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Procedures and institutional mechanisms for the resolution of questions on implementation

**Procedures and institutional mechanisms for the resolution of questions on  
implementation**

**Note by the secretariat\***

*Summary*

This report presents background information and describes progress made in considering procedures and institutional mechanisms for the resolution of questions on implementation in accordance with article 27 of the Convention. Relevant precedents and new developments are highlighted, and conclusions, recommendations and proposed action are presented.

In accordance with decision 22/COP.7, this document has been prepared on the basis of document ICCD/COP(7)/9, taking into account, as appropriate, previous reports of the Conference of the Parties relating to this matter.

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\* The submission of this document was delayed because of the need to obtain inputs from international organizations in the subject matter.

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## I. Background information

1. By its decision 22/COP.7, the Conference of the Parties (COP) decided, for purposes of fulfilling the provisions of article 27 of the Convention, to reconvene, during its eighth session, the open-ended Ad Hoc Group of Experts (AHGE) to examine further and make recommendations on procedures and institutional mechanisms for the resolution of questions on implementation.

2. In the above-mentioned decision, the COP also:

(a) Invited any Parties wishing to communicate their views on article 27 to do so, in writing, to the secretariat by 31 January 2007;

(b) Requested the secretariat to prepare a new working document on the basis of the submissions by Parties contained in documents ICCD/COP(4)/8, ICCD/COP(5)/8, ICCD/COP(6)/7 and ICCD/COP(7)/9, and those submitted pursuant to the decision;

(c) Decided that the AHGE shall take as the basis of its work the new working document to be prepared by the secretariat.

3. The Chair of the AHGE noted in the summary report on the Group's work to the sixth session of the COP that the nature of the issue at hand was complex and stressed the need for further submissions by the Parties on article 27. The Group furthermore asked the secretariat to prepare two documents – one on article 27 and the other on article 28, paragraphs 2 (a) and 6 – for its consideration at the next session of the COP. The secretariat, acting on the advice of the AHGE, has since prepared separate documents on the two matters in question; the information on annexes containing arbitration and conciliation procedures is contained in document ICCD/COP(8)/8.

4. The secretariat prepared reports on arbitration and conciliation procedures for the second to the seventh sessions of the Conference of the Parties (COP).<sup>1</sup> The secretariat has prepared the present document to summarize developments and progress made in the resolution of questions on implementation, in accordance with article 27 of the Convention, with a view to deciding how to take this matter forward. This report aims to assist the AHGE in examining and making recommendations in the light of progress in negotiations on the same matters in the context of other relevant environmental conventions and taking into account documents prepared by the secretariat for previous sessions of the COP.

5. In 2006 the secretariat forwarded a note verbale reminding Parties to communicate their views regarding this matter by 31 January 2007. As at 15 June 2007, the secretariat has not received any written proposals on the aforementioned matter.

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<sup>1</sup> Documents ICCD/COP(2)/10, ICCD/COP(3)/18, ICCD/COP(4)/8, ICCD/COP(5)/8, ICCD/COP(6)/7 and ICCD/COP(7)/9.

## **II. Procedures and institutional mechanisms for the resolution of questions on implementation**

### **A. Relevant precedents**

6. This report deals with recent developments of relevance to article 27 of the UNCCD as well as progress made in the context of the following international environmental agreements: the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the Convention on Long-Range Transboundary Air Pollution (LRTAP), the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol, the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), the Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention), and the Convention on Persistent Organic Pollutants (Stockholm Convention).

#### **1. Montreal Protocol on Substances that Deplete the Ozone Layer**

7. During the period 2005-2007, the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol reviewed information relating to compliance with the Montreal Protocol by Parties and made appropriate recommendations to the Meeting of the Parties. Compliance issues reviewed by the Implementation Committee included data reporting and compliance with data reporting under article 7 of the Montreal Protocol, establishment of licensing systems under article 4B of the Protocol, and reports of Parties submitted under article 9 of the Protocol on research, development, public awareness and exchange of information.

8. In reviewing the status of establishment of licensing systems, the Committee recognized that licensing systems bring the following benefits: monitoring of imports and exports of ozone-depleting substances, prevention of illegal trade and enabling data collection. The Committee also noted, and the Meeting of the Parties agreed, that the Parties to the Montreal Amendment to the Montreal Protocol that have not yet established licensing systems are in non-compliance with the Montreal Protocol and can be subject to the non-compliance procedure under the Protocol.

9. The Implementation Committee also addressed some challenges associated with future implementation of the non-compliance procedure and possible options for addressing those challenges. In discussing this issue, the Committee considered ideas for improving its procedures and effectiveness, particularly given its increasing workload, while ensuring that the operation of the non-compliance procedure remains flexible, transparent and equitable.

10. In 2006 the Implementation Committee adopted a primer intended to provide its members, particularly new members, with a comprehensive understanding of the non-compliance procedure of the Montreal Protocol and the manner in which the Committee has operated for more than 15 years. The primer provides a basis for future advances in the timely and effective resolution of instances of non-compliance while at the same time ensuring the consistent and transparent treatment of the issues considered by the Committee. The primer will

be updated by the Ozone Secretariat as and when necessary to provide new members elected to the Committee with the most up-to-date information available.

## 2. Convention on Long-Range Transboundary Air Pollution

11. In 2006 the Executive Body of the LRTAP Convention received the ninth report of its Implementation Committee regarding compliance by Parties with their obligations under the protocols to the Convention. The Committee had reviewed cases of non-compliance and submitted recommendations.

12. In that report, the Chair of the Committee drew attention to the annual review of Parties' compliance with reporting obligations, noting non-compliance by several Parties with respect to reporting emissions as required under the Convention's protocols, all of which were then in force. There also remained a number of instances of non-compliance with several protocols with respect to meeting emission target obligations.

13. Based on the recommendations of the Implementation Committee, the Executive Body adopted a number of decisions concerning non-compliance by specific Parties with their obligations under different protocols. It noted that in the years that the Committee had been working, some countries had moved back into compliance with their obligations; others were moving in the right direction and expected to be back in compliance soon. A few countries, however, still showed little indication of achieving compliance and the Executive Body expressed its concern about this situation. These countries in particular were called upon by the Executive Body to present further information to the Implementation Committee showing progress made towards achieving compliance and setting out a timetable that specified the year by which they expected to be in compliance, as well as listing the specific measures taken or scheduled to fulfil their emission reductions obligations. Some countries were called upon to make a presentation to the Executive Body regarding their non-compliance and what action they were taking to meet their obligations.

14. The Chair of the Implementation Committee also indicated that the Committee had completed its first in-depth review of the 1998 Protocol on Heavy Metals (the 1998 Protocol on Persistent Organic Pollutants had been reviewed previously). He added that the Committee had started its in-depth review of the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone, which had entered into force in 2005; the Committee would report on this in 2008.

## 3. United Nations Framework Convention on Climate Change

15. As stated in document ICCD/COP(7)/9, the Multilateral Consultative Committee established in accordance with article 13 of the UNFCCC (resolution of questions regarding non-compliance), whose role is to prevent disputes among Parties from arising, has not made any progress since 2003. This is mainly due to differences of views regarding the composition of the Committee.

4. Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

16. Since its establishment in 2004 by the sixth meeting of the Conference of the Parties to the Basel Convention, the Basel Convention Committee for Administering the Mechanism for Promoting Implementation and Compliance (“the Compliance Committee”) has yet to receive a specific submission of alleged non-compliance. Nevertheless, it has done considerable work on reviewing general issues of compliance and implementation under the Convention, in exercise of its general review powers set out in paragraph 21 of its terms of reference, and on developing its working practices.

17. As part of its 2005–2006 work programme, the Compliance Committee undertook to identify and analyse difficulties relating to the following: reporting obligations under the Basel Convention; designation and functioning of national competent authorities and focal points; and the development of national legislation to implement effectively the Basel Convention. To this end, the Committee transmitted a questionnaire to Parties seeking more information on the aforementioned issues, to which it received a considerable number of replies. The Committee analysed the responses received and considered the difficulties and solutions identified by Parties. The Committee then drew a number of conclusions and made recommendations for consideration by the eighth meeting of the Conference of the Parties to the Basel Convention. The Compliance Committee’s report to the eighth meeting of the Conference of the Parties on its work for the period 2005–2006, including its recommendations, may be found at the following website: <[www.basel.int/meetings/cop/cop8/docs/12e.doc](http://www.basel.int/meetings/cop/cop8/docs/12e.doc)>.

18. Pursuant to the annex to decision VIII/32 of the eighth meeting of the Conference of the Parties, the Committee is in the process of commencing its 2007–2008 work programme, under which, exercising its general review powers, it is required:

(a) To further develop its understanding of national reporting issues by building on the work undertaken pursuant to its work programme for 2005–2006, with a view to providing guidance on how national reporting could be improved, given that it underpins the operation of the Convention; and

(b) To undertake work on the issues of illegal traffic, which could include identifying available existing resources from a number of institutions, working in collaboration with such institutions and the Basel Convention regional centres, and assisting Parties through training, taking into account that such work would assist in ensuring the environmentally sound management of wastes.

19. Notwithstanding the above, the Committee is required to give priority to dealing with any specific submissions it receives. The Committee will report on its work relating to the period 2007–2008 to the ninth meeting of the Conference of the Parties to the Basel Convention, in 2008.

## **B. New developments**

### **1. Kyoto Protocol to the United Nations Framework Convention on Climate Change**

20. The Kyoto Protocol, which entered into force in February 2005, supplements and strengthens the Convention, providing a framework for remedial and precautionary action to tackle adverse effects of climate change. Only Parties to the Convention can become Parties to the Protocol. The Protocol is founded on the same principles as the Convention and shares its ultimate objective as well as the way it groups and classifies countries. It also shares the Convention's institutions, including its subsidiary bodies and secretariat. The Kyoto Protocol broke new ground with three innovative mechanisms (joint implementation, the clean development mechanism and emissions trading) designed to boost cost-effectiveness for climate change mitigation by opening ways for Parties to cut emissions, or to enhance carbon sinks, more cheaply abroad than at home.

21. In order to assess compliance with the Protocol by each Party included in Annex I to the Convention (Annex I Party), information will be needed on the steps they have taken to implement the Protocol as well as on their emissions over the commitment period from 2008 to 2012 and their transactions under the mechanisms.

22. Entry into force of the Protocol has brought into play modified reporting and review requirements. In addition, each Annex I Party is required to have made demonstrable progress in achieving its commitments under the Protocol, to report on such progress by 1 January 2006 and to incorporate in its national communication supplementary information to demonstrate compliance with commitments under the Protocol. This supplementary information should be submitted as part of the first national communications due under the Convention.

23. The Compliance Committee set up under the system consists of a plenary, a bureau and two branches (a facilitative branch and an enforcement branch). If a Party fails to meet its emissions target, it must make up the difference, plus a penalty of 30 per cent, in the second commitment period. It must also develop a compliance action plan and its eligibility to sell credits under emissions trading will be suspended.

### **2. Cartagena Protocol on Biosafety to the Convention on Biological Diversity**

24. The second meeting of the Compliance Committee under the Cartagena Protocol took place from 6 to 8 February 2006. The meeting discussed several issues relating to the rules of procedure of its meeting and adopted recommendations for submission to the third meeting of the Conference of the Parties serving as the meeting of the Parties (COP-MOP/3).

25. The meeting also considered an analysis by the secretariat of interim national reports that were submitted two years after the entry into force of the Protocol. The Committee identified general issues of compliance that need due attention in order to ensure a good start to effective implementation of the provisions of the Protocol and the achievement of its objective. The Biosafety Clearing-House was another source of information in respect of which the Committee identified some general issues affecting compliance.

26. The Committee submitted all its recommendations to the third meeting of the COP-MOP, which was held in March 2006 in Curitiba, Brazil. The meeting considered the recommendations regarding general issues of compliance and adopted decision BS-III/1. Several other recommendations of the Committee were also considered and integrated into other relevant decisions of COP-MOP/3.

27. The Compliance Committee held its third meeting from 5 to 7 March 2007 in Kuala Lumpur, Malaysia. It reviewed information compiled by the secretariat on the experience of other multilateral environmental agreements regarding measures to deal with cases of repeated non-compliance. It requested the secretariat to revise the document in the light of its comments and to submit it to the next meeting of the Committee. The Committee followed up on issues arising from its second meeting, including the issue of conflict of interest under rule 11 of the rules of procedure; and reviewing general issues of compliance and possible lessons learned from analysing the interim national reports. It also considered how the Committee might contribute to the upcoming review process of the effectiveness of the Protocol in general, and the procedures and mechanisms on compliance in particular, in the context of article 35 of the Protocol and decision BS-III/15 adopted by COP-MOP/3. (For details see the report of the Committee's third meeting contained in document UNEP/CBD/BS/CC/3/3, available at: <[www.cbd.int/doc/meetings/bs/bssc-03/official/bssc-03-03-en.pdf](http://www.cbd.int/doc/meetings/bs/bssc-03/official/bssc-03-03-en.pdf)>.)

3. United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

28. Since the second Meeting of the Parties (May 2005, Kazakhstan), the Committee has held seven further meetings. In addition to the eight communications that were dealt with before or at the second Meeting of the Parties, it has considered 10 communications from members of the public. Its findings on four of these have been finalized and transmitted, where appropriate with recommendations, to the Parties concerned; one communication has been found to be inadmissible; and four are currently in various stages of processing. Under the compliance mechanism any member of the public having concerns about a Party's compliance with the Convention may trigger a process of formal review by the Committee.

29. At the request of the Meeting of the Parties, the Committee is also following up the implementation of decisions on compliance by individual Parties adopted by the Meeting of the Parties in 2005. Having regard to its mandate to monitor, evaluate and facilitate implementation of and compliance with the reporting requirements, the Committee has prepared a Guidance Document on reporting requirements aimed at addressing difficulties in preparation of the reports to be submitted in the first reporting cycle as well as facilitating preparation of updated information and consolidated reports in the second reporting cycle. The Committee is expected to report on its work to the next Meeting of the Parties (June 2008, Riga, Latvia).

Further information on the compliance review mechanism under the Convention is available at <[www.unece.org/env/pp/compliance.htm](http://www.unece.org/env/pp/compliance.htm)>.

#### 4. Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

30. Pursuant to article 17 of the Rotterdam Convention, an Open-Ended Ad Hoc Working Group on Non-Compliance was convened in September 2005 to prepare for and carry forward deliberations on the issue. The matter was further considered and discussed during the second meeting of the Conference of the Parties convened immediately after that meeting. The Conference decided to consider further the procedures and institutional mechanisms on non-compliance at its third meeting in October 2006. At that meeting, the Conference prepared the draft text of the procedures and mechanisms on compliance with the Rotterdam Convention. In addition, the it decided to consider further at its fourth meeting in 2008 the procedures and institutional mechanisms on non-compliance required under article 17 of the Convention, taking the draft text as the basis for its work.

#### 5. Convention on Persistent Organic Pollutants

31. Pursuant to article 17 of the Stockholm Convention and in accordance with the decision of the first meeting the Conference of the Parties, the first meeting of the open-ended ad hoc working group on non-compliance was held in April 2006 to consider procedures and mechanisms required under that article. Its outcome was considered by the second meeting of the Conference of the Parties held immediately after the meeting of the working group. Pursuant to a decision adopted by the Conference of the Parties at its second meeting, the second meeting of the open-ended ad hoc working group on non-compliance was held in April 2007 to further elaborate on the draft procedures and mechanisms. On that basis, the third meeting of the Conference of the Parties held from 30 April to 4 May continued its consideration of the matter, which resulted in the revised draft text on procedures and mechanisms. The Conference of the Parties decided to negotiate further and to consider for adoption at its fourth meeting, to be held in 2009, the procedures and institutional mechanisms on non-compliance required under article 17 of the Convention.

### **III. Conclusions, recommendations and proposed action**

32. As stated in document ICCD/COP(7)/9, the balance of obligations varies from one treaty to another and thus the precedents and experience of other environmental agencies should be examined with caution. For example, some compliance mechanisms have more than 10 years of experience reviewing cases (Montreal Protocol and LRTAP), whereas others have yet to be formally established (Rotterdam Convention and Stockholm Convention). The Basel Convention and the Kyoto Protocol to the UNFCCC have not yet examined a specific case of non-compliance, whereas the Aarhus Convention has considered 18 communications since 2005. Specific penalties are applied to Parties found to be non-compliant with their obligations (Kyoto Protocol). However, some environmental non-compliance mechanisms foster more technical assistance and apply more flexible solutions to such cases.

33. As a result of the various experiences mentioned above, the procedures and institutional mechanisms need to be tailored to suit individual treaties. In the case of the UNCCD, effective action to combat desertification and mitigate the effects of drought has to be implemented

through national, subregional and regional action programmes. The specifics of each Regional Implementation Annex should be taken into account to tackle and successfully resolve any matter with regard to the interpretation or application of the Convention. The foregoing review of relevant precedents should therefore be examined bearing this in mind.

34. In its summary report at COP 5, the Chair of the AHGE stated that any procedure or institutional mechanism to resolve questions on implementation should be facilitative and non-confrontational in character and should assist the Parties in fulfilling their obligations under the Convention.

35. With due regard to the aforementioned issues, the questions raised by document ICCD/COP(6)/7, in particular the scope of article 27, the relationship between article 22, paragraph 2, and articles 26, 27 and 28, and the scope, mandate, functions and composition of a multilateral consultative mechanism, should be considered.

36. Due to the numerous formal and informal meetings that take place during each COP session and the resulting time restrictions, legal advisers and other representatives in charge of following this matter have frequently been unable to fully participate in the meeting of the AHGE. One of the recommendations intends to address this situation by proposing an intersessional meeting of the Group in order to allocate enough time and resources to the discussion of this matter.

37. Upon consideration of the issues mentioned above, the COP may wish to:

(a) To call for further comments from Parties on the elements mentioned in the present note;

(b) To extend the mandate of the AHGE up and until COP 9 and to convene a three-day meeting of the Group during the seventh session of the Committee for the Review of the Implementation of the Convention;

(c) To request the AHGE, with the assistance of the secretariat, to develop a draft model of a mechanism to take up cases of unresolved questions on implementation.

38. At the intersessional meeting of the AHGE, delegations could have enough time to analyse, discuss and draft a mechanism aimed at resolving questions on implementation, which could in the second instance be reviewed by the AHGE at the ninth session of the Conference of the Parties so that the COP may adopt such a mechanism in order to assist Parties in complying with their commitments under the Convention.

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