UNITED NATIONS

PIC

United Nations Environment Programme

UNEP

Food and Agriculture Organization of the United Nations

Distr.
GENERAL

UNEP/FAO/PIC/INC.7/10
21 August 2000

ORIGINAL: ENGLISH

INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR AN INTERNATIONAL LEGALLY BINDING INSTRUMENT FOR THE APPLICATION OF THE PRIOR INFORMED CONSENT PROCEDURE FOR CERTAIN HAZARDOUS CHEMICALS AND PESTICIDES IN INTERNATIONAL TRADE
Seventh session
Geneva, 30 October – 3 November 2000
Item 5 (d) of the provisional agenda*

PREPARATION FOR THE CONFERENCE OF THE PARTIES: NON-COMPLIANCE

Procedures and institutional mechanisms for determining non-compliance

Note by the secretariat

I. INTRODUCTION

1. The Rotterdam Convention, in its article 17, states that the Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of the Convention and for treatment of Parties found to be in non-compliance. The Committee, at its sixth session, requested the secretariat to prepare documentation, for submission to its seventh session, on procedures and institutional mechanisms for determining non-compliance. The present note outlines this issue.

II. OVERVIEW

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

* UNEP/FAO/PIC/INC.7/1.

K00190110 040900

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

(a) Inadequate political will to adhere to the obligations;

(b) Negligence in undertaking the obligations;

(c) Legal, administrative, technical or financial capacity and capability of a Party;

(d) Overall political, economic or social circumstances and changes thereof within or surrounding a Party;

(e) The provisions of the Convention, including the question of interpretation or adequacy of the provisions;

(f) Flaws in the governance of the Convention;

(g) Existence of ambivalent international regimes in conflict with the norms of the Convention.

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

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

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

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

III. CRITERIA TO DETERMINE NON-COMPLIANCE

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

IV. FLOW OF ACTION

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

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

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

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

(d) Decision by the authoritative body.

10. In addition, in the case of the non-compliance procedure under the Montreal Protocol on Substances that Deplete the Ozone Layer, a Party may submit to the secretariat a statement concluding that it is unable to fully comply with the obligations under the Protocol, with relevant explanation. The secretariat subsequently submits such statement to the body established to implement the non-compliance procedure (Implementation Committee).

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

12. Under the Montreal Protocol, the secretariat, in the context of the preparation of its report, may initiate a process for collecting relevant information and submit such information to the Meeting of the Parties to the Protocol, should it become aware of non-compliance cases.

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

V. PROCEDURE

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

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

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

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

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

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

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

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

VI. INSTITUTIONAL ARRANGEMENTS

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

(a) The authoritative body under which the non-compliance procedures are established (e.g. the Conference of the Parties);

(b) An advisory body to the authoritative body to examine alleged cases of non-compliance;

(c) The secretariat.

19. Regarding the advisory body, it might be established on a permanent or ad hoc basis, depending on the foreseen needs for employing the non-compliance procedure. Such a body might consist of a certain number of Parties or experts designated by the Parties. Due consideration should be given to the geographical representation of its membership. Arrangements may be made to identify the officers of the body (e.g. chair, vice-chair and rapporteur). Under the existing arrangement, a relatively small membership is identified for such a body (e.g. 10 members for the Implementation Committee of the Montreal Protocol, and 20 members for the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations).

VII. TREATMENT

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

(a) Exposure to the public, through published reports, of the fact of the violation of the obligations by the Party;

(b) Issuing cautions or recommendations to the Party;

(c) Provision of appropriate assistance to enable the Party to comply with the obligations;

(d) Suspension of specific rights of the Party under the Convention.

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