implementation of this Convention.”

9. Thus, the Conference of the Parties decided that a compliance mechanism was necessary to further the implementation of and the compliance with the provisions of the Basel Convention and therefore it was within its competence to adopt Decision VII/12. As the preamble to the Decision states such a mechanism promotes “the identification, as early as possible, the implementation and compliance difficulties encountered by Parties” and will “assist Parties to develop and implement the most appropriate and effective solutions for resolving those difficulties.”

10. A similar approach was followed by the parties to the Convention for the Protection of the Alps and its Protocols. The 7th Alpine Conference (i.e. the Conference of the Parties

¹ The MCP under the UNFCCC has not become operational as no agreement could be reached on the size and the composition of the committee.

under the Convention for the Protection of the Alps) decided to establish a “mechanism for the review of the compliance with the Alpine Convention and its Protocols” (Meran, 19 November 2002). As in the case of the Basel Convention no specific authorisation is contained in the Convention and its Protocols. The Alpine Conference based its decision on Article 6 paragraph (e), which provides that the Conference may establish permanent working groups, which it deems necessary for the implementation of the Convention and its Protocols. Both examples demonstrate that compliance mechanisms are means to further implementation and thus no specific authorisation is needed in the Convention or Protocol texts for the establishment of a compliance mechanism.

11. All compliance mechanisms under international environmental agreements until now have been established by a decision of the supreme body (i.e. in general the Conference of the Parties²) under the agreement in question.³

12. Considering the establishment under the Barcelona Convention and its Protocols it has to be noted that no specific authorisation for the establishment of a compliance mechanisms is provided in the Convention or the Protocols as in some international environmental agreements. Following the approach taken under the Basel Convention and the Convention for the Protection of the Alps two provisions of the Barcelona Convention need to be considered: Article 27 and Article 18 paragraph 2. Article 27 of the Barcelona Convention entitled “Compliance Control” reads as following: “The meetings of the Contracting Parties shall, on the basis of periodical reports referred to in Article 26 and any other reports 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.”

13. Furthermore, Article 18 paragraph 2 of the Barcelona Convention states, “it shall be the function of the meetings of the Contracting Parties to keep under review the implementation of this Convention and the Protocols, in particular:

- (v) To establish working groups as required to consider any matters related to this Convention and the Protocols and annexes;
- (vi) To consider and undertake additional action that may be required for the achievement of the purposes of this Convention and the Protocols.”

14. Thus, the meeting of the Parties under the Barcelona Convention is entrusted with similar functions like the Conference of the Parties under the Basel Convention and the Alpine Convention. It is to further implementation and compliance and shall take the steps it deems necessary. Therefore, the conclusion may be drawn that these provisions may serve as a basis for the establishment of a compliance mechanism under the Barcelona Convention and its Protocols by a decision, if the meeting of the Parties wishes to do so.

² E.g. under LRTAP Convention this institution is called Executive Body, under the Cartagena Protocol on Biosafety the institution is called Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol.

³ Only under the Kyoto Protocol the discussion continues whether the compliance procedures and mechanisms are to be adopted by a decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol or whether by way of an amendment to the Kyoto Protocol. This is due to Article 18 of the Kyoto Protocol which reads in its relevant part as follows: “Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.”

III. Draft road map for the elaboration of a compliance mechanism under the Barcelona Convention and its Protocols

15. In elaborating a compliance mechanism as a first step the issue of non-compliance needs to be discussed in the overall framework of the implementation of the Barcelona Convention and its Protocols. This would help to identify situations that are to be regarded as cases of non-compliance and how to address them.

16. Reporting and information exchange are important means to further implementation of and compliance with internationally agreed rules. Thus, the reporting obligations of the parties under the Barcelona Convention and its Protocols should be scrutinized and their operation analysed. Regular reporting and exchange of information does not only increase the transparency concerning the implementation of the Barcelona Convention and its Protocols, but may also enhance international cooperation among the parties and thus limit the emergence of non-compliance. Furthermore, reports also help to identify areas of potential non-compliance.

17. Once possible situations have been identified which need to be addressed by a compliance mechanism, elements of such a mechanism are to be elaborated. Thereby, the specific nature of the obligations under the Barcelona Convention and its Protocols have to be taken into account in order to ensure that the compliance mechanism is "tailor-made" in order to address best the issues in question.

18. As a comparison of compliance mechanisms and procedures which have been established under global or regional treaties addressing environmental issues shows a number of common elements, although these mechanisms and procedures differ to a certain extent. In discussion these elements reference will be made to mechanisms and procedures under treaties to which all or some of the Parties to the Barcelona Convention and its Protocols are Parties.

19. In elaborating a compliance mechanism under the Barcelona Convention and its Protocols the following issues have to be addressed:

- Composition of the compliance body: size of the body, status of the members (state representatives or serving in their personal capacity);
- Functions of the compliance body and its relationship to the meeting of the Parties as well as to the Secretariat;
- Submissions and referrals to the compliance body: who may provide information and how should the information be transmitted;
- Procedural rules for the compliance body (e.g. decision-making)
- Treatment of parties in non-compliance (e.g. advice and assistance).

IV. Draft outline of possible options for a compliance mechanism

20. In general the following different options for the operation of a compliance mechanism may be envisaged:

- a) a compliance body, consisting of representatives of all parties or a limited number of members, discusses the regular reports provided by the parties and makes general recommendations to the meeting of the Parties in order to enhance the compliance of the parties;
- b) a compliance body, consisting of representatives of all parties or a limited number of members, discusses the regular reports provided by the parties and makes specific recommendations to the meeting of the Parties to enhance the compliance of individual parties;

- c) a compliance body, consisting of representatives of all parties or a limited number of members, discusses submissions or referrals concerning an individual party's compliance and makes recommendations to the meeting of the Parties;
- d) a compliance body, consisting of representatives of all parties or a limited number of members, discusses submissions or referrals concerning an individual party's compliance and decides on the treatment of the party concerned.

21. Although examples may be found for all these options under international environmental agreements, a combination of some of these options is also possible. E.g. the implementation committee established under the UNECE Convention on Long-Range Transboundary Air Pollution (LRTAP Convention) and its Protocols may consider submissions and referrals concerning an individual party's compliance as well as may review periodically compliance by the parties with the reporting requirements of the Protocols.

22. As regards the size of the compliance body under nearly all international environmental agreements has been limited. Only in the case of the Convention for the Protection of the Alps that has a very limited number of parties (eight States and the European Community) the compliance body includes all parties. In all other cases it was decided that a limited membership would increase its efficiency. Furthermore, consideration has to be given to the question whether members of the compliance body act as party representatives or whether they act in their individual capacity. Examples of both options may be found in compliance mechanisms established under international environmental agreements. Under the Montreal Protocol a party is elected to the compliance body, whereas under the Cartagena Protocol an individual is elected to serve on the compliance body.

23. Moreover, depending on the treatment of parties in non-compliance basically two options of compliance mechanisms may be distinguished:

- a) a Multilateral Consultative Process (MCP) or facilitation procedure, which provides only for recommendations to the parties concerned;
- b) a compliance or non-compliance procedure that provides for decisions to be taken by the competent body on the treatment of parties found in non-compliance.

24. Examples for facilitation procedures may be found under the United Nations Framework Convention on Climate Change (UNFCCC)¹ or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. In this context the system of "case files" elaborated under the Bern Convention has to be considered as this system looks at particular situations where concerns regarding a parties implementation has been raised, but a solution is thought by the competent bodies under the Bern Convention by means of recommendations to the party concerned. Further examples for compliance procedures may be found under the Montreal Protocol, the LRTAP Convention or the Cartagena Protocol.

25. A compliance mechanism established under the Barcelona Convention and its Protocols may follow the example of other international environmental agreements and combine a number of elements given by the different options.

26. It could be envisaged to establish a compliance committee of limited size that will address general issues of implementation and compliance as well as individual cases of non-compliance or potential non-compliance based on Parties' reports and relevant information from other sources.

27. In considering an individual Party's problems in implementing and complying with the provisions of the Barcelona Convention and its protocols a two-stage approach could be feasible:

28. The compliance committee in cooperation with the concerned party should – first - give advice on how the situation is to be improved (facilitative approach). Only if these efforts to bring the Party concerning into compliance fail, the compliance committee could be authorised to communicate its findings to the Party concerned and make suggestions to the meeting of the Parties how the situation should be addressed. These suggestions would be discussed by the meeting of the Contracting Parties and the meeting would decide which measures are to be taken concerning the Party concerned. In its decision it will take into account the cause, degree and frequency of the non-compliance under consideration.

29. The measures taken may range from advice, additional reports on specific issues raised to the publication of cases of non-compliance.

V. Functions of a compliance mechanism

30. The objective of a compliance mechanism in general is to promote and improve compliance with the provisions of the treaty. Thus, the compliance mechanism shall be non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, oriented in the direction of helping parties to implement the provisions of the international agreement. It shall pay particular attention to the special needs of developing countries and countries with economies in transition and shall be intended to promote cooperation between all parties.

31. The functions of compliance mechanisms vary between the different treaties to a certain extent. On the one hand those compliance committees, which have been established following the example of the Montreal Protocol, deal with specific submissions made concerning an individual Party. Others, like the implementation committee of the LRTAP, also address general questions of implementation and compliance, such as whether parties fulfil their reporting requirements.

32. The following functions may be given to a compliance committee:

- review periodically compliance by the Parties with their reporting requirements;
- consider any submission or referral made to it in accordance with the procedural rules of the compliance mechanism;
- prepare reports on general issues of compliance, including recommendations, to the meetings of the Parties;
- prepare reports on specific cases of non-compliance, including recommendations, to the meeting of the Parties;
- decide on the treatment of the Party found to be in non-compliance with the Convention and its Protocols (e.g. provision of advice, provision of appropriate assistance, exposure to the public; issuing cautions or recommendations to the Party).

33. The functions given to a compliance mechanism depend to a large extent on the commitments undertaken by the parties to the international agreement. As the example of the MCP under UNFCCC demonstrates if the commitments of the parties are of a very general nature, the functions of the compliance mechanism will be centred on recommendations given to the parties concerned. If on the other hand, the commitments undertaken by the parties are specific, the compliance mechanism has been given the authority to take decisions that aim to bring the party concerned into compliance. Examples

of the latter are the compliance procedure under the Montreal Protocol, the Kyoto Protocol and the Cartagena Protocol.

VI. Rules of procedure of a compliance mechanism

34. Rules of procedure are central for the operation of the compliance mechanism as they determine how the compliance mechanism will proceed on matters referred to it. In general, decisions establishing compliance mechanisms only address those issues, which are regarded as important to guarantee an efficient and effective compliance mechanism and tend to leave certain flexibility to the compliance body in its operation.

35. In elaborating the rules of procedure for a compliance mechanism the following issues will have to be discussed:

- modalities for submissions, including who may provide observations and corroborating information and to whom and how it is to be transmitted to the compliance body (i.e. involvement of other parties and the “civil society”);
- modalities for considering submissions by the compliance body, e.g. on how to proceed in a particular case (submissions may concern *de minimis* issues or may be ill-founded);
- information of the Party concerned about issues raised before the compliance committee concerning its implementation and compliance;
- modalities for subsequent correspondence between the compliance body and the Parties concerned as well as a time frame;
- participation of the party concerned in the proceedings (“due process” - principle);
- procedures for the compliance body, including (further) information gathering (e.g. by requesting more detailed information from the party concerned or on the spot appraisals with the consent of the party concerned) and decision-making;
- procedures on the transmission of the finding of the compliance body, including its recommendations, to the meeting of the Parties and the parties concerned;
- measures which might be recommended by the compliance committee to the party concerned;
- measures which might be adopted by Meeting of the Contracting Parties concerning parties in non-compliance;
- the specific needs of developing countries in implementing and complying with the Barcelona Convention and its Protocols;
- role of the compliance body in the implementation of recommendations addressed to the party concerned;
- reporting requirements by the party concerned on the measures taken to achieve compliance with the Barcelona Convention and its Protocols;
- role of the meeting of the Parties and the secretariat in the compliance proceedings;
- right of appeal of the Party concerned or right to reconsideration for the Party concerned;
- confidentiality of information provided to the committee;
- transparency of the proceedings;
- relationship between the compliance committee and the Meeting of the Parties (e.g. reports of the compliance committee to the Meeting of the Parties);
- review of the compliance mechanisms and procedures by the Meeting of the Contracting Parties.

[36, The Working Group on Implementation and Compliance considered some of the issues listed in paragraphs 19 and 35 above at its first meeting, Based on the findings and

conclusions of the first meeting the Coordinating Unit was asked to elaborate a “draft paper on the main elements for a possible compliance mechanism” for discussions at the second meeting of the Working Group. The discussions on the draft paper are contained in the report of the Working Group and the attached revised draft paper on the main elements (see Annex III). This draft paper is to be seen as a first step in elaborating mechanisms and procedures addressing compliance issues under the Barcelona Convention and its Protocols. Its sets out the general structure and lays down first elements for a compliance mechanism and procedures.]