

I. INTRODUCTION

1. At its sixth meeting (January - February 2013), the Compliance Committee requested (Point 7 of the report on Conclusions and Decisions) that the Secretariat address a memorandum to its members on the implementation of the Guidelines for the evaluation of reports to identify actual or potential instances of non-compliance in the application of the Barcelona Convention and its Protocols. The present document is intended as a supplementary approach to document UNEP (DEPI)/ MED CC.7/3.
2. The fundamental issue is to determine the objective criteria by which to verify whether a Contracting Party has respected its commitments under the Barcelona Convention and its Protocols. In answering this question it must first be assumed that a distinction has been made between formal and substantive obligations with regard to compliance.

II. EVALUATION

3. At its third meeting held in Athens in November 2009, the Compliance Committee examined this matter based on a working document and discussed the measures to be implemented to structure its work. The Committee based itself on the proposals and considerations formulated by Mr Gerhardt Loibl, an independent expert. These are laid out in a working document which was put before the Committee, entitled Proposed minimum measures to achieve compliance with obligations under the Barcelona Convention and its Protocols (UNEP (DEPI) MED WG CC 3/3). This report is illuminating, as it underlines two aspects of the implementation of compliance principles. The question of compliance is effectively viewed from two angles. A distinction is made between, on the one hand, formal compliance, that is, the identification of formal measures that a Contracting Party is required to take in applying a particular provision of the Barcelona Convention and its Protocols. In this instance, it is a matter of investigating whether the obligations have been met on a formal level that is, examining whether the Contracting Parties have actually taken the legal, administrative and institutional measures needed to implement the obligations within their national laws. The matter of compliance can, on the other hand, be evaluated in substantive terms, that is, from the point of view of the practical application of a provision in individual cases.
4. The report's main finding was that in principle, the failure by a Contracting Party to take formal measures to incorporate the provisions into national law constitutes a clear case of non-compliance. From this perspective, it falls to the Committee to prioritize as an initial step an evaluation of the formal application of the provisions of the Convention and its Protocols. This formal approach to compliance presumes prior identification of the articles of the Convention and its Protocols which necessitate the practical implementation of essential legislative and regulatory measures in order to comply with the obligations set out in certain articles of these legal instruments.

III. PROPOSAL OF CRITERIA TO EVALUATE THE APPLICATION OF THE PROVISIONS OF THE BARCELONA CONVENTION AND ITS PROTOCOLS.

5. The provisions of the Barcelona Convention and its Protocols do not all have the same scope in the extent to which they set out the different obligations of the Contracting Parties. Some of these obligations may be very specific, while others simply set out wide-ranging objectives. Consequently, only a close analysis of the content of each provision enables an evaluation of its impact in terms of compliance. It is therefore necessary to proceed to evaluate the content and wording of each

article of the Convention and its Protocols in order to determine the nature of the international compliance required from the Contracting Parties. This was the objective of the exercise carried out in working document UNEP (DEPI) MED CC6/4 regarding the revised summary of national reports submitted by the Contracting Parties for the 2008-2009 Biennium.

6. An analysis of the wording of the majority of the provisions of the Barcelona Convention brings to light the importance of formal compliance. By contrast, relatively few articles allow for matters regarding substantive obligations. It follows from this that the evaluation of formal compliance with the provisions by a Contracting Party constitutes the most practical approach, since the evaluation of compliance with substantive obligations can only be envisaged in cases where a provision anticipates the adoption of a specific implementation measure.

Practical application of formal evaluation criteria

7. The implementation of a formal review of compliance by a Contracting Party assumes that the Party is required to adopt national legal measures prescribed by the Barcelona Convention and its Protocols. From this point of view, the provisions of the Barcelona Convention are drawn up in general terms, allowing the Parties wide latitude to use their discretion in applying these provisions at national level. In this scenario, it would be very difficult to determine non-compliance by a Party.
8. As an example, article 4 of the Barcelona Convention on General Undertakings clarifies this problem: the article charges all Contracting Parties with equal obligations to take measures. Thus the Parties are requested (paragraphs 1, 2 and 3a and b) to undertake all appropriate measures (...) and to apply certain principles in accordance with their capabilities, such as the precautionary principle and the polluter pays principle, with due regard to the public interest. The wording of these provisions, which leaves a wide margin for maneuver in the application of principles and measures, does not therefore make it possible to determine whether or not a Contracting Party has indeed complied with its obligations. However, only paragraph 3c of the article would make it possible to establish whether or not a Contracting Party is not formally complying with its obligations, as this provision clearly indicates the conditions under which an environmental impact assessment must be undertaken.
9. This frame of reference is equally applicable to the Barcelona Convention Protocols. As an example, several provisions in the Dumping Protocol call for the Contracting Parties to adopt national legislative measures in order to comply with their obligations. It should therefore be easy for the Committee to determine, based on the reports, whether the Parties have actually taken the formal application measures defined in these articles. By contrast, the Hazardous Wastes Protocol, in article 5 of the General Undertakings, invites Parties to take all appropriate measures to achieve the goals set out in the provisions of the article. Consequently, it is for the Contracting Parties to use their discretion in deciding the measures they deem appropriate. In this context, a non-compliance review can only be considered where it becomes apparent that the measures taken by the Contracting Party have not enabled it to achieve the goals set out in the article of the Protocol.