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

I. Introduction

1. Since 1975 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 1995, 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. This document will be submitted to the 14th Meeting of the Contracting Parties in 2005 for follow-up. The Contracting Parties have nominated already their representatives in the Working Group.

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

5. 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.

6. 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.

7. 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.

8. 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).

III. Draft outline of possible options for a compliance mechanism

9. Basically the options may have to address:

- a) reporting and assessment systems, which are based on regular reporting by parties (e.g. by standardized reporting formats) and an assessment of the general implementation of the internationally agreed rules by an institution (either a specific body established for this purpose or the supreme body) under the international agreement. They might make recommendations to the parties how implementation might be improved. In this context the practice of OSPAR Convention should be studied more closely.
- b) a specific compliance mechanism (as has been elaborated under numerous international environmental agreements) that will deal with specific cases of non-compliance or potential non-compliance by an individual party. Under such a mechanism decisions on the treatment of parties in non-compliance may be made (e.g. ranging from recommendations, advice, additional reports to the loss of specific rights under the international agreement). Examples for such compliance mechanisms are found in international environmental agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer, the Cartagena Protocol on Biosafety or the Kyoto Protocol.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

Examples for compliance procedures may be found under the Montreal Protocol, the LRTAP Convention or the Cartagena Protocol.

IV. Review of the legal basis for its establishment

15. 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."

16. Similar provisions authorising the Conference of the Parties to establish compliance mechanisms may be found e.g. in Article 13 UNFCCC, 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

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.

Access to Justice in Environmental Matters and Article 14bis of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.

17. 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.

18. 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."

19. 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."

20. 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 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.

21. 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

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.

22. 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."

23. 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."

24. 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 necessary 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.

V. Functions of a compliance mechanism

25. 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.

26. 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.

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."

27. 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)

28. 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

29. 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.

30. The rules of procedure for a compliance mechanism have to address the following issues:

- 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);
- 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;
- 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) 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;
- role of the compliance body in the implementation of recommendations addressed to the party concerned;
- role of the meeting of the Parties and the secretariat in the compliance proceedings.

VII. Options

31. In discussing options at this early stages in the elaboration of a compliance system under the Barcelona Convention and its Protocols a distinction should be drawn on the substantive, institutional and procedural aspects.

32. As regards options to further implementation and compliance the following substantive issues may be considered:

- a) a reporting and assessment system based on regular reports by the parties which makes recommendations concerning the overall implementation and compliance by the parties;
- b) a reporting and assessment system based on regular reports which makes recommendations concerning an individual party's implementation and compliance;
- c) a compliance mechanism which addresses specific cases of non-compliance by an individual party and makes recommendations;
- d) a compliance mechanism, which addresses specific cases of non-compliance by an individual party and decides on the treatment of the party found in non-compliance.

33. Concerning institutional issues of such a system the following options have to be discussed:

- a) a compliance body is to be established (consisting of representatives of all parties or of a limited number) which discusses the issues and makes recommendations to the meeting of the parties which will then either make a recommendation or take a decision;
- b) a compliance body is established (consisting of representatives of all parties or of a limited number) which discusses the issues and makes recommendations to the party concerned or decide on the treatment of the party concerned.

34. Depending on the options to be further elaborated the procedural aspects have to be further discussed. In particular consideration has to be given to the possible contents of recommendations to the parties concerned or to the possible treatment of the parties concerned. Also the question who may provide information to the "compliance mechanism" needs to be elaborated (e.g. information by parties themselves, other parties or the civil society) based on options chosen to be discussed further concerning substantive issues.