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**NON-COMPLIANCE REGIMES IN
MULTILATERAL ENVIRONMENTAL AGREEMENTS**



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INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR AN
INTERNATIONAL LEGALLY BINDING INSTRUMENT
FOR IMPLEMENTING INTERNATIONAL ACTION ON
CERTAIN PERSISTENT ORGANIC POLLUTANTS

Seventh session

Geneva, 14-18 July 2003

Item 5 of the provisional agenda*

Preparations for the Conference of the Parties

NON-COMPLIANCE REGIMES IN MULTILATERAL ENVIRONMENTAL AGREEMENTS**

Note by the secretariat

Introduction

1. Article 17 of the Stockholm Convention on Persistent Organic Pollutants stipulates that the Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of the Convention and for the treatment of Parties found to be in non-compliance.
2. At its sixth session, the Intergovernmental Negotiating Committee, in its decision INC.6/18, requested the secretariat to prepare a report on the existing non-compliance regimes under multilateral environmental agreements, taking into account a study on the subject prepared for the Intergovernmental Negotiating Committee for an International Legally Binding Instrument for the Application of the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, in connection with the Rotterdam Convention.
3. The report on existing non-compliance regimes under multilateral environmental agreements, as requested by the Committee at its sixth session, is given in the present note. It reflects the study of procedures and institutional mechanisms for determining non-compliance contained in document UNEP/FAO/PIC/INC.7/10 prepared for the Intergovernmental Negotiating Committee for the Rotterdam

* UNEP/POPS/INC.7/1.

** Stockholm Convention on Persistent Organic Pollutants, article 17; Conference of Plenipotentiaries on the Stockholm Convention, resolution 1, paragraph 4 (in document UNEP/POPS/CON4/4, appendix I); decision INC-6/18 (in document UNEP/POPS/INC.6/22, annex I).

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Convention on the Prior Informed Consent Procedure for Certain Hazardous and Pesticides in International Trade, while specific examples are presented in chapter III of the present note, which gives an overview of non-compliance regimes under eight current multilateral environmental agreements.

I. PROCEDURES AND INSTITUTIONAL MECHANISMS FOR DETERMINING NON-COMPLIANCE

A. Overview

4. Under the Rotterdam Convention, each Party is obligated to undertake, positively or negatively, certain actions as set out in the provisions of the Convention. To ensure that the objective of the Convention is fully achieved and the Parties gain the benefits expected of the Convention, it is essential that each Party and the Parties in totality comply with those obligations. There could be circumstances, however, where a Party is found not to be undertaking the actions required by the Convention or engaged in the actions prohibited under the Convention. Such circumstances may be conceived as non-compliance or, in certain situations, incomplete compliance.

5. The problem of non-compliance with the obligations under a convention could be associated with possible problems related to:

- (a) Inadequate political will to adhere to the obligations;
- (b) Negligence in undertaking the obligations;
- (c) Legal, administrative, technical or financial capacity and capability of a Party;
- (d) Overall political, economic or social circumstances and changes thereof within or surrounding a Party;
- (e) The provisions of the Convention, including the question of interpretation or adequacy of the provisions;
- (f) Flaws in the governance of the Convention;
- (g) Existence of ambivalent international regimes in conflict with the norms of the Convention.

6. It would seem that the modalities of the implementation of the Convention would be closely related to the issue of non-compliance. The effectiveness in the implementation of the Convention, to a certain extent, will depend upon the mechanisms by which compliance with the obligations is ensured and incidents of non-compliance are prevented or resolved efficiently. Such mechanisms might provide, for example, incentives for Parties to facilitate compliance or disincentives to prevent them from activities or lack thereof leading to non-compliance.

7. In general, the issue of non-compliance needs to be considered in an overall framework of the implementation of the Convention. This would help identify what constitutes cases of non-compliance and how to address them.

8. Given the evolving nature of the regime to implement the Convention, a regular exchange of information on the status of the implementation of the Convention is likely to contribute effectively to addressing the issue of compliance. This might be achieved, for example, through reporting or policy dialogue forums. Building the capacity and capabilities of certain Parties, insofar as they contribute to the implementation of the Convention, would also help considerably to address the non-compliance issue. Increased transparency in the governance of the Convention and enhanced international cooperation among the Parties in the implementation of the Convention could contain the emergence of non-compliance.

9. The mechanisms for the settlement of disputes, such as those set out in article 20 of the Rotterdam Convention, address particular aspects of the issue of non-compliance to resolve disputes concerning the interpretation or application of the Convention. From the viewpoint of the overall implementation of the Convention, measures to ensure compliance with the obligations would prevent the possible causes of disputes. The mechanisms for settlements of disputes and those on non-compliance would thus complement each other.

B. Criteria to determine non-compliance

10. The provisions of the Convention provide the basis for identifying any deviation from them. There might be cases, however, where the Convention does not elaborate in detail how certain provisions ought to be applied. In such cases, a common understanding among the Parties might be required to establish the threshold between the state of compliance and of non-compliance with given obligations. Consideration might be given to practical implications of undertaking the obligations and the need to clarify what would be considered an acceptable conduct under the Convention.

C. Flow of action

11. Existing arrangements established under environmental and other treaties envisage a similar course of action to address the issue of non-compliance, which may be summarized as follows:

(a) Submission of observations by a Party to a body established under the Convention, with corroborating information on the performance of another Party in the application of the Convention;

(b) Consideration by the body of the observations and relevant information submitted to it, as well as additional information it might gather, to establish the fact and make recommendations;

(c) Consideration of the recommendations above by an authoritative body of the Convention (e.g. the Conference of the Parties);

(d) Decision by the authoritative body.

12. The secretariat of the Convention may provide administrative services for the above process by receiving and transmitting information and correspondence and providing secretarial assistance and documentation.

13. Where the mechanism for settlement of disputes is available, the above action may be undertaken without prejudice to such mechanism. The outcome of the dispute settlement mechanisms might complement the non-compliance procedure.

D. Procedure

14. The course of action might be spelled out in the agreed procedure, which might cover:

(a) Modalities for the initiation of the procedure, including how and to whom a Party may submit its observation and corroborating information;

(b) Modalities for transmission of subsequent correspondence, information and documents among the parties concerned, including the time-frame for such transmission;

(c) Procedures for a body established to deal with non-compliance, as well as for the transmission of a report of its findings and the recommendations to the authoritative body;

(d) Procedures for the authoritative body to act on the report and recommendations submitted to it.

15. Procedures might be set out also for the secretariat of the Convention in respect of its administrative functions related to the non-compliance procedure.

16. Since relevant information might be made available in confidence, procedures might be set out to protect the confidentiality of such information.

17. In order to ensure that the non-compliance procedure is in line with developments in the implementation regime of the Convention, the procedure might set out a mechanism for regular review and updating.

E. Institutional arrangements

18. Key components of the institutional arrangements to address the issue of non-compliance might include:

- (a) The authoritative body under which the non-compliance procedures are established (e.g. the Conference of the Parties);
- (b) An advisory body to the authoritative body to examine alleged cases of non-compliance;
- (c) The secretariat.

19. Regarding the advisory body, it might be established on a permanent or ad hoc basis, depending on the foreseen needs for employing the non-compliance procedure. Such a body might consist of a certain number of Parties or experts designated by the Parties. Due consideration should be given to the geographical representation of its membership. Arrangements may be made to identify the officers of the body (e.g. Chair, Vice-Chair and Rapporteur).

F. Treatment

20. Relevant existing arrangements provide a range of possible treatments of the Party found to be in non-compliance with the Convention. They include:

- (a) Exposure to the public, through published reports, of the fact of the violation of the obligations by the Party;
- (b) Issuing cautions or recommendations to the Party;
- (c) Provision of appropriate assistance to enable the Party to comply with the obligations;
- (d) Suspension of specific rights of the Party under the Convention.

21. Possible treatment of the party might correspond to the nature of the conduct of the Party having constituted non-compliance with the Convention.

II. OVERVIEW OF CURRENT NON-COMPLIANCE REGIMES UNDER MULTILATERAL ENVIRONMENTAL AGREEMENTS

22. Many multilateral environmental agreements contain articles referring to compliance or non-compliance. Parties to those and to other agreements which do not include such articles have developed or are developing compliance schemes. Such work under several recent multilateral environmental agreements has been reviewed for the purposes of the present overview, which covers both regimes adopted and in force and also regimes under consideration. For each agreement, the overview includes a short description of the relevant provisions of the agreement itself and of any other elements of the mandate for developing non-compliance procedures, together with the compliance scheme, non-compliance procedures in their present

state of development and any future steps which may be planned. Compliance issues and non-compliance procedures are reviewed in tandem and are treated as interrelated and complementary. It is assumed that the *pacta sunt servanda* principle, even if not expressly stated in an agreement, is the prevailing underlying principle of the agreement's operation.

A. Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention for the Protection of the Ozone Layer (Montreal Protocol)

23. Article 8 of the Montreal Protocol 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 in non-compliance”.

24. Parties to the Montreal Protocol first finalized the development of non-compliance procedures in 1992. Those procedures were adopted by the fourth Meeting of the Parties in its decision IV/5. Procedures included the non-compliance procedure itself and an indicative list of measures that might be taken in respect of non-compliance. Decision IV/5 stated also that the responsibility for legal interpretation of the Protocol rested ultimately with the Parties themselves.

25. By its decision IX/35, the ninth Meeting of the Parties established the Ad Hoc Working Group of Legal and Technical Experts on Non-compliance with the task of reviewing the non-compliance procedure. As a result of the work of the Group, by decision X/10 of the tenth Meeting of the Parties, in November 1998, several amendments of the non-compliance procedure were introduced with a view to clarifying particular paragraphs. Amendments were aimed at streamlining the procedure by measures such as setting specific deadlines for provision of replies and information and by adding to the duties of the Implementation Committee. Parties agreed also to conduct the first review of the procedure no later than the end of 2003.

26. According to the amended procedure, the Implementation Committee under the Non-compliance Procedure for the Montreal Protocol forms the basis of the Protocol's procedures for non-compliance. The Implementation Committee has 10 members, with due consideration being given to equitable geographical distribution. The functions of the Committee are to receive submissions on non-compliance; to request, gather and consider relevant information; to identify causes of non-compliance and to make recommendations for remedying them to the Meeting of the Parties; and to maintain information exchange with the Executive Committee of the Multilateral Fund. The Implementation Committee reports to the Meeting of the Parties. Reports of the Implementation Committee are available to the public, with due respect to the confidentiality of the information involved in the Implementation Committee's proceedings. To date the Implementation Committee has held over 30 meetings.

27. Under the non-compliance procedure, one or more Parties may trigger the procedure with regard to another Party's non-compliance. A Party may also indicate its own inability to comply with its obligations under the Protocol.

28. The secretariat serves as the linking element between the Parties involved and for the collection of relevant information. The secretariat may indicate cases of potential non-compliance to the Meeting of the Parties through its reports, and inform the Implementation Committee accordingly.

29. The indicative list of measures that may be taken in respect of non-compliance include: assistance, including assistance in collecting and reporting data; technical assistance; technology transfer; financial assistance; information transfer, training; cautions; and suspension of specific rights and privileges under the Protocol.

30. Each annual Meeting of the Parties reviews the compliance of all Parties with their obligations under the Protocol on the basis of information reported by each Party. Meetings of the Parties make specific decisions for those Parties whose implementation of the Protocol is not in conformity with it. Decisions include possible measures aimed at restoring compliance such as monitoring and review of performance by

the Implementation Committee until the Party returns to compliance; submission to the Implementation Committee of action plans, including compliance benchmarks for the Committee's review; issuance of cautions of further measures in the event that the Party does not restore compliance; and various other measures.

31. Special consideration is given by Meetings of the Parties to non-compliance with data reporting requirements under various articles of the Protocol, as those data constitute the basis for assessing compliance with the Protocol. Thus, decisions XIV/14 to 17 of the fourteenth Meeting of the Parties, the most recent, all address this issue. For example, decision XIV/17 specifically refers to potential non-compliance with some obligations as a number of Parties had failed to report required data. In the absence of further clarification on the issue, such Parties are presumed to be in non-compliance with the Protocol.

32. Also, each Meeting of the Parties reviews the interaction between the Executive Committee and the Implementation Committee.

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

33. Paragraph 3 of article XI of the Convention requires the Conference of the Parties to review the implementation of the Convention at all its meetings and authorizes the Conference of the Parties, where appropriate, to make recommendations for improving the effectiveness of the Convention. Article XIII provides the Conference of the Parties with the authority to make whatever recommendations it deems appropriate in relation to allegations of unsustainable trade or ineffective implementation.

34. The Standing Committee is empowered by the Conference of the Parties to consider measures, including restrictions of trade, and recommend specific trade sanctions in the periods between meetings of the Conference. The Animals Committee and the Plants Committee are authorized to formulate recommendations for remedial measures in the event that trade in a species has detrimental effects.

35. Under article XII of the Convention, the Secretariat is required to study the reports of Parties and to request from them any further information necessary to ensure implementation of the Convention. It is also required to make recommendations for the implementation of the aims and provisions of the Convention.

36. The present compliance scheme of CITES is evolving and is based on a positive and facilitative approach to compliance, with some coercive elements. CITES has employed a range of remedial actions to deal with non-compliance. The actions have been consultative, non-judicial and non-adversarial in nature and include procedural safeguards for the Parties involved. The compliance scheme has been focusing on the following obligations under the Convention: the designation of Management Authorities and Scientific Authorities in the Parties (article IX); that trade may take place only after the prior grant of certain permits or certificates (articles III to VI); that records of trade must be maintained and periodic reports must be prepared on implementation of the Convention (article VIII); that appropriate measures must be adopted to enforce the provisions of the Convention and prohibit trade in specimens in violation thereof (article VIII); and that Parties must respond to communications from the Secretariat related to information that a species included in Appendix I or II is being affected adversely by trade (article XIII). Compliance is also of concern for Parties in the context of payment of contributions to the Trust Fund, and in relation to export quotas for CITES-listed species, which are set through the Review of Significant Trade or on a national level by Parties, even though there is no obligation under the Convention for export quotas to be set.

37. To promote compliance and to prevent non-compliance, the CITES scheme uses the collection, communication and review of more and less general information, such as annual and biennial reports, special reports and responses to information requests, as a primary means to collect information on and assess compliance specifically. Facilitation of compliance is promoted through advice and assistance, by providing Parties with information, technical and financial assistance, technology transfer, training and so on. Parties may be asked to undertake additional self-reporting and targeted monitoring. An informal warning may be issued if necessary.

38. The process of establishing non-compliance is initiated by a specific event, which may be a Party's failure to meet a deadline or a complaint registered by one or more Parties, and is determined after a review of the information submitted.

39. Measures to address non-compliance have included provision of advice and assistance; issuance of a formal caution in direct contact with the Party concerned; verification through verification missions; public notification of non-compliance; development of a compliance action plan; and suspension of rights and privileges through recommendations for temporary suspension of trade, selected-species trade boycotts and other trade measures. Trade sanctions have mainly been used to deal with Parties that have not adopted adequate domestic legislation. In some cases, the power delegated to the Secretariat has been substantial, including determining whether States are adequately implementing their obligations.

40. The better to address non-compliance issues, at its 45th meeting, in June 2001, the CITES Standing Committee instructed the Secretariat to prepare an analysis of the range of legal, technical and administrative actions that might be taken in response to problems of non-compliance with the Convention and with resolutions and decisions of the Conference of the Parties. On the basis of the document, SC46 Doc.11.3, prepared by the Secretariat on possible measures for non-compliance, and of the discussions held during the 46th meeting of the Standing Committee, in March 2002, the Secretariat prepared a document, CoP12 Doc.26, for the 12th meeting of the Conference of the Parties, in November 2002. Upon discussion of the document, in its decision 12.84 the Conference of the Parties, agreed that the Secretariat should draft a set of Guidelines on Compliance with the Convention for consideration by the Standing Committee at its 49th meeting.

C. Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol)

41. Article 34 of the Cartagena Protocol reads as follows:

“The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate. They shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention.”

42. The issue of compliance was addressed by the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) in preparing for the entry into force of the Protocol. At its first meeting, in December 2000, ICCP invited Parties to the Convention and Governments to communicate to the Executive Secretary their views regarding elements and options for a compliance regime under the Cartagena Protocol, on the basis of a questionnaire.¹ An Open-ended Meeting of Experts on a Compliance Regime under the Cartagena Protocol on Biosafety was convened in September 2001 back-to-back to the second meeting of ICCP, which reviewed a synthesis report² of views submitted by Parties.

43. On the basis of the draft procedures and mechanisms on compliance contained in annex to the report³ of the Open-ended Meeting of Experts on Compliance, at its second meeting ICCP developed the draft procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety reproduced in annex to its recommendation 2/11.⁴ A number of issues remained unresolved in that draft, and in recommendation 2/11 ICCP invited Parties to the Convention and other States to submit their views with respect to the contents of the draft which remained in square brackets.

¹ See document UNEP/CBD/ICCP/1/9, annex I, item 4.5, para. 1.

² UNEP/CBD/ICCP/2/13.

³ UNEP/CBD/ICCP/2/13/Add.1.

⁴ See document UNEP/CBD/ICCP/2/15, annex I.

44. At its third meeting, in April 2002, ICCP further developed the text of the procedures and mechanisms on compliance and agreed in its recommendation 3/2 to forward the draft text⁵ to the Conference of the Parties, serving as the meeting of the Parties to the Protocol, for consideration at its first meeting. It also invited Parties and Governments to submit their views on the contents of the draft which remained in square brackets.

45. The draft text comprises the following sections: I., "Objective, nature and underlying principles", whereby compliance procedures and mechanisms must be simple, facilitative, non-adversarial and cooperative; II., "Institutional mechanisms", in which the Compliance Committee is established and its size, composition and operation are determined; III., "Functions of the Committee", which are to identify cases of non-compliance, consider information, provide advice and assistance, review general issues of compliance, and to take measures or make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol; IV., "Procedures", whereby the Compliance Committee is obliged to receive submissions, and the procedures to follow receipt of submissions are established; V., "Information and consultation", which sets forth modalities for the collection of information, enumerates the bodies entitled to submit information, enables the Committee to seek advice from experts and obliges it to respect the confidentiality of the information collected; VI., "Measures to promote compliance and address cases of non-compliance"; and VII., "Review of the procedures and mechanisms".

46. The draft includes bracketed text on several substantial issues, including, in its section I, whether the operation of the compliance procedures and mechanisms should be guided by the principle of common but differentiated responsibilities. Nor has agreement been reached, under section II, on the issue of balance between representatives of importing and exporting countries in the composition of the Compliance Committee, or on whether the members of the Committee should serve in their individual capacity. As to the procedures set forth in section IV of the draft, divergent views remain as to whether submissions may be made by any Party with respect to another Party and whether the Conference of the Parties serving as the meeting of the Parties to the Protocol may make submissions to the Compliance Committee. In section V, on information and consultation, square brackets remain in the list of sources from which the Committee may seek, receive or consider information. Lastly, in section VI, agreement has not been reached on the measures which the Conference of the Parties serving as the meeting of the Parties may take to address cases of non-compliance.

D. Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)

47. Article 13 of the United Nations Framework Convention on Climate Change, on the resolution of questions regarding non-compliance, reads as follows:

"The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention."

48. Pursuant to article 13, a multilateral consultative process was developed and was adopted by the Conference of the Parties in its decision 10/CP.4⁶ at its fourth session, in November 1998. The process must be conducted in a facilitative, non-judicial, transparent, cooperative and timely manner by the standing Multilateral Consultative Committee established in that same decision to provide assistance to Parties in implementing the Convention and to prevent disputes from arising.

⁵ Annexes to recommendation 3/2 (in document UNEP/CBD/ICCP/3/10, annex).

⁶ See document FCCC/CP/1998/16/Add.1.

49. Article 18 of the Kyoto Protocol reads as follows:

“The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.”

50. The compliance procedures and mechanisms were developed during the second part of the sixth session of the Conference of the Parties, in July 2001, and at the seventh session, in November 2001, at which the compliance procedures and mechanisms were finalized and a decision to forward them to the first Meeting of the Parties of the Protocol was taken.⁷

51. The draft compliance structure for the Kyoto Protocol consists of a Compliance Committee comprising a facilitative branch and an enforcement branch, both of which have 10 members, with rotation of members and due respect to the principle of equitable geographical distribution. In addition to work in the two branches, the Committee meets in plenary and elects its bureau. Submissions to the Committee on compliance issues may be made by any Party with regard to itself or another Party.

52. The facilitative branch is responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments, taking into account the principle of common but differentiated responsibilities. The facilitative branch decides on the application of consequences of a facilitative nature as listed. Decisions of the facilitative branch may be taken by a three-quarters majority.

53. The enforcement branch is responsible for determining whether a Party included in Annex I to the Protocol is not in compliance with its obligations as set forth. The enforcement branch determines whether to apply measures aiming at adjustments of requirements, or consequences, as listed, aimed at restoring compliance. Possible consequences include measures such as declaration of non-compliance, an analysis of causes of non-compliance, development and implementation of various plans or timetables to restore compliance, deductions from future assigned amounts of emissions the event that currently assigned amounts are exceeded, and suspension of eligibility to make transfers of emissions and participate in the emissions market. Decisions of the enforcement branch require a double majority of both Annex I and non-Annex I Parties. Parties may appeal to the Conference of the Parties against decisions by the enforcement branch.

54. The procedures of the branches include assessment of information from reports provided under the Protocol from Parties concerned, from the Conference of the Parties and from the other branch. Intergovernmental and non-governmental organizations may submit information also. Information is normally made public subject to applicable confidentiality restrictions. Procedural safeguards apply for Parties concerned.

55. More detailed additional procedures with specific time frames are set for the enforcement branch, including the opportunity for Parties to make formal written submissions and request hearings at which they may present their views and call on expert testimony. In the event of non-compliance with emissions targets, Parties may also lodge appeals to the Conference of the Parties if they believe that they have been denied due process. An expedited procedure with a shorter time frame set for the enforcement branch applies for questions concerning eligibility to participate in the mechanisms. A Party may request, either through an expert review team or directly to the enforcement branch, to have its eligibility restored if it believes it has rectified the problem in question and is again meeting the relevant criteria.

⁷ Decision 24/CP.7 and annex (in document FCCC/CP/2001/13/Add.3).

E. United Nations Convention to Combat Desertification (UNCCD)

56. Article 27 of UNCCD stipulates that the Conference of the Parties shall consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention.

57. From its first session, the Conference of the Parties included in its agenda an item on procedures and institutional mechanisms for the resolution of questions that may arise with regard to implementation. By its decision 20/COP.3,⁸ the Conference of the Parties at its third session decided to convene, during its fourth session, an open-ended ad hoc group of experts to examine and make recommendations on, inter alia, procedures for resolution of questions of implementation. In the same decision, Parties were invited to communicate their views on how to take the matter forward. Those views were compiled and were presented for consideration to the the Conference of the Parties at its fifth session, in October 2001, together with an overview of the progress achieved in that area under other conventions.⁹

58. At its fifth session, the Conference of the Parties adopted decision 1/COP.5 entitled “Additional procedures or institutional mechanisms to assist in the review of the implementation of the Convention”,¹⁰ whereby it established the Committee for the Review of the Implementation of the Convention (CRIC) as a subsidiary body of the Conference of the Parties, together with its terms of reference. The decision also made provision for the mandate, functions, terms of reference and operations of the Committee to be reviewed on the basis of lessons learned and invited Parties to submit proposals for criteria for the review exercise.

59. The Committee comprises all Parties to the Convention, with participation by observers, and transparency of work, ensured. The main tasks of the Committee are to review the implementation of the Convention on the basis of reports submitted by Parties, analyse the effectiveness of implementation, identify best practices, necessary adjustments and challenges, and identify ways of improving implementation of the Convention in various areas. The Committee is empowered to make recommendations to the Conference of the Parties. For the purposes of the Committee’s work, the secretariat is assigned the functions of information collection, synthesis, preliminary analysis and dissemination. The secretariat also compiles a synthesis report for the Committee.

60. At its fifth session, the Conference of the Parties also adopted decision 21/COP.5, entitled “Resolution of questions on implementation, arbitration and conciliation procedures”,¹¹ where it decided to reconvene the Open-ended Ad Hoc Group of Experts at its sixth session and invited Parties to communicate their views on the matter.

F. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)

61. Article of the Basel Convention, on verification, reads as follows:

“Any Party which has reason to believe that another Party is acting or has acted in breach of its obligations under this Convention may inform the Secretariat thereof, and in such an event, shall simultaneously and immediately inform, directly or through the Secretariat, the Party against whom the allegations are made. All relevant information should be submitted by the Secretariat to the Parties.”

⁸ In document ICCD/COP(3)/20/Add.1.

⁹ See document ICCD/COP(5)/8.

¹⁰ In document ICCD/COP(5)/11/Add.1.

¹¹ Ibid..

62. In developing the procedures in article 19 and in other articles containing specific provisions for the monitoring of implementation and compliance and prevention of non-compliance, after the entry into force of the Convention Parties mandated the Convention's Legal Working Group to develop procedures for monitoring the implementation of and compliance with the obligations set out by the Convention. In decision V/16 of the Conference of the Parties at its fifth meeting¹², the Legal Working Group was requested to prepare a draft decision for adoption by the Conference of the Parties at its sixth meeting, in December 2002. A draft decision was elaborated by the Legal Working Group for its fourth session, in January 2002, and comments on the draft by Parties and Signatories were requested. The views submitted were summarized by the secretariat and, together with the draft decision, were discussed by the Legal Working Group at its fifth session, in May 2002. The draft decision was further discussed at an intersessional meeting immediately preceding the sixth session of the Conference of the Parties, and was submitted to the Conference of the Parties at its sixth session.¹³

63. The mechanism for promoting implementation and compliance, whose terms of reference were adopted by of the Conference of the Parties at its sixth session¹⁴ is required to be non-confrontational, transparent, cost effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention¹⁵. A 15-member Committee was established to administer the mechanism. Members serve on the basis of a rotation schedule. Submissions may be made to the Committee, inter alios by Parties in a situation of non-compliance. Meetings dealing with specific submissions should as a general rule not be open to other Parties or to the public.

64. The facilitation procedure established as part of the mechanism for promoting implementation and compliance includes provision by the Committee of advice, non-binding recommendations and information. Additional measures which may be taken consist of two alternatives, to be decided on by the Conference of the Parties at the recommendation of the Committee: the provision of further support, particularly technical assistance, capacity-building and access to financial resources, or the issuance of a cautionary statement and provision of advice to help Parties return to compliance and to promote cooperation between parties.

65. The Committee is required to review general issues of compliance and implementation as directed by the Conference of the Parties. Under the rubric of consultation and information, in carrying out its functions the Committee may request information from Parties on general issues of compliance and implementation, consult with other bodies, undertake information gathering on the territories of the Parties with their consent, consult with the secretariat and review national reports provided pursuant to the Convention.

66. The Committee must report to the Conference of the Parties on the work it has carried out. Also, it must make every effort to reach agreement on all matters of substance by consensus. If consensus cannot be achieved, the report and recommendations must reflect the views of all Committee members. As a last resort, decisions must be supported by a two-thirds majority of members present and voting or by eight members, whichever is greater. The quorum for the Committee was set at 10. Confidentiality of information received in confidence must be protected by the Committee and by any Party or others involved.

¹² In document UNEP/CHW.5/29, annex I.

¹³ See document UNEP/CHW.6/9.

¹⁴ Decision VI/12, appendix (in document UNEP/CHW.6/40, annex).

¹⁵ Ibid., para. 2.

G. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)

67. Article 15 (Review of Compliance) of the Aarhus Convention reads as follows:

“The meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.”

68. At the first meeting of Signatories to the Convention, a task force on compliance mechanisms was established¹⁶ to draft elements for compliance mechanisms to facilitate future discussion of the matter. At their second meeting, the Signatories decided¹⁷ to establish an open-ended intergovernmental working group to draw up a draft text of a decision for the first Meeting of the Parties. The Working Group met twice in 2001 and prepared a draft decision¹⁸ on review of compliance for the first Meeting of the Parties.

69. The first Meeting of the Parties, in October 2002, adopted¹⁹ the draft decision as decision I/7 on review of compliance with the Convention. In the decision, the Parties established a Compliance Committee and adopted a set of rules on the structure and functions of the compliance committee and procedures for the review of compliance, set forth in annex to the decision. The functions of the Committee (chapter III of the annex) include consideration of submissions by Parties on their own compliance or other Parties' compliance (chapter IV), of referrals on possible non-compliance by the secretariat made on the basis of reports submitted by Parties in accordance with the Convention's requirements (chapter V), and of communications from the public submitted under specified conditions (chapter VI). Parties may opt out of the mechanism for consideration of communications from members of the public for a maximum of four years. The Committee also prepares reports to the Meeting of the Parties on compliance with the Convention (chapter X). Its functions include also monitoring, assessing and facilitating the compliance with the reporting requirements of the Convention (chapter III) and making recommendations if and as appropriate. In order to fulfil its functions, the Committee undertakes information gathering (chapter VII), with due regard being paid to the confidentiality of the information collected (chapter VIII).

70. Under chapter XII, the Meeting of the Parties may, upon consideration of a report and any recommendations of the Compliance Committee, decide upon one or more of the following measures: advice and assistance; recommendations to the Party concerned; a request to the Party concerned to submit a strategy and time schedule for achievement of compliance; a recommendation to the Party concerned on specific measures to address a matter raised in a communication from a member of the public; issuance of a declaration of non-compliance; issuance of a caution; suspension of rights and privileges under the Convention; and/or any other non-confrontational, non-judicial and consultative measures.

71. The first Meeting of the Parties elected the first Compliance Committee,²⁰ which held its first session in March 2003.

¹⁶ See document CEP/WG.5/1999/2, para. 49.

¹⁷ See document CEP/WG.5/2000/2, para. 22.

¹⁸ See document MP.PP/2002/9.

¹⁹ See document ECE/MP.PP/2, para. 47.

²⁰ See document ECE/MP.PP/2, paras. 48-50.

H. Convention on Long-Range Transboundary Air Pollution (LRTAP)

72. In its decision 1997/2,²¹ the Executive Body of the LRTAP Convention established the Implementation Committee for the review of compliance by the Parties with their obligations under the protocols to the Convention.

73. The Implementation Committee decided that it would take all its decisions by consensus.²² The Committee bases its decisions on the review of information provided under the reporting procedure of the Convention. The Committee also worked on a questionnaire for use by Parties to report on their strategies and policies for air-pollution abatement, and held consultations with experts on evaluation of the quality of nationally reported emission data.

74. The Committee reviews cases concerning compliance with provisions of the protocols to the Convention and submits recommendations to the Executive Body. It reviews compliance by Parties with reporting obligations and prepares assessments of compliance with the various protocols for consideration by the Executive Body.

75. The Executive Body weighs cases of non-compliance with Protocols. Decisions mainly state concerns over non-compliance and set specific reporting tasks so that the process of returning to a state of compliance can be evaluated. The Executive Body also decides in cases concerning compliance with reporting obligations, and requests parties to remedy situations of non-compliance before specific deadlines.

III. UNEP GUIDELINES ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

76. The UNEP guidelines on compliance with and enforcement of multilateral environmental agreements²³ were adopted by the UNEP Governing Council at its seventh special session in decision SS.VII/4. Compliance is defined in the context of the guidelines for enhancing compliance with multilateral environmental agreements as the fulfilment by the contracting parties of their obligations under a multilateral agreement and any amendments to the multilateral environmental agreement.

77. In part 4, entitled “Compliance considerations in multilateral environmental agreements”, of section D of chapter I – guidelines for enhancing compliance with multilateral environmental agreements – the guidelines state that the competent body of a multilateral agreement may, where authorized to do so, regularly review the overall implementation of obligations under that multilateral agreement and examine specific difficulties of compliance. Approaches to enhancing compliance may take into account such considerations as clarity of obligations, development of national implementation plans, reporting, monitoring and verification. Non-compliance mechanisms may take into account the importance of tailoring compliance provisions and mechanisms to the multilateral agreement’s specific obligations. In developing non-compliance mechanisms, parties may consider the establishment of a body, such as a compliance committee. Non-compliance mechanisms may be used to provide a vehicle to identify possible situations of non-compliance at an early stage, and the causes of non-compliance, and formulate appropriate responses. Non-compliance mechanisms may be non-adversarial and include procedural safeguards for those involved. The final determination of non-compliance of a party may be made through the conference of the parties or by another body under the agreement given that mandate by the conference of the parties.

²¹ In document ECE/EB.AIR/53, annex III.

²² EB.AIR/1998/4, para. 6.

²³ UNEP(DEPI)MEAs/WG.1/3 and Corr.1, annex II.