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MEDITERRANEAN ACTION PLAN

Seventh meeting of the Compliance Committee

Athens (Greece), 26 - 28 June 2013

Power of Initiative of the Compliance Committee

Introduction

At its sixth meeting held in Athens on 30 January 2013, the Committee was apprised of a note (UNEP (DEPI) MED CC6/7) on the possibility of introducing a right to self-referral to support the Committee in the Compliance Procedures and Mechanisms (Decision IG 17/2). In conclusion of the debates on this question, the Chair proposed that Mr Michel Prieur and Mr José Juste Ruiz should be responsible for collecting from the members of the Committee the amendments and comments on the draft amendment proposed by the Secretariat in the above document CC.6/7 and for preparing a revised document that would be submitted for discussion at the seventh meeting of the Committee.

In accordance with the Decision of the Compliance Committee, Mr Michel Prieur and Mr José Juste Ruiz have sent to the Secretariat the working document set out below to be submitted for discussion to the members of the Compliance Committee:

Note from Mr Michel Prieur and Mr José Juste Ruiz on self-referral to the Compliance Committee

I. Terminology

1. To date, the terminology used to distinguish the various cases of intervention of the Compliance Committee has not really been standardized. Depending on the case, in the "official" documents the terminology used is:

- "submission": Decision IG 17/2 para 18; Decision IG 19/1 art. 24, 25, 26, 27;
- "alleged non-compliance": Decision IG 17/2 para 19;
- "referrals by the Secretariat": Decision IG 17/2 para 23; Decision IG 19/1 art. 25-3;
- "any information to be considered by the Committee": Decision IG 19/1 art. 14-1 and 14-4;
- "to consider any other issues as requested": Decision IG 17/2 para 17- (c).

2. On the "UNEP/MAP Compliance" website the terminology used is:

- "self-trigger", when a Party approaches the Committee regarding its own situation under para 18 a of Decision IG 17/2;
- "Party to Party trigger";
- "Secretariat trigger".

3. The adoption of a new referral procedure by the Committee should avoid the use of the French expression "auto-saisine" for "self-trigger", as it has "imperialist", authoritarian overtones which could cause certain Contracting Parties to reject it in a psychological knee-jerk response, on the grounds that the Committee is seeking to impose its dominance. Also, it would be preferable to use a less dramatic designation such as "review of individual questions instigated by the Committee", "procedure instigated by the Committee" or "spontaneous action of the Committee", "initiative of the Committee", "initiative that the Committee can take".

II. Existing models and practices compared

4. The document UNEP (DEPI) MED CC 6/7 suggests that there would be no review of compliance instigated by the existing committees in the multilateral conventions on the environment. In reality, it must first be observed that such Committee-instigated reviews have existed for a long time in the field of human rights:

- Final conclusions of the Human Rights Committee of the United Nations following the submission of reports by States Parties (art. 40, International Covenant on Civil and Political Rights);
- Final remarks of the Committee on Economic, Social and Cultural Rights following the submission of reports by States Parties since 1985 (art. 16 to 22, International Covenant on Economic, Social and Cultural Rights);
- Reports of the European Committee of Social Rights of the European Social Charter.

5. Most of the multilateral conventions on the environment which have a "Compliance Committee" have allocated to it the right to initiate a review of cases of non-compliance resulting either from the reports of the States, from information received by the Committee or from information requested by the Committee. There follows a non-exhaustive list of examples:

- **Aarhus Convention** (Decision I/7 adopted at the 1st COP in Lucca on 23 October 2002) para. 18 "Communications from the public"; paragraph 25 "Information gathering". The Committee may be approached through a combination of para 14 "the Committee may examine compliance issues and make recommendations if and as appropriate" and of para 25 (d) "the Committee may consider any relevant information submitted to it". It must therefore be considered that for Aarhus there are two routes for the intervention of the Committee on its own initiative: the Committee may decide whether or not to take the referral of a case following a communication from the public, or, following information gathered, it may ensure that the Secretariat makes a referral to it.
- **Espoo Convention** (decision II/4 adopted at the 2nd COP of Sofia in 2001 replaced by decision III/2 adopted at the 3rd COP in 2004). Referral by the Committee itself is even more direct in this case. According to para 4 (a) the Committee shall examine (outside the communications referred to it by the States) "any other possible case of non-compliance by a Party which it decides to consider under para 6, with a view to finding a satisfactory solution". According to para 6, clearly entitled "Initiatives that the Committee can take", it is stated that:

"When the Committee becomes aware that a Party may not be in compliance, it may ask the Party in question to provide the information necessary in this regard. The response and supporting information shall be provided to the Committee within a period of three months, or a longer period if the circumstances of the case so require. The Committee shall examine the question as soon as possible, taking into account any response provided by the Party".

6. Decision IV/2 of 2008 on the Rules of Procedure of the Committee is even more explicit. Art. 15 is entitled "Procedures relating to the initiatives that the Committee can take". It indicates that:

"The sources of information by which the Committee might become aware of possible non-compliance could be: (a) Parties' work under the Convention, (b) any other source".

7. Thus the Espoo Committee and its Kiev Protocol clearly distinguish in the agenda between types of case reviews: - communications from the States - information gathering - initiatives of the Committee.

- **Convention on the protection and the use of transboundary watercourses and international lakes** (decision of the 6th COP in Rome/30 November 2012): establishment of a Committee for the application of the Convention. This Committee has among its remits the possibility to take "initiatives". Para VII of the decision (Appendix I, para. 28 and 29) is entitled "Committee initiative". These initiatives are the result of the information that it deems appropriate, as well as the information that it receives from the States and individuals or those known to the members of the Committee or the Secretariat (Appendix II, Internal Regulations VII para 28).
- **The Protocol on water and health to the Convention of 1992 on the protection and the use of transboundary watercourses and international lakes**, agreed in London on 17 June 1999. The first meeting of the Parties (Geneva, 17-19 January 2007) established a Compliance Committee which shall consider "any submission, referral or communication relating to specific issues of compliance made in accordance with paragraphs 13 to 22 below". These paragraphs refer to applications submitted by the Parties (para 13-14), matters referred by the Secretariat (para 15) and communications from the public (para 16 to 22).
- **Alpine Convention:** a Compliance Committee was set up by decision VII/4. This decision was replaced due to a reform of the Committee by decision AC XII/a 1 of the 12th COP in Poschiavo in 2012. The Committee, in addition to the referrals by the Parties and the observers, shall review ex officio "compliance with the Alpine Convention and its Implementation Protocols on the basis of the national reports and further available information" (para 2-1).
- **Draft review of compliance with the Nagoya Protocol on access to genetic resources** (Recommendation 2/7 of the Intergovernmental Ad Hoc Committee for the Nagoya Protocol at the Conference in New Delhi/6 July 2012). This preparatory document stipulates that the Compliance Committee may receive communications from members of the Committee, the Secretariat and the public. In addition, the Committee may examine on its own initiative any question related to compliance including any systemic issues of non-compliance. It may rely on the national reports and all other relevant information brought to its attention, in particular by the public and indigenous and local communities.

8. This comparison of practices reveals that, in general, and supplementary to cases of referral by a Party or by the Secretariat, Compliance Committees are allowed to intervene on their own initiative. Such an intervention may be activated by different routes such as: a) on the basis of the reports submitted to the Secretariat; b) as a result of communications by the public; c) as a result of communications by observers; d) by any other source of information brought to the attention of the Committee.

III. Means of intervention of the Compliance Committee of the Barcelona Convention and its protocols

9. The document UNEP (DEPI)/MED CC 6/7 considers that there are at present two procedures for intervention by the Committee: on the initiative of the Parties (para. 18 of GI 17/2) or on the initiative of the Secretariat (para 23 of Decision IG 17/2). In fact, there is already a third procedure which allows the Committee to consider a particular case of non-compliance at the request of the meeting of the Contracting Parties. This is clear both from para 17 (b) and (c) of Decision IG 17/2 and from the fact that, in the exercise of their

sovereign powers as regards compliance with the obligations, the meeting of the Contracting Parties may always instruct the Committee to consider an individual case of a State if the meeting considers it relevant.

IV. Sources of information of the Compliance Committee

10. A crucial issue is that of the sources of information available to the Committee so that it can act and take decisions on an issue of non-compliance. In the case of a matter referred by the Secretariat, the Decision IG 17/2 explicitly refers to information obtained on the basis of the reports submitted by the States (para. 23). This means not only the periodic reports stipulated in art. 26 of the Convention but also "any other" report submitted by the Parties, including the reports submitted to the Secretariat by the various bodies of the Convention and its protocols, in particular those of the Regional Activity Centres (RAC). Some of those Centres have already submitted reports to the Compliance Committee, such as that of MEDPOL. This could also be the case for those reports submitted to the Committee by other Regional Activity Centres such as REMPEC or PAP/RAC for integrated coastal zone management.

11. In general, it must be noted that the current Regulations of the Compliance Committee, unlike other regulations of the existing committees specified above in II, are silent on the range of sources of information for the Committee. This is clearly a shortcoming which needs to be resolved because it influences the planned system for procedures taken on the initiative of the Committee.

12. Undoubtedly, the main questions are 1) whether the Committee may itself request information from the Centres, the Secretariat and the States? 2) whether such information may come from the public and NGOs via the Centres and the Secretariat? and (3) whether it is then possible for it to initiate a procedure on its own initiative on the basis of this information?

13. As regards information sent by the NGOs, it would be reasonable to give this opportunity to at least those organizations which have observer status under art. 20 of the Barcelona Convention. This would have the merit of rendering effective Decision IG 19/6 of the 16th COP in Marrakesh in 2009 on Cooperation and partnership between MAP and civil society. The code of conduct adopted in this connection is clearly aimed at the effective application of the Convention and the work of the MAP and in particular the monitoring of the works and actions (para 7 of the rights of MAP partners). Para. 5 on the "responsibilities of MAP partners" even specifies that those organizations must "promote and strengthen compliance with the Barcelona Convention and its Protocols". Para 8 of "rights of MAP partners" specifies, accordingly, that they may submit general or specific comments and suggestions in writing to the Secretariat.

V. Justification and grounds

14. The document UNEP (DEPI)/ MED. CC 6/7 refers to several arguments in favour of a new procedure for the initiative of the Committee. This would contribute to strengthening the Committee itself, to making its actions more dynamic and to facilitating its rapid intervention for cases of non-compliance which come to its knowledge. The document also indicates the reasons why it is unlikely that the States will make use of the existing procedure of referral under para 18 of Decision IG 17/2, either against another State, or against themselves. As regards the procedure for matters referred by the Secretariat under para 23 of GI 17/2, experience shows that the body encounters some difficulties and confusion in assuming responsibility of this type with respect to the States in circumstances that would quite often be politically difficult. The Secretariat could easily be accused of bias and of being a whistle-

blowing entity, which would have a serious adverse effect on its authority and its key role of monitoring the implementation of the Convention and its protocols.

15. It is appropriate to add other arguments in favour of the proposed reform:

- It would make it possible to crystallize and strengthen the role of the Committee as a body primarily intended "to assist the Contracting Parties" (preamble to Decision IG 19/1) and also mandated to "facilitate and promote compliance with the obligations" (para 1 of Decision IG 17/2).
- It would also contribute to the progressive democratization initiative according to art 15 of the Convention on information and public participation.
- There is another argument which should make it possible to overcome the reluctance of certain States. This is to emphasize the fact that the new procedures on the initiative of the Committee shall not be used as a substitute to the existing ones.
- Moreover, the initiation of a procedure on the basis of information available by any of those within the Barcelona system simply records this information, without the Committee having any power to act alone in initiating an investigation, as would be the case with a public prosecutor. In fact, taking note of the available information and then proceeding to provide assistance and support to facilitate the application of the Convention and its protocols would merely be a simple application of the objectives already agreed by the Contracting Parties when they approved the establishment of the Committee.
- The only difference to the existing procedures is that the Committee has more opportunity to exercise its mission to render the system of Barcelona more effective in accordance with the objectives set by Decision IG 17/2.

VI. Proposed text

16. In the light of the above considerations and the conclusions reached, the text proposed involves an amendment of Decision IG 17/2. It is preferable that the text is as short as possible and does not introduce case reviews which differ from those which already exist. It should be possible to apply *mutatis mutandis* the general rules applicable in Decision IG 17/2 and the Rules of Procedure of the Committee IG 19/1.

17. A new paragraph could be added to Section V "procedure" of Decision IG17/2:
"3. Initiative of the Committee

23a. The Committee may examine, on the basis of the biennial activity reports or in the light of information received from the partner NGOs of the MAP or any other [relevant] source of information, the difficulties encountered by a Contracting Party in the application of the Convention and its protocols. [The Committee shall examine the information collected in a non-discriminatory, non-arbitrary and objective manner]. The Committee shall request the Party concerned to provide additional information. The Party concerned shall have a period of two months to respond.

Paragraphs 24 to 30 and 32 to 34 shall apply, mutatis mutandis, in the case of initiation by the Committee".

18. It is appropriate to harmonize this reform with the Rules of Procedure by also amending Decision IG19/1:

"art. 14 -2 A referral received in accordance with paragraphs 18) (a) and 23a of Section V

"art. 2 5 -3: The deadlines for the referrals of a Party in respect of the non-compliance of another Party shall also apply to matters referred by the Secretariat and/or by the Committee"