Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements

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Chapter Six

Procedures and Mechanisms on Compliance under the 2000 Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity

Chiara Ragni

1. Brief Introduction to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity

The Convention on Biological Diversity, negotiated under the auspices of the United Nations Environment Programme (UNEP), which entered into force on 29 December 1993 (hereinafter the Convention), is the main international instrument addressing biodiversity issues.[1] It embodies the principle of sustainable development by taking into consideration both the need to protect the natural environment from the potential negative effects of modern biotechnology and the benefits that can derive from their use in fields such as agriculture, food and human health. With a view of striking a balance between these opposite but fundamental interests, the Convention provides a comprehensive and binding set of rules aimed at granting the conservation of biological diversity on the one hand, and the sustainable use of natural resources and the fair and equitable sharing of benefits deriving from genetic resources on the other.

The Convention sets up an institutional structure composed of two main bodies: the Conference of Parties (hereinafter the COP) and the Secretariat.[2] The COP, whose functions are set out in Article 23 of the Convention, is essentially entrusted with the task to review the implementation of the Convention. To this end: it considers reports

[1] The Convention on Biological Diversity was finalized in Nairobi in May 1992 and opened for signature at the United Nations Conference on Environment and Development (UNCED). As of January 2008, 190 instruments of ratification or accession have been deposited with the UN Secretary-General. The United States signed the Convention, but it has not ratified it yet. On the Convention see C. Redgwell, "The Convention on Biological Diversity", in K. Koufa (ed.), *Protection of the Environment for the New Millennium* (Athens: Sakkoulas, 2002) 341–396.

[2] In addition it is worth mentioning the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), established by Art. 24 of the Convention, charged with reporting regularly to the COP on all aspects of its work. Its tasks include providing assessments of the status of biological diversity; assessments of the types of measures taken in accordance with the provisions of the Convention; and responding to questions that the COP may put to the body.

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submitted by States (Article 26)[3] and by subsidiary bodies; it considers and adopts, as required, protocols or annexes to the Convention and any possible amendments to them; it establishes subsidiary bodies, entrusted with the task to provide scientific and technical advice necessary for the implementation of the Convention; it contacts, through the Secretariat, the executive bodies of conventions dealing with environmental matters related to biodiversity, with a view to establishing appropriate forms of cooperation with them; and it considers and undertakes any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation. The Secretariat, whose functions are set out by Article 24, is the administrative body of the Convention.

In accordance with Article 19.3 of the Convention, which provides the States with the power to adopt Protocols, at its second meeting, held in Jakarta in November 1995, the COP established an open-ended *ad hoc* Working Group to draft a protocol on biosafety. The Working Group was to provide procedures and rules aimed at ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology[4] that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements. After a four years of negotiations a compromise was reached on the most controversial issues, such as the scope of the Protocol and its relationship with other international agreements, the type of living modified organisms concerned and the information required from the States wishing to export them, the precautionary principle and others. In 1999 the Working Group submitted a Draft Text for consideration by the COP at its first extraordinary meeting (Ex-COP).[5] The meeting was held in Cartagena in February 1999, but it was only one year later during the resumed session of the Ex-COP, and namely on 29 January 2000,[6] that the Protocol was finally adopted. It entered into force on 11 September 2003, ninety days after receipt of the

[3] With the aim of monitoring and ensuring the full implementation and respect of the obligations deriving from the treaty, Art. 26 provides that each Contracting State shall present to the Conference of Parties, the main body established by the Convention, periodical reports on measures taken in order to implement the provisions of the Convention and their effectiveness in relation to the goals of the treaty.

[4] Art. 19.3 provides that: "[t]he Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity." It should be noted that while Art. 19.3 refers to biotechnology in general, the mandate of the Working Group, as resulting from the document adopted by the COP at the end of its second Meeting (*Decision II/5 on Consideration of the Need for and Modalities of a Protocol for the Safe Transfer, Handling and Use of Living Modified Organisms*, doc. UNEP/CBD/COP/2/19 (30 November 1995), is confined to modern biotechnology.

[5] The meeting was convened for the purpose of discussing and performing the adoption of the Protocol on Biosafety. See *Decision IV/3 on Issues Related to Biosafety*, doc. UNEP/CBD/COP/4/27 (15 June 1998), at 65.

[6] The Resumed Session of the Extraordinary Meeting of the Conference of the Parties (Ex-COP) for the Adoption of the Protocol on Biosafety to the Convention on Biological Diversity was held from 24–28 January 2000, in Montreal, Canada. Over 750 participants, representing 133 governments, NGOs, industry organizations and the scientific community, attended the meeting.

fiftieth instrument of ratification (Article 37).[7] In the interim period before this date the Ex-COP established an Intergovernmental Committee for the Cartagena Protocol (hereinafter ICCP) to undertake preparatory work for the decisions to be taken at the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol (hereinafter COP/MOP),[8] which took place shortly after its entry into force (Article 29).

With the aim of ensuring an adequate level of protection in the field of transfer (especially with regard to transboundary movement), handling and use of living modified organisms, the Protocol introduces an advance informed agreement procedure based on a precautionary approach. In particular it provides that States wishing to export such organisms have to notify the Party of import in advance of certain information, as specified by the Protocol. Once it has received the information, the importing State has the opportunity to accept or to refuse the import or make it conditional to the respect of further conditions, basing its decision on a risk assessment.

In order to grant the correct interpretation and application of the provisions included therein, the Protocol vests the Parties with the power to resort, at their discretion, either to traditional mechanisms of dispute settlement, as provided for in Article 27 of the Convention on Biological Diversity, to which the Cartagena Protocol makes reference (Article 32), or to compliance procedures which shall be established according to Article 34.

2. Legal Basis of the Mechanism and Negotiating History

Article 34 of the Protocol provides that:

> "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 Art. 27 of the Convention."

It was noted that Article 34 takes the form of a so-called "enabling provision" since, rather then directly establishing the compliance mechanism, it simply gives the MOP the mandate to do so.[9] It is not uncommon to find similar provisions in international instruments dealing with environmental issues and in particular with compliance

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[7] In accordance with its Art. 36 the Protocol was opened to signature during the fifth meeting of the COP in May 2000, and remained open for signature at the UN Headquarters in New York until 2001. As of October 2006, 135 instruments of ratification or accession have been deposited with the UN Secretary-General.

[8] For the text of the Protocol see *Decision EM-I/3 on Adoption of the Cartagena Protocol and Interim Arrangments* UNEP/CBD/ExCOP/1/3 (20 February 2000), at 38, Annex. For a detailed guide to the provisions of the Protocol, see R. Mackenzie, F. Burhenne-Guilmin, A.G.M. La Viña and J. Werksman, *An Explanatory Guide to the Cartagena Protocol on Biosafety. IUCN Environmental Policy and Law Paper* note 46 (2003).

[9] McKenzie et al., *supra* n. 8, at 193.

procedures.[10] The norm is characterized by the accuracy of the instructions given to the COP/MOP and by the fixation of a time frame within which the mechanism shall be established. In addition it regulates the relationship between the compliance mechanisms and the traditional procedures of dispute settlement.[11]

Before the entry into force of the Protocol the ICCP at its first meeting, held in Montpellier from 11 to 15 December 2000, considered a note by the Executive Secretary of the Convention on Biological Diversity regarding the development of compliance procedures and mechanisms under Article 34 and invited the Parties to the Protocol to communicate their views in writing by 30 March 2001 on the basis of a questionnaire enclosed with the note. It requested the Executive Secretary to compile the views submitted, to prepare a synthesis report for the consideration of experts, who met back-to-back with the second meeting of the ICCP. The report dealt with various significant issues related to non-compliance (such as the objective, nature and underlying principles of the procedure, institutional aspects, triggering mechanisms) and it was the starting point of the rules drafted by the Compliance Committee once it was established.

3. The Text Establishing the Mechanism

Pursuant to Article 34 at its first meeting, held in Kuala-Lumpur in February 2004, the COP/MOP adopted Decision BS-I/7 thus establishing an *ad hoc* Compliance Committee entrusted with the tasks to assist Parties in implementing the Protocol, to identify the specific circumstances and possible causes of individual cases of non-compliance referred to it, to take measures, as appropriate, or to make recommendations with a view to assisting States to comply with their obligations under the Protocol.[12] The functions, structure and working procedures of the Committee are set out in the Annex to the Decision BS-I/7 which introduces (Section VII) also the possibility for the Parties to the Protocol, at their third meeting and thereafter, to review the effectiveness of procedures and mechanisms provided for therein, address repeated cases of non-compliance and take appropriate action.[13]

During its first meeting, which took place in Montreal between 14 and 16 March 2005, the Committee adopted by consensus its Rules of Procedure as contained in Annex I to the final report on the work of the meeting. In accordance with Section II paragraph 7 of the Annex they were then submitted to the COP/MOP for consideration and approval. The rules covered various issues related to the functioning of the

[10] See for example Montreal Protocol, Art. 8; the UNFCCC Convention, Art. 13; the Kyoto Protocol, Art. 18; the Rotterdam PIC Convention, Art. 17 and the Stockholm POPs Convention, Art. 17. A list of treaties with full references is provided *supra* at XXXVII.

[11] Most MEAs provide both procedures for dispute settlement and compliance mechanisms, stating that they operate independently from and without prejudice to one another.

[12] See *Decision BS-I/7 on Establishment of Procedures and Mechanisms on Compliance under the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/COP-MOP/1/15 (27 February 2004), Annex I, at 98 (Non-compliance procedure).

[13] On the highly contentious question of whether stronger measures can be invoked in cases of persistent non-compliance, the Parties failed to reach a consensus and left the issue for the third COP/MOP to decide.

Committee: in particular they dealt with dates and notice of meetings; agenda; distribution and consideration of information; publication of documents and information; members; officers; participation in Committee proceedings and voting procedure. They were adopted by the second meeting of the COP/MOP, held in Montreal between 30 May and 3 June 2005,[14] with the exception of those concerning the voting procedure and the question whether to have an open or closed session of the Committee.

At its second meeting, held in Curitiba (Brazil) from 6 to 8 February 2006, the Compliance Committee discussed some questions related to its Rules of Procedure and adopted recommendations for submission to the third COP/MOP, in particular with regard to the voting quorum. At its third meeting the Committee reiterated its recommendation in favour of removing the square brackets around Rule 18 on voting (see *supra* n. 14).[15] At its fourth meeting, that took place from 21 to 23 November 2007 in Montreal, the Committee assessed general issues of compliance on the basis of the information made available by Parties through their first national reports submitted four years after the entry into force of the Protocol; it also refined further its report on experiences of other multilateral environmental agreements regarding measures concerning repeated cases of non-compliance.

4. The Principles Governing the Mechanism and the Procedure

Section I of the Annex to the Decision BS-I/7 states that compliance procedures shall be simple, facilitative, non-adversarial and cooperative in nature. It further expressly mentions the principles of transparency, fairness, expedition and predictability as those governing the procedure. In addition Section I of the Annex provides that particular attention should be paid to the special needs of developing country Parties, in particular the least developed and small island developing States, and Parties with economies in transition, and takes into full consideration the difficulties they face in the implementation of the Protocol. All these principles are broadly reflected in institutional and procedural aspects of the mechanism.

[14] *Decision BS-II/1 on Rules of Procedure for Meetings of the Compliance Committee*, doc. UNEP/CBD/BS/COP-MOP/2/15 (6 June 2005), Annex, at 29. Rule 18 of the rules of procedure of the Compliance Committee as approved during its first meeting stated that: "The Committee shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement has been reached, any decision shall, as a last resort, be taken by a two-thirds majority of the members present and voting or by eight members, whichever is the greater. Where consensus is not possible, the report shall reflect the views of all members of the Committee. 2. For the purposes of these rules, the phrase 'members present and voting' means members present at the session at which voting takes place and casting an affirmative or negative vote. Members abstaining from voting shall be considered as not voting."

[15] See *Report of the Compliance Committee under the Cartagena Protocol on Biosafety on the Work of its Third Meeting*, doc. UNEP/CBD/BS/CC/3/3 (7 March 2007), para. 43.

5. Institutional Aspects

The main bodies in the compliance procedure are the Compliance Committee, the Secretariat and the COP/MOP.

5.1 **The Compliance Committee**

The Committee consists of fifteen members nominated by the Parties to the Protocol and elected for a period of four years by the COP/MOP on equitable geographical representation of the five regional groups of the United Nations (Section II of the Decision BS-I/7).[16] They must be chosen from among persons with a recognized competence in the field of biosafety or other relevant matters and serve objectively in a personal capacity (Section II paragraph 3 of the Decision BS-I/7). At the time of writing the Committee is reconsidering Rule 10.2 of its Rules of Procedure that provides for the case of replacement of members that resign before their term of office. According to the norm, when such circumstance occurs the Bureau of the COP/MOP "shall, in consultation with the appropriate regional group, appoint a replacement."[17] Since some of its members resigned in the last months and before the expiration of their office, the Committee noted how this circumstance can affect the effectiveness of its work until the next COP/MOP. In order to remedy this situation, the Committee explored some possible solutions and among them the opportunity that regional groups act promptly as soon as they receive from the Secretariat notice of the resignation or of the non-availability of one or more members in order to obtain nominations for the replacement; in any case it recommended the Parties to the Protocol to discuss the question in the next COP/MOP and to seek an alternative solution to replace any missing member of the Committee during the inter-session period.[18]

To perform its functions the Committee shall meet twice a year unless it decides otherwise. As stated above (*supra* paragraph 3), one of the most controversial issues was whether the meetings should be held in an open or closed session. The Committee at its second meeting, after taking into consideration the advantages and disadvantages of both solutions, agreed to decide on a case-by-case basis[19] and it addressed the

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[16] See Non-compliance procedure, Section II.4 expressly provides that: "At its first meeting, the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety shall elect five members, one from each region, for half a term, and ten members for a full term. Each time thereafter, the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety shall elect for a full term, new members to replace those whose term has expired. Members shall not serve for more than two consecutive terms."

[17] Rules of Procedure of the Compliance Committee, Rule 10.2.

[18] See *Report of the Compliance Committee under the Cartagena Protocol on Biosafety on the Work of its Third Meeting*, doc. UNEP/CBD/BS/CC/3/3 (7 March 2007), paras. 37 and following; *Report of the Compliance Committee under the Cartagena Protocol on Biosafety on the Work of its Fourth Meeting*, doc. UNEP/CBD/BS/CC/4/3 (23 November 2007), paras. 29–30; *Report of the Compliance Committee under the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/COP-MOP/4/2 (5 December 2007), para. 23.

[19] With regard to the meeting in progress, members of the Committee reaffirmed their decision to have a closed session in order to assess various implications and possible options of implementing rules of procedure. With regard to the third meeting that took place in Kuala Lumpur, Malaysia from 5 to 7 March 2007, the Committee decided to have it in an open session and to admit to the meeting interested observers from

question as to who should be allowed to participate in an open session. As a general rule it stated that only Parties who expressed their wishes to the Secretariat could be present at the session, provided that an appropriate balance in the involvement of developing and developed countries in each open session were taken into account. Members of the Committee agreed that, to this end, the COP/MOP might consider the allocation of some financial resources in the budget with a view to supporting eligible country Parties' participation.

Finally the Committee noted the opportunity to leave participation at open sessions of its meetings open also to observers, where appropriate.[20]

At its third meeting, held in Kuala Lumpur between 5 and 7 March 2007, the Committee chose to have an open session and noted how this experience proved to be a positive one. Taking note of this, it decided to have the fourth meeting in an open session, and then to decide on the opportunity to review Rule 14 of its Rules of Procedure. At its fourth meeting, held in Montreal from 21 to 23 November 2007, the Committee finally agreed to conduct, as a general practice, its upcoming meeting in an open session, unless specific circumstances required otherwise; it decided not to change its Procedure, since this practice seems to be in accordance with Rule 14 of Decision BS/II-1 (*supra* n. 14).

5.2 **The Secretariat**

The Secretariat is the administrative body of the mechanism. It receives candidatures for the Committee; it arranges for and services its meetings and it acts as a liaison between Parties and the Committee in receiving any submission relating to compliance. Unlike other compliance procedures, the Secretariat is not entrusted with a triggering function.

5.3 **The COP/MOP**

The COP/MOP is the body under whose guidance the Committee shall discharge its functions. As we mentioned above it is entrusted with the task to elect members of the Committee and to examine and approve its Rules of Procedure. It may provide the Compliance Committee with relevant information on compliance matters and decides upon the measures to take in order to promote compliance and to address cases of non-compliance according to the Committee's recommendations.

5.4 **The Biosafety Clearing-House**

In order to ensure to promote and facilitate technical and scientific cooperation within and between countries and to develop a global mechanism for exchanging and

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Parties, other governments, and relevant international organizations, including non-governmental organizations. See the *Note of the Chairman of the Committee*, doc. UNEP/CBD/BS/CC/3/INF/1 (12 February 2007).

[20] The Committee noted that the participation of observers could provide information, enrich the deliberations and facilitate the resolution of issues being considered by the Committee.

integrating information on biodiversity, a "Clearing-House Mechanism" has been established under the Convention on Biological Diversity. Within the framework of this mechanism Article 20, para. 1, of the Cartagena Protocol established a Biosafety Clearing-House (BCH) with the aim of facilitating the exchange of scientific, technical, environmental and legal information on, and experience with, living modified organisms and to assist Parties to implement the Protocol, taking into account the special needs of developing country Parties.[21] From the report prepared by the Compliance Committee at the end of its fourth meeting, dealing with general issues of compliance by the Parties with their obligations under the Protocol, it results that a gap exists "with respect to implementing the requirement to adopt national measures addressing illegal transboundary movements of living modified organisms and reporting the occurrence of such movements to the BCH."[22] Indeed from the first national reports on the implementation of the Protocol it appears that while over a quarter of respondent States (most of which were developed States) identified the occurrence of cases of illegal movements of living modified organisms (LMOs) to their countries, just a very few of them transmitted information concerning the occurrence of these incidents to the BCH in accordance with Article 25.3 of the Protocol. The Committee came to the conclusion that Parties, especially the least developed and developing ones, lacked the capacity to identify the presence of LMOs and consequently provide an account on it. It drew this conclusion from the fact that most of the incidents of illegal movement of LMOs were reported by developed countries, while it seems farfetched that they are the only ones interested by the problem.[23]

In addition to the tasks described above the BCH has the faculty to submit relevant information to the Compliance Committee once the mechanism has been triggered by a Party. Until now however no case of non-compliance results as being submitted to the Committee.

6. Functions of the Committee

According to Section III of the Annex to the Decision BS-I/7 the Committee performs general tasks in relation to promoting compliance and addressing individual cases

[21] In addition to facilitating the general exchange of information, the BCH is established as the only means through which Parties can provide certain information required under the Protocol, including information provided by Parties for the advance informed agreement procedure. The BCH will also provide the mechanism by which Parties are informed about final decisions regarding domestic use (including the placing on the market) of LMOs that may be subject to transboundary movement.

[22] See *Report of the Compliance Committee under the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/COP-MOP/4/2 (5 December 2007), para. 18.

[23] See the *Note by Executive Secretary* of 14 November 2007, prepared with a view to assisting the Committee in its consideration of general issues of Compliance as identified through the analysis of the information contained in the first national reports submitted to the Secretariat. *Preliminary Suggestions and Information for Consideration in relation to Items 4, 6 and 7 of the Provisional Agenda*, doc. UNEP/CBD/BS/CC/4/2/Add.1, para. 6. See also on the same issue *Report of the Compliance Committee under the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/CC/4/3 (23 November 2007), para. 21.

of non-compliance. In accordance with its mandate, the Committee is required to: (a) identify the specific circumstances and possible causes of individual cases of non-compliance referred to it; (b) consider information submitted to it regarding matters relating to compliance and cases of non-compliance; (c) provide advice and/or assistance, as appropriate, to the concerned Party, on matters relating to compliance with a view to assisting it to comply with its obligations under the Protocol; (d) review general issues of compliance by Parties with their obligations under the Protocol, taking into account what transpires from the analysis of the interim national reports transmitted by States Parties[24] and the assessment of information available in the Biosafety Clearing House; (e) take measures, as appropriate, or make recommendations, to the COP/MOP in the case it reaches a finding of non-compliance; (f) carry out any other functions as may be assigned to it by the Conference of the Parties serving as the meeting of the Parties to the Protocol.

As until now, as stated above, no case has been brought to its attention, the Committee has been able to perform just a part of its functions; among them it is worth noting that it gathered and assessed information deriving from the reports transmitted by the States and from the notes collected by BCH in order to prepare a synthesis report on general issues of compliance by Parties with their obligations under the Protocol. The issues taken into consideration were: 1) the low number of first national reports received by the deadline of 16 October 2007, in accordance with paragraph 1(d) of section III of the compliance procedure and mechanisms contained in the annex to decision BS-1/7; 2) the continued existence of significant gaps regarding the obligation to put in place at the national level the necessary measures to implement the Cartagena Protocol; 3) the lack of compliance to the obligation of reporting to the BCH the occurrence of illegal movement of LMOs (see *supra* paragraph 5.4); 4) the lack of adequate implementation of the duty to promote public awareness and participation.[25]

With particular regard to the first point, the Compliance Committee noted that only about 35% of the Parties to the Protocol submitted national reports and that this can negatively influence the analysis and the evaluation of the effectiveness of the Protocol in accordance with its Article 33 and prejudice the implementation of the other norms included therein. The Committee stressed the importance to submit the problem to the COP/MOP as a general issue of compliance; indeed a gap exists between the high number of reports transmitted by States under the Convention and those prepared in accordance with the Protocol. The suggestion is that the difference depends on the funds available to support the preparation of national reports, since it is easier for eligible Parties to assess resources from the Global Environment Facility (GEF) in order to implement the obligations under the Convention rather than those provided

[24] At this regard in the report resulted from its second meeting the Committee expressed its concern about the fact that only the 38% of the Parties to the Protocol submitted their interim reports fulfilling their obligation under Art. 33 of the Protocol and of the decision BS-I/9 of the first meeting of the COP/MOP. See *Report of the Second Meeting of the Compliance Committee under the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/COP-MOP/3/2 (8 February 2006), para. 32.

[25] See *Report of the Compliance Committee under the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/COP-MOP/4/2 (5 December 2007).

for in the Protocol. In this connection the Committee recommended that the question be included in the scope of the dialogue session between Parties to the Convention and the Chief Executive Officer of GEF to be held in Bonn on 17 May 2008. In addition it requested the Secretariat of the compliance mechanism to compile a report on reporting rates under other MEAs.

7. Trigger Mechanism

The Cartagena Protocol, unlike some other MEAs, provides that the non-compliance procedure can be triggered only by Parties. Section IV of the Annex to the Decision BS-I/7 states that they are entitled to bring before the Committee, through the Secretariat, submission related to compliance, both when, despite their efforts, they are unable to implement or comply with the Protocol provisions (self-trigger), and when they hold that they are affected or likely to be affected by the failure of another Party to fulfil its obligations (Party-to-Party trigger). In the latter case the communication may be rejected when it is ill-founded, bearing in mind the objectives of the Protocol.

No provision concerning referral by the Secretariat or submission by the public of alleged cases of non-compliance is included in the Protocol, even though this option, like that of the opportunity of entrusting NGOs with triggering power, was taken into consideration.

8. The Procedure before the Compliance Committee and Procedural Safeguards

8.1 **The Procedure**

The rules governing the non-compliance procedure are to be found in two different sources. Some aspects are directly dealt with by the Annex to the Decision BS-I/7. Other are regulated by the Rules of Procedure ("Procedure"), approved by the COP/MOP at its second meeting.[26] According to Section I.2 of the Decision BS-I/7, the procedure before the Committee is quite simple. It can be divided into three different moments: the initial stage, the discussion and the deliberating phases.

In accordance with Section IV.1 of the Annex, submissions of non-compliance must be presented by the Party to the Secretariat which shall, if the request involves a problem regarding another Party, make the submissions available to the Party concerned within fifteen days of its receipt. Once a response or further information have been received by the Secretariat from the Party involved, the Secretariat shall forward them to the Committee.[27] If the Secretariat receives no response or information within six months from receipt of the submission, it shall transmit the latter to the

[26] See *Rules of Procedure of the Compliance Committee*, *supra* n. 14.

[27] According to the non-compliance procedure, Section IV.3: "the Party that has received a submission regarding its compliance with the provisions of the Protocol should respond and, with recourse to the Committee for assistance if required, provide the necessary information preferably within three months and

Committee. With regard to cases of self-triggering, the submission received by the Party shall be transmitted by the Secretariat to the members of the Committee as soon as possible, but no later than ninety days of its receipt (Rule 8 of the Procedure).

Once it has received the submission from the Party through the Secretariat, and after acquiring or taking into account all the information necessary for deliberation, the Committee shall discuss the substance of the matter.[28]

On the basis of the information collected and as a result of the discussion, the Committee firstly establishes whether or not the Party concerned fulfilled its obligations under the Protocol. If the Committee reaches a finding of non-compliance, it can consider, where appropriate, whether to take measures as described in Section IV.1 of the Annex to the Decision BS-I/7 or to make recommendations to the COP/MOP in accordance with para. 2 of the same Article. In any case, in deciding on the measure to be adopted, the capacity of the Party concerned should take into account, especially if they are developing countries (and in particular the least developed and small island developing States among them), together with such factors as the cause, type, degree and frequency of non-compliance.

8.2 **Procedural Safeguards**

In order to grant full respect of the principles governing the procedure within the rules developed by the Committee, some safeguards have been provided for concerning the rights of Parties during the proceedings, conflict of interest and language issues.

a) Rights of the Parties

With regard to the first aspect, paragraph 4 of section IV of the Annex to the Decision BS-I/7 provides that a Party, in respect of which a submission is made or which makes a submission, is entitled to take part in the deliberations of the Committee, save for those regarding the adoption of recommendations. However, the Party concerned shall be given an opportunity to present in writing its comments on such recommendations, which shall be enclosed with the Committee's report and forwarded to the COP/MOP.

As a further safeguard of Parties' rights the Committee shall – at their express and motivated request – consider confidential the information given by them.

b) Conflict of interests

As mentioned above, members of the Committee shall sit in a personal capacity. In order to guarantee the fairness of the procedure, Rule 11 of the Procedure provides that where a member of the Committee finds himself or herself faced with a direct or indirect conflict of interest, he/she shall bring the issue to the attention of the Committee before consideration of that particular matter and shall not participate in the

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in any event not later than six months. This period of time shall commence on the date of the receipt of the submission as certified by the Secretariat."

[28] *Infra* paragraph 9.

elaboration and adoption of a recommendation related to the case concerned. The Rule is aimed at ensuring that members of the Committee, in performing their functions in relation with a submission, shall avoid being in "conflict of interest", but it does not clarify what the expression means. For this reason the COP/MOP invited the Committee to give further consideration to the issue during its second meeting.[29] The Committee noted that it is impossible to identify all the possible circumstances under which a conflict of interests arises, given also the limited experiences in this regard of compliance mechanisms existing under other MEAs. It considered that Rule 11 and Section II paragraph 3 of the Decision BS-I/7 provided a general guidance to the members of the Committee with respect to conflict of interest and that, as a consequence, it was not necessary to change or review the existing rules for the moment.

c) Languages

The working language of the Compliance Committee is English. With regard to the request presented when triggering the mechanism, the Committee, in the course of its second meeting, noted that if a submission made by a Party regarding itself is in English, it may be transmitted to it immediately. In the case where such submission is made in an official language of the United Nations other than English, the Secretariat should transmit the English translation within ninety days of receipt of the submission to the members of the Committee. Each of them, however, may request the Secretariat for the copy of the submission in its original form.[30]

9. Sources of Information

According to section V of Decision BS-I/7 the Committee shall consider relevant information transmitted by the triggering Party and by the Party concerned. In addition it may request or evaluate, when received, pertinent information from other sources, namely the BCH, the Conference of the Parties to the Convention (COP), the COP/MOP, subsidiary bodies of the Convention or of the Protocol and relevant international organizations.

In its report to the third COP/MOP the Committee underlined the importance of the availability of significant information in the Biosafety Clearing-House in a timely manner, expressing its concern about the attitude shown by States in this regard. In particular it noted the shortage and the lack of clarity of information on focal points, presumably due to the insufficient capacity of States in terms of expertise, infrastructure and predictable funding to cover the running costs necessary to gather relevant

[29] See *Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity Serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/COP-MOP/2/15 (6 June 2005), para. 59.

[30] See *Report of the Compliance Committee on the Work of its First Meeting*, doc. UNEP/CBD/BS/COP-MOP/2/2 (16 March 2005), para. 11(c).

information available at the national level and to provide such information to the BCH.[31]

Unlike other MEAs the Cartagena Protocol does not emphasize the advisory function of NGOs and – more generally – of civil society but, as we have seen, it makes a general reference to "relevant international organisations", without further specification. The question of the entitlement of these subjects to provide the Committee with information on compliance issues was actually one of the most controversial points during the negotiating phase. The first draft of the Rules of Procedure elaborated by the ICCP included also NGOs and civil society among those allowed to submit information, but no mention can be found in the final text.

10. Decision-Making

During the negotiations one of the most controversial points was the one related to the quorum required in the Committee for it to deliberate. At its first meeting the COP/MOP favoured a solution based on a majority vote in cases where all efforts made to reach consensus had been exhausted. This option, included in Rule 18 of the Rules of Procedure, is therefore still in square brackets as a result of the lack of consensus on it at the second COP/MOP. As a response the Committee, at its second meeting, considered that the Rules of Procedure of compliance mechanisms adopted under other MEAs provide for a qualified majority voting as a last resort.[32] This reasoning led members of the Committee to call upon the COP/MOP to reconsider the question at its third meeting and to remove the square brackets from Rule 18. The COP/MOP decided to remain seized of the matter and to address the issue at its fourth meeting within the framework of the overall evaluation of the effectiveness of the Protocol in accordance with Article 35 of the Protocol and according to the modalities established in decision BS-III/15.

11. Outcomes

As mentioned above the Compliance Committee and the COP/MOP, upon its recommendation, can adopt measures described by Section VI of the Annex to Decision

[31] The Committee noted that this problem is often exacerbated by the fact that relevant information is held by multiple national competent authorities. In addition it noted that the lack of time as well as financial resources makes it particularly difficult to have all the necessary information, available at the national level in local languages, translated into English or into one of the official United Nations languages before submission to the Biosafety Clearing-House. See *Report of the Second Meeting of the Compliance Committee under the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/COP-MOP/3/2 (8 February 2006), para. 36.

[32] In this regard the Committee mentioned the compliance mechanism provided for in the Kyoto Protocol.

BS-I/7 when they find that a Party to the Protocol failed to comply with or found difficulties in implementing provisions included therein.[33]

The characteristics of the possible measures to be taken seem to suggest the essentially facilitative and cooperative nature of the mechanism, especially regarding actions that the Committee can perform without the intermediation of the COP/MOP. According to Section VI.1, with a view to promoting compliance and addressing cases of non-compliance it may, for example, provide advice or assistance to the Party concerned, as appropriate; make recommendations to the COP/MOP regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures; request or assist, as appropriate, the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a timeframe to be agreed upon between the Committee and the Party concerned; and invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Protocol. The COP/MOP, upon recommendation by the Committee, may decide measures aimed at providing assistance to the Party concerned, but it may also take action in the case of repeated non-compliance by a State.

In order to assess the effectiveness of the measures adopted, especially when they consist in developing and implementing a compliance strategy, it is provided that the Party concerned shall report on the steps taken in order to return in compliance with its obligations under the Protocol. It must be stressed that, as mentioned above, both the Committee and the COP/MOP shall take into account the capacity of the Party concerned when deciding on an action directed at tackling situations of non-compliance, with special regard to developing States. Moreover Section VI, in making a distinction between promoting compliance and addressing non-compliance, seems to imply that the choice of the measure to be adopted depends on the situation of the Party concerned, but also on the *ratio* of the measure. However it should be noted that sanctioning actions are not provided for.

Regarding such sanctions Section VI requires the COP/MOP to decide at its third meeting which measures have to be taken in the case of repeated non-compliance. Accordingly, on the occasion of the third COP/MOP the Executive Secretary prepared a note in which it suggested some options to be considered by the Conference through a comparative assessment of the experience of other environmental agreements.[34] From this assessment it emerged that in most cases such measures include issuing cautions or suspending, in accordance with the applicable rules of international law related to the deferral of the functioning of a treaty, the special rights and privileges accorded to the Party concerned under the Convention whose provisions

[33] Non-compliance procedure, Section VI: "To this end, upon the recommendation of the Committee and taking into account the capacity of the Party concerned to comply, the COP/MOP may decide upon one or more of the following measures: (a) provide financial and technical assistance, technology transfer, training and other capacity-building measures; (b) issue a caution to the concerned Party; (c) request the Executive Secretary to publish cases of non-compliance in the Biosafety Clearing-House (see *infra*); and (d) in cases of repeated non-compliance, take such measures as may be decided by the COP/MOP at its third meeting."

[34] See *Compliance (Article 34): Measures in cases of repeated non-compliance*, doc. UNEP/CBD/BS/COP-MOP/3/2/Add. 1 (10 January 2006).

were the object of the non-compliance procedure. The third COP/MOP agreed not to decide on the matter immediately, but to resume the discussion at its fourth meeting, within the framework of the overall evaluation of the effectiveness of the Protocol in accordance with Article 35, and it requested the Compliance Committee to compile further information on the experience of other multilateral environmental agreements regarding repeated cases of non-compliance for its consideration.[35] To assist the Committee in fulfilling that request the Secretariat accordingly compiled a document based on information and experiences from other MEAs to be reviewed at its third meeting,[36] during which it was recommended that the report should have been updated taking into account some more MEAs. Basing its work on the document drafted by the Secretariat,[37] the Committee prepared a compilation of the experience of other non-compliance mechanisms, derived some observations from their assessment and drew conclusions about the possible measures that could be adopted in cases of repeated non-compliance. All this was to be submitted to the COP/MOP at its fourth meeting.

The Committee noted that in all the MEAs taken into account, the frequency of cases of non-compliance regarding the same State is a factor to be taken into consideration in recommending or determining the measures to adopt and that, as a general rule, those measures are listed in an order of increasing severity, meaning that the most restrictive ones should be taken just in the most significant cases of non-compliance with the obligations under the MEAs, such as those of repeated non-compliance. In this regard the Committee noted that remedies affecting trade are not only provided for just in the MEAs that directly regard trade in certain goods or substances, such as the Montreal Protocol or the CITES, but also that they should be adopted as an *extrema ratio*. In any case the Committee stressed that the measures intended to address cases of repeated non-compliance should not usually be pursued in the event the Party concerned has been working and continues to work towards compliance.[38]

On the basis of the above observations and of the analysis of the measures provided for under other mechanisms, the Committee identified some possible actions to take in cases of repeated non-compliance that go beyond those mentioned in paragraphs 1 and 2 of Section VI of the Annex to Decision BS-I/7. The Committee listed the possible measures in an order of increasing severity starting with those providing for technical assistance to the Party concerned and arriving to contemplate also the possibility to adopt trade restrictions.[39]

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[35] *Decision BS-III/1 on Compliance*, doc. UNEP/CBD/BS/COP-MOP/3/15 (8 May 2006), at 33, paras. 1–2.

[36] See *supra* n. 35.

[37] *Further Information and Experience Regarding Cases of Repeated Non-Compliance under the Compliance Mechanisms of Other* M*ultilateral Environmental Agreements, Note by the Executive Secretariat*, doc. UNEP/CBD/BS/CC/4/2 (18 October 2007).

[38] *Further Information and Experience Regarding Cases of Repeated Non-Compliance under the Compliance Mechanisms of Other* M*ultilateral Environmental Agreements, Compilation by the Compliance Committee*, doc. UNEP/CBD/BS/COP-MOP/4/2/Add.1 (6 December 2007).

[39] Ibid., paras. 93–95.

12. Coordination with Dispute Settlement Procedures and other Non-Compliance Procedures

As mentioned above, with the aim of ensuring compliance with the provisions included therein the Cartagena Protocol provides that both the traditional confrontational means of dispute resolution and compliance mechanism are available also with regard to issues arising from the same facts or situations. Due to their different purpose and approach the two methods can coexist within the same treaty; that conclusion is enshrined in Article 34 of the Cartagena Protocol where it is stated that the dispute settlement system and compliance procedure are separate from, and without prejudice to each other.[40] The Protocol provides that no hierarchy exists as to the status or order of procedural precedence between the two. It is possible therefore to expect that Parties would choose to submit their problems to the Compliance Committee before resorting to traditional means of dispute settlement and that, in any case, the findings, if any, reached within the framework of the procedure triggered first should be taken into account.[41]

With regard to the relationship between compliance mechanism and traditional and adversarial methods of dispute resolution provided for under other international instruments some problems might arise as to whether an issue does not only regard environmental matters but also trade law. For example, if a Party refuses the import of some genetically modified products because of the failure by the exporting State to comply with the Protocol, a conflict could occur with obligations under a trade agreement (e.g., the WTO agreement) to which both States may be Parties. A dispute could be brought before the WTO dispute settlement body, since the attitude of the importer State could be seen as a restriction to free trade and a violation of WTO law, and at the same time the procedures created under the Cartagena Protocol could be triggered. The question has been broadly explored by scholars, but at the time of writing it has never occurred in practice.[42]

13. Participation of the European Community

The European Community (EC) is Party to the Cartagena Protocol, as are all its Member States. By ratifying the Protocol on 27 August 2002 the EC, as results from the declaration that accompanied its ratification, acted in accordance with Article 175.1

[40] The Protocol does not include specific provisions on the settlement of disputes arising from its interpretation or application, but it makes reference to Art. 27 of the Convention on Biological Diversity which, in this regard, provides for optional recourse to judicial settlement by the International Court of Justice or arbitration, or a conciliation procedure that is compulsory at the request of one of the Parties to a dispute.

[41] If so, the compliance mechanism may be seen as a means to prevent dispute settlement.

[42] Actually in a recent dispute brought before the WTO by the United States against the EC, some Member States of which had ordered a ban on the import of GMO and GMO foods, the defendant States attempted to justify their position by making reference to the Cartagena Protocol, but the *panel* concluded that the agreement was not applicable in the case of *specie* since the United States are not Party to it. *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, docs WT/DS291, WT/DS292, WT/DS293, Panel Report circulated on 29 September 2006.

of the EC Treaty, which provides for the EC's competence to enter international agreements which contribute to preserving, protecting and improving the quality of environment; to protecting human health; to promoting the prudent and rational utilisation of natural resources and the adoption of measures at international level that deal with regional or worldwide environmental problems. Moreover, the EC declared that it had already adopted legal instruments, binding on its Member States, covering matters governed by the Protocol.

The Protocol has indeed been implemented in EC Law first with Directive 2001/18/EC, then through Regulation (EC) No. 1946/2003 of the European Parliament and of the Council of 15 July 2003, which respectively deal with the release into the environment and with transboundary movements of genetically modified organisms. Unlike the Cartagena Protocol, which applies only to States Parties, the EC Regulation extends the Advanced Informed Agreement Procedure to all prospective importing States.[43]

As regards the compliance mechanism, during its negotiation the EC pushed for the inclusion in the Rules of Procedure of the possibility for the Committee to consider all the relevant information coming not only from the Party concerned, but also from those that made the submission with regard to another Party and the opportunity to adopt strong sanctions, such as the suspension of the rights and privileges of the Party concerned, in cases of repeated non-compliance.[44] The idea was that the mechanism should be as effective as possible in promoting compliance and addressing non-compliance with the Protocol.

Even though it is not specified, it seems that the EC may be Party to the Compliance Procedure. The use of the term "Party" instead of "State" in the text of Decision BS-I/7 validates this assumption. In addition, since the EC in its declaration stated that it is responsible for the performance of those obligations resulting from the Protocol which are covered by the Community law in force, it is questionable whether it should be a Party to the procedure even when a Member State, and not the EC itself, does not to comply with the Protocol.

14. Financial Aspects

The Cartagena Protocol (Article 28, para. 2) provides that the costs related to its functioning and implementation will be covered through the financial mechanism established under the Convention on Biodiversity, whose Conference of the Parties designated the restructured GEF to serve as the institutional

[43] This is the most relevant difference between the Regulation and the Protocol, but the two texts differ in some other significant aspects. See on the subject D. Langlet, "Advance Informed Agreement on Biosafety: the Elaboration, Functioning and Implications of AIA in the Cartagena Protocol", *Eur. Env'l L. Rev.*, 14 (2005) 291–310, at 308.

[44] As seen above the idea of mechanism cooperative and facilitative in nature prevails in the final version of Decision BS-I/7 (*supra* n. 12) and it is possible that the Parties of the Protocol will agree on the opportunity not to include the possibility to take sanctions even in case of repeated non-compliance by the Party concerned.

structure to operate the financial mechanism under the Convention on an interim basis.[45]

Following the recommendation by the first COP/MOP, the COP at its seventh meeting provided detailed guidance to the GEF with regard to the Cartagena Protocol, which included eligibility criteria, strategy and priorities.[46] It was in particular stressed that all developing countries, especially the least developed ones, and States with economies in transition, which are Parties to the Protocol, are eligible for funding by the GEF in accordance with its mandate. States not Parties in the same situation that show a real commitment to take part to the Protocol are eligible too. With regard to the objectives the COP/MOP, in its recommendations to the COP, emphasized the importance of financial support to ensure a rapid working of its initial strategy for assisting countries to prepare for the ratification and implementation of the Protocol and to support capacity-building. At its second and third meetings the COP/MOP encouraged the GEF and the Executive Secretary of the Convention to continue their strong collaboration in advancing and strengthening support for the implementation of the Protocol[47] and submitted recommendations to the eighth meeting of the COP to the Convention so that the latter provides further guidance to the GEF.[48]

In addition the Protocol, in Article 28, paras. 1 and 6, encourages developed country Parties to provide additional financial and technological resources, over and above the financial mechanism, to enable developing country Parties and Parties with economies in transition to implement the provisions of the Convention.

15. Survey of Practice

At the time of writing no submission of non-compliance has been received by the Committee, which has decided to take into consideration and to discuss the possible reasons why no specific case has been brought to its attention and to eventually come up with recommendations. A possible reason could be the fact that the mechanism

[45] *Decision I/2 on Financial Resources and Mechanism*, doc. UNEP/CBD/COP/1/17 (28 February 1995), at 32.

[46] *Decision VII/20 on Further Guidance to the Financial Mechanism*, doc. UNEP/CBD/COP/7/20 (13 April 2004), Annex, at 314, paras. 20–26.

[47] *Decision BS-II/5 on Matters Related to the Financial Mechanism and Resources*, doc. UNEP/CBD/BS/COP-MOP/2/15 (6 June 2005), at 44.

[48] *Decision BS-III/5 on Matters Related to the Financial Mechanism and Resources*, doc. UNEP/CBD/BS/COP-MOP/3/15 (8 May 2006). In line with the guidance provided by the COP, the GEP Council in 2000 approved a global UNEP-GEF project to assist all eligible countries to develop national biosafety frameworks. The project was launched in June 2001, and assisted 123 countries. Under the initial strategy, the GEF also provided support to 12 demonstration projects for capacity-building in implementation of national biosafety frameworks. In November 2003, the GEF approved an add-on project to the UNEP-GEF project on the Development of national biosafety frameworks entitled Building Capacity for Effective Participation in the BCH of the Cartagena Protocol. In the GEF *Strategic Business Plan* FY04-FY06, capacity-building for the implementation of the Cartagena Protocol on Biosafety is one of the strategic priorities in the biodiversity focal area to be funded, in line with the guidance from the COP.

under the Cartagena Protocol, unlike those established under other MEAs,[49] can be triggered only by the Parties.

16. Conclusions

During the negotiation of the Rules of Procedure of the Compliance Committee two views emerged with regard to the legal nature the mechanism should have assumed. Most of the States Parties to the Protocol favoured procedures and mechanisms for a compliance regime that were non-confrontational and non-judicial. Some have stressed that the Protocol itself, by contemplating compliance procedures without prejudice to the dispute settlement means established by Article 27 of the Convention, leaves no other option than to seek a simple and advisory mechanism that is non-confrontational in nature.

There was, however, an alternative minority approach that favoured procedures that were judicial and punitive in nature where non-compliance involve exporting countries, and facilitative and non-judicial in cases involving LMO-importing countries. During the first meeting of ICCP, similar minority views were expressed in favour of procedures that treated developing and developed countries differently. According to this approach, failure to comply with the obligations of the Protocol by a developed country Party or an LMO-exporting Party should have set in motion a judicial process and entailed sanctions, whereas non-compliance by a developing Party or an importing Party should have only triggered a non-judicial cooperative procedure.

As seen the first approach prevailed. The examination of the institutional and procedural aspects of the mechanism established according to Article 34 of the Cartagena Protocol seems indeed to suggest that it is to be considered cooperative, facilitative and non-judicial in nature. Provisions dealing with the relationship between the explored procedures and traditional dispute settlement means may be considered to confirm this conclusion.

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[49] See for example the Montreal Protocol (See F. Romanin Jacur, "The Non-Compliance Procedure of the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer", *supra* 11–32, at 20) or the Aarhus Convention (See C. Pitea, "Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters", *supra* 221–250, at 228). The mechanisms established under the MEAs mentioned were mostly triggered by the Secretariat and by NGOs respectively.

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