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INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR AN INTERNATIONAL LEGALLY BINDING INSTRUMENT FOR IMPLEMENTING INTERNATIONAL ACTION ON CERTAIN PERSISTENT ORGANIC POLLUTANTS
Seventh session
Geneva, 14-18 July 2003
Item 5 of the provisional agenda*

Preparations for the Conference of the Parties

COMPILATION OF VIEWS ON NON-COMPLIANCE**

Note by the Secretariat

As noted in paragraph 2 of document UNEP/POPS/INC.7/21, in its decision INC-6/18 the Intergovernmental Negotiating Committee invited Governments and the secretariats of multilateral environmental agreements to provide the secretariat with their views on non-compliance addressed in article 17 of the Stockholm Convention on Persistent Organic Pollutants and requested the secretariat to prepare and submit to the Committee at its seventh session a report that provides a compilation of views submitted and a synthesis of those views. In response to that decision, and as of 31 January 2003, the secretariat had received comments from Argentina, Australia, Canada, Colombia, the Republic of Moldova, Switzerland, the United States of America and the European Community. Those comments, as received by the secretariat, are compiled in annex to the present note. They have not been formally edited.

* UNEP/POPS/INC.7/1.

** Stockholm Convention on Persistent Organic Pollutants, article 20; Conference of Plenipotentiaries on the Stockholm Convention, resolution 6 (in document UNEP/POPS/CONF/4, appendix I); decision INC-6/19 and appendix (in document UNEP/POPS/INC.6/22, annex I).

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Annex

Views on non-compliance addressed in article 17 of the Stockholm Convention on Persistent Organic Pollutants received by the Secretariat

I. ARGENTINA

Solicitud No. 6

Convenio de Estocolmo sobre contaminantes orgánicos persistentes

Información solicitada por el Comité Intergubemamental de Negociación en su sexto periodo de sesiones

Informacion solicitada:

El Comité Intergubemamental de Negociacion invita a los gobiemos y a las secretarias de los acuerdos ambientales multilaterales a que proporcionen a la, secretaría sus opiniones sobre el incumplimiento de que trata el artículo 17 del Convenio de Estocolmo sobre contaminantes orgánicos persistentes.

Decisión del Comité Intergubemamental de Negociación:

Decjsión INC-6/18, relativa al incumplimiento
(Referencia: anexo l de UNEP/POPS/INC.2/22)

Respuesta: .

Se entiende que los procedimientos y mecanismos institucionales para determinar el incumplimiento deben ser de naturaleza no confrontativa, facilitadora y flexible, alentando y asistiendo a los paises a lograr un adecuado y eficaz cumplimiento.

Tales procedimientos y mecanismos no deben resultar de carácter punitivo.

II. AUSTRALIA

FOREIGN AFFAIRS AND TRADE

International Organisations and Legal Division

2 April 2003

Mr Jim Willis
Executive Secretary
Interim Secretariat for the Stockholm Convention
UNEP Chemicals
11-13 chemin des Anemones
CH-1219, Chatelaine, Geneva
SWITZERLAND

Dear Mr Willis

I refer to the invitation issued by the Intergovernmental Negotiating Committee (INC) at its sixth session (decision INC 6/18) to Governments to provide the Interim Secretariat for the Stockholm Convention with their views on non-compliance, addressed in Article 17 of the Stockholm Convention on Persistent Organic Pollutants.

Please find attached the submission made in this regard by the Australian Government.

Yours sincerely

Andrea Faulkner
Director
Environment Strategies Section
Environment Branch

Stockholm Convention on persistant organic pollutants (POPs): Compliance
Submission by Australia

Introduction

1. This paper is submitted in response to the invitation to Parties made by the Intergovernmental Negotiating Committee of the Stockholm Convention at its sixth sesssion (decision INC 6/18). It sets out Australia's general views on the appropriate nature and timing of a compliance mechanism.

Timing of discussions on the possible development of a compliance regime

2. In stating that a compliance mechanism should be developed as soon as *practicable*, Australia believes that Article 17 of the Stockholm Convention gives clear guidance that Parties must first and foremost be guided by the practical needs of the Convention in determining if and when such a mechanism is to be developed. Article 17 of the Convention places a clear responsibility on Parties to ensure that matters more pressing to the Convention's functioning are dealt with first, before moving to consider issues of non-compliance. This should occur after the appropriate mechanisms have been put in place for the effective functioning of the Convention at its entry into force and in the crucial first years of its operation.

3. If a compliance regime is ultimately found to be necessary or useful, consideration must be given to the type of mechanism that would effectively meet the particular needs of the Parties to this Convention as well as the needs of the Convention itself. Australia suggests that Parties, the Secretariat and the Convention's expert bodies will need to gain practical experience of the Convention in operation to understand the kinds of compliance problems which may arise under this Convention and how they might best be addressed. Subsequent debate on compliance would then benefit from a more complete picture of real compliance issues arising under the Convention, a better understanding of Convention priorities, and from the ability to draw upon technical and legal expertise that would be built up during the Convention's operation.

4. Australia supports continued exploration of ideas and discussions on this matter at meetings of the Intergovernmental Negotiating Committee (and, upon entry into force, by the Conference of the Parties).

The appropriate nature of a possible compliance regime for the Stockholm Convention

5. It is Australia's view that if a compliance regime is necessary to the proper functioning of the Stockholm Convention, its primary objective should be to assist Parties which may be experiencing difficulties in meeting their obligations under it. This, for example, is the clear implication behind Article 12 of the Convention. Such a regime would seek to work constructively with Parties to facilitate their achieving or maintaining compliance. In other words, the role of a compliance regime should be a facilitative one. A compliance regime should also have a more general compliance implementation review function by examining general compliance or implementation issues relevant to all Parties and making recommendations for all Parties to apply.

6. In Australia's experience, non-compliance is most often a result of a Party's lack of capacity or expertise, rather than lack of political will or an unilateral decision to be in breach of a convention's provisions. The political will to comply with the provisions of a convention is signalled by a Party's ratification of that convention. Consequently, in Australia's view the most effective compliance procedure would be one that focuses on preventing potential incidents of non-compliance through the adoption of a capacity-building or problem-solving approach.

7. Australia believes that a compliance regime should be flexible, fair, transparent, as well as cost effective. As such, it should not duplicate provisions already codified in a particular convention. Specifically, it should not seek to duplicate provisions for reporting (Article 15 of the Convention) and for the peaceful resolution of disputes (Article 18 of the Convention). By definition, such a regime would be non-adversarial and non-punitive in nature, and instead would focus on cooperation between Parties, in line with the cooperative spirit of the Stockholm Convention.

III. CANADA

Jan. 22, 2003

James B. Willis
Executive Secretary
Interim Secretariat for the Stockholm Convention on POPs
UNEP Chemicals
11-13 chemin des Anémones
CH-1219, Chatelaine
Geneva, Switzerland

Re: Request for Government views on Non-Compliance addressed in Article 17 of the Stockholm Convention on Persistent Organic Pollutants

Dear Mr. Willis:

Thank you for the opportunity to review and provide Canada's views on non-compliance, as requested in your letter of August 13, 2002. As the Focal Point for Canada to the Stockholm Convention, I am pleased to forward our response, which is attached to this letter.

I apologize that we were unable to provide this material by the requested Dec. 31, 2002 deadline. However, I hope and trust that our response will be useful, and look forward to further development of this important issue.

Sincerely,

ORIGINAL SIGNED BY

Greg Filyk
Stockholm Convention on POPs
Focal Point for Canada

cc. Alain Tellier - Permanent Mission of Canada to the Office of the United Nations

Attach.

**CANADA'S VIEW ON NON-COMPLIANCE
UNDER THE
STOCKHOLM CONVENTION ON POPs**

Introduction

1. Canada is strongly supportive of efforts to develop as early as possible a procedure which effectively promotes compliance of all Parties with the obligations in the Stockholm Convention. The impacts of POPs on Canada's Arctic and its people are well known and this is why the Stockholm Convention is of particular importance for Canada and Canada was the first country to ratify.

2. These comments are provided as requested by the letter of 13 August 2002 which is the implementation of decision INC 6/18 adopted in June 2002.

General Comments

3. Article 17 of the Convention provides:

> *The Conference of Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with provisions of this Convention and for the treatment of Parties found to be in non-compliance.*

4. Canada welcomes international discussions on how best to achieve the objectives set out in Article 17 and to secure full compliance with the Convention. While it may be that prevention of further environmental harm from POPs can best be achieved by the adoption of a compliance mechanism which focuses on facilitation and the encouragement of Parties to meet their obligations under the Convention, Parties may wish to discuss and consider whether additional persuasive measures might also assist in the fulfilment by Parties of their Convention obligations, particularly in cases of very serious or repeated non-compliance.

5. Canada is of the view that an effective compliance mechanism is a means to avoid environmental harm and disputes and is also of the view that compliance information is critical to the evaluation of the Convention's effectiveness, as is acknowledged in Article 16.3 of the Convention.

6. Treatment of Parties not in compliance should take into account a Party's lack of capacity or other relevant reasons for the situation of non-compliance in order to promote a return to compliance by the Party.

7. Canada is of the view that the recently completed compliance mechanism for the Basel Convention is instructive and may provide a significant contribution to the establishment of a compliance mechanism. Nevertheless, it is important that there be a tailoring of the compliance mechanism to the specifics of the Stockholm Convention.

Specific Comments

8. The following are structured as comments to the Secretariat's Note, "Non-Compliance", INC.6/17, 31 January 2002.

9. a) Objective of the non-compliance regime

Canada agrees with the Secretariat that the compliance regime should have as its objective assistance to Parties to meet their obligations under the Convention. In doing so this would prevent undue delay in addressing harmful conduct. This should be done by means of a compliance mechanism that has sufficient flexibility built in to address the diverse range of non-compliance issues that could arise under the Convention. The objective should also reflect Article 17's objective which is to develop procedures "for determining non-compliance...and for the treatment of Parties found to be in non-compliance".

10. b) Institutional mechanisms

i) Conference of the Parties

Canada agrees that the role of the CoP is key and should be addressed, recognizing that it has the final authority in ensuring the efficient and effective functioning of a compliance system .

ii) A Compliance Committee

As in most compliance mechanism procedures in existence or being developed, a standing Committee should be established under the POPs Convention to address compliance issues. The Committee should be composed of a limited number of Parties elected by the CoP and representative of the geographic regions. The Committee's functions should be, first and foremost, to examine cases of non-compliance of a specific or a systemic nature, and, based on this examination, to make recommendations to the CoP.

11. c) Invocation of the procedures

i) Authority

The trigger issue is always contentious. At a minimum Canada is of the view that there should be a Party self-trigger and a Party-to-Party trigger. Canada would like to discuss and consider other possibilities, including CoP and Committee triggers, as well as a secretariat trigger solely for failure to provide a national report or a national implementation plan.

ii) Procedural aspects

Procedural steps and protections similar to the ones existing or being developed in other MEAs, such as under the Basel Convention, should be included. Key elements of the process include communicating to the relevant actors the information on the compliance issues to be examined as well as giving the allegedly non-compliant Party the opportunity to make representations. In particular, the Party whose compliance is at issue, should, as in other compliance mechanisms, be invited to participate at the meeting at which the Committee examines the issue. Canada is of the view that, as a rule, these meetings should be closed, as Parties would then engage in more open discussions among themselves. On the other hand, all recommendations of the Committee to the CoP should be made public. Similarly, all CoP decisions on compliance should be made available to the public.

12. d) Secretariat

As in other compliance mechanisms, one of the key roles of the Secretariat should be to receive information. Whether it would be appropriate for the Secretariat to collect information on its own initiative is something that should be considered carefully.

13. e) Obligations

The compliance mechanisms should apply to all the obligations contained in the Convention. All Parties should be treated equally with respect to the consideration of their compliance status, but in the application of measures to help facilitate a return to compliance, each situation should be viewed on its own merits taking into account the special circumstances that may exist, including for developing country parties. Also, the means to promote compliance could differ depending on the nature of the obligations.

14. f) Collection of information

The Stockholm Convention obliges Parties to report regularly on a number of items. Canada expects that the information provided by periodic national reports may be key for the examination of general compliance matters. With regard to other information, Canada is of the view that information provided by Parties, the CoP or subsidiary bodies of the Convention should be available to the Committee. There is a need to consider the issue of the confidentiality of certain information.

15. g) Relationship with other provisions of the Stockholm Convention

Canada has always been of the view that while there are factors that appear to be common to most if not all compliance mechanisms, such mechanism should be designed taking into account the needs of

the specific agreement. Consequently, Canada agrees with the Secretariat that the specific provisions of the Stockholm Convention that it has identified (dealing with reporting, evaluation of effectiveness, dispute settlement, national implementation plans, information exchange, financial and technical assistance) should be duly considered when framing the compliance mechanism. Other provisions could also prove relevant such as, for instance, the action plans or the review of exemptions.

16. h) Relationship with other agreements

Canada is not aware of any compliance mechanisms adopted or being developed that have provisions providing for sharing of information and expertise with mechanisms set up under other MEAs (see the Basel Convention compliance mechanism for example). There are also no mechanisms that deal with overlapping cases. Canada believes that the efforts should be focussed on developing and adopting an effective mechanism for the Stockholm Convention. As this mechanism evolves over time the relationship with other MEAs could be looked at.

17. i) Treatment of Parties with Compliance Problems

Canada agrees with the Secretariat that MEA compliance mechanisms principally focus on restoring compliance and that a compliance plan is often the most effective means to accomplish this end. More generally, Canada supports measures that would promote compliance, such as advice and assistance measures. However, Canada is interested in discussing and considering the contribution which additional measures, consistent with international law, could make in promoting compliance with the Convention. It should be noted that the more "punitive" the nature of an additional measures, the more likely Parties will insist on strict due process and the more judicial in nature the compliance committee will become. Further, it may be counter-productive to utilize certain types of additional measures against Parties where the concern over non-compliance arises from a lack of capacity.

IV. COLOMBIA

REPUBLICA DE COLOMBIA
Ministerio de Relaciones Exteriores

SOLICITUDES DE INFORMACIÓN PARA EL CONVENIO DE ESTOCOLMO POR EL COMITÉ INTERGUBERNAMENTAL DE NEGOCIACIÓN EN SU SEXTO PERÍODO DE SESIONES

En atención a la solicitud del Comité Intergubernamental de Negociación del Convenio de Estocolmo sobre contaminantes orgánicos persistentes, presentamos los comentarios a la Solicitud No 6

El Comité Intergubernamental de Negociación invita a los gobiernos y a las secretarías de los acuerdos ambientales multilaterales a que proporcionen a la Secretaría sus opiniones sobre el incumplimiento de que trata el artículo 17 del Convenio de Estocolmo sobre contaminantes orgánicos persistentes, consignada en la Decisión INC-6/18, relativa al incumplimiento.

COMENTARIOS

Colombia mantiene sus comentarios anteriores. En este sentido la nota de la Secretaría que servirá de base para la discusión en este punto de la agenda recopila los principales elementos de los regímenes de cumplimiento de otros acuerdos multilaterales ambientales. Con base en estos, se espera que en el futuro próximo se dé inicio al proceso de negociación para la definición del mecanismo de cumplimiento previsto en el Artículo 17 para el Convenio de Estocolmo.

Colombia considera, en primer lugar, que el enfoque utilizado por la Secretaria para aproximarse al tema es el adecuado, es decir, adelantar una recopilación de los elementos de otros regímenes de cumplimiento para estudiar su aplicabilidad a este Convenio. Se debe tener presente, sin embargo, que los elementos compilados provienen de diferentes acuerdos, algunos de los cuales como la Convención Marco sobre Cambio Climático que no implican compromisos para los países en desarrollo.

En el caso del Convenio de Estocolmo, se requiere ante todo un mecanismo que facilite el cumplimiento de las obligaciones y no penalice su incumplimiento. Por ello, en el objetivo del mecanismo se debe dejar sentado que la naturaleza del mecanismo es asistencial. Así mismo, se recomienda incluir un elemento adicional a los enumerados en la nota de la Secretaría sobre los principios del mecanismo, los cuales deben ser entre otros, la no-confrontación, la eficacia, la transparencia, la equidad, la justicia y el debido proceso. Estos principios pueden quedar consignados como un elemento aparte o mencionarse como parte del objetivo del mecanismo.

En cuanto a la institucionalidad del mecanismo, se recomienda apoyar la creación de un comité de cumplimiento en lugar de que sea la Conferencia de las Partes quien debe revisar los posibles casos de incumplimiento. Lo anterior porque un comité de cumplimiento permite mayor eficiencia en el estudio de asuntos relativos al incumplimiento. Se debe entonces iniciar la discusión sobre su mandato, funciones, composición y procedimientos.

Manteniendo la coherencia de la posición defendida por Colombia en este tema en el marco de otros acuerdos multilaterales ambientales, se debe defender que los procedimientos de incumplimiento puedan ser invocados por: la Parte en incumplimiento, otros Estados Parte, la Conferencia de las Partes y el Comité de cumplimiento. Las ONGs y la sociedad civil en general no deben quedar habilitadas para invocar estos procedimientos.

En general, los procesos establecidos para tratar un posible caso de incumplimiento deben ser claros, sencillos y transparentes. Es bienvenido el intercambio de información con otros convenios, sobretodo a la luz de las sinergias que se busca promover entre acuerdos relacionados, en el marco del proceso sobre la gobernabilidad internacional ambiental.

En el tratamiento de los casos de incumplimiento se deben incluir consecuencias facilitadoras y no sancionatorias. Es decir que el país que esté en situación de incumplimiento reciba apoyo técnico y financiero y asesoría para poder cumplir con sus obligaciones. La Parte involucrada debe desarrollar un plan de acción en el que demuestre cómo y cuándo dará cumplimiento a sus compromisos bajo el Convenio. Las consecuencias deben, en cualquier caso, hacer que el mecanismo de cumplimiento sea efectivo.

Finalmente, dos elementos adicionales a los contenidos en la nota de la Secretaría se deben incluir en el régimen de cumplimiento del Convenio de Estocolmo: definición del órgano encargado de tomar decisiones en casos de posible incumplimiento, el cual recomendamos sea el Comité mismo aunque la Conferencia de las Partes (COP) tenga la última palabra si se pretenden imponer sanciones a la Parte que incumplió sus compromisos; y definición de la forma en que se adoptará el régimen de cumplimiento. En este último punto Colombia es partidario de que se haga mediante la adopción de una decisión de la COP.

V. REPUBLIC OF MOLDOVA

M I N I S T R Y O F E C O L O G Y , C O N S T R U C T I O N
A N D T E R R I T O R I A L D E V E L O P M E N T
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M D - 2 0 0 5 , C H I S I N A U
R E P U B L I C O F M O L D O V A

FAX TRANSMISSION

To:	**From:**
Mr. James B. Willis, Director, UNEP Chemicals	Dr. Gheorghe Duca, Minister of Ecology, Construction and Territorial Development
Fax:	**Date:**
(41 22) 797 34 60	29 November, 2002
Organization:	**Number of pages:**
UNEP Chemicals	5, including this cover sheet
Telephone:	**Telephone:**
(41 22) 917 81 95	(373 2) 22 24 64 / 22 16 67
Subject:	**Fax:**
Proposals on non-compliance in conformity with Article 17 of the Stockholm Convention on POPs and according INC6 Decision No. 6/18	**(373 2) 22 07 48**

Comments:

Dear Mr. James B. Willis,

On behalf of the Government of the Republic of Moldova Ministry of Ecology, Construction and Territorial Development is pleased to provide you the prepared proposals on non-compliance under Stockholm Convention on Persistent Organic Pollutants according INC6 Decision No. 6/18 and letter of the UNEP Chemicals dated from 13 August 2002 (Request number 6).

In the process of preparation of our proposals we took into account the following documents:

- Stipulations of the articles 17, which states: "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 this Convention and for the treatment of Parties found to be in non-compliance".
- Provisions of the document UNEP/POPS/INC.6/17
- Chapter L of the document UNEP/POPS/INC.6/22
- INC-6 Decision No. 6/18
- Paragraph 4 of the Resolution 1 of the Conference of Plenipotentiaries on the Stockholm Convention on POPs
- The letter of the UNEP Chemicals dated from 13 August 2002 (Request No. 6) and other documents.

The Republic of Moldova considers that:

- A compliance mechanism should be established at the first meeting of the Conference of the Parties or shortly thereafter.
- This mechanism should be placed on a non-confrontational, facilitative and flexible regime that would encourage and assist countries to achieve and maintain compliance rather than be punitive.

- It is necessary to establish a Compliance Committee [Implementation Committee] as subsidiary body responsible for operation of compliance mechanism.
- It is necessary to elaborate a model of procedures and institutional mechanisms for handling cases of non-compliance. This model may contains two parts: part one on institutional mechanisms and part two on procedures (e.g.
  - ***Part one on institutional mechanisms*** may contain the following chapters:
    - ***Objective***.
    - ***Authority of Conference of Parties.*** This chapter may stipulate that Conference of Parties shall oversee the operation of compliance mechanism.
    - ***Compliance Committee*** [***Implementation Committee***]. This chapter may stipulate that a Compliance Committee is established by Conference of Parties as its subsidiary body responsible for operation of compliance mechanism.
    - ***Functions of a Compliance Committee*** [***Implementation Committee***]. This chapter may stipulate that a Compliance Committee [Implementation Committee] shall undertake functions as specified in the procedure and those as otherwise entrusted by the Conference of Parties...
    - ***Membership of a Compliance Committee*** [***Implementation Committee***]. This chapter may contain provisions concerning expert's staff, qualification, term etc.
    - ***Officers of a Compliance Committee*** [***Implementation Committee***]. This chapter may stipulate that a Compliance Committee [Implementation Committee] shall elect its own officers and also that for election shall be given to an equitable geographic distribution and a balance between developed and developing Parties and Parties with economies in transition...
    - ***Meetings of a Compliance Committee.*** This chapter may contain provisions concerning meetings periodicity etc.
    - ***Decision-making in a Compliance Committee.*** This chapter may stipulate that rules of procedure for meetings of Conference of Parties shall apply, mutatis mutandis to a decision-making and proceedings of meetings of a Compliance Committee [Implementation Committee]...
    - ***Reporting to the Conference of Parties.*** This chapter may contain provisions that a Compliance Committee [Implementation Committee] shall submit a report to each ordinary meeting of Conference of Parties and provisions concerning report content etc.
    - ***Relationship with dispute settlement and other provisions of the Convention.*** This chapter may contain provisions concerning effectuation of compliance mechanism without prejudice of Article 18 and other provisions.
    - ***Relationship with other subsidiary bodies*** and other chapters.
  - ***Part two on procedures*** may contain the following chapters:
    - ***procedures invocation*** (which may contain provisions as may be initiated procedures)
    - ***consultation*** (which may contain provisions concerning consultations and other actions of Compliance Committee [Implementation Committee] if it has determinated that there is non-compliance...)
    - ***measures regarding non-compliance*** (which may contains provisions concerning: recommendations a Party to take actions to rectify any sources of possible non-compliance and any negative detriments; assisting a Party to develop programmes for ensuring of compliance its obligations etc)
    - ***monitoring*** (which may contain provisions as a Compliance Committee [Implementation Committee] may monitor results of measures effectuation etc)
    - ***review of compliance mechanism*** (which may contain provisions that a Conference of Parties shall regularly review the implementation of compliance mechanism and working programme of a Compliance Committee [Implementation Committee]) and
    - other chapters).

Also, the Republic of Moldova considers that provisions for technical assistance, technology transfer, financial resources and capacity-building should be taken into account under preparation of compliance mechanism.

VI. SWITZERLAND

Swiss comments

pursuant to Decision INC 6/18

on the development of a procedure and institutional mechanism for determining non-compliance

Switzerland thinks that, as in many other MEAs as well, effective procedures and mechanisms for determining and preventing compliance are very important to achieve the objective of the POPS-Convention. Switzerland therefore welcomes and will actively support the elaboration of such procedures and mechanisms.

Switzerland considers the note by the Secretariat (document UNEP/POPS/INC.6/17 of 31 January 2002) as being a very helpful basis for the work to be done. The elements identified in this document are in fact the core elements of a future non-compliance regime. Switzerland is glad to submit the following views on general aspects and the points raised in the Secretariats note:

- In Switzerland's view, a compliance regime should be in place at the time of the entry into force of the Convention. As soon as the implementation of the Convention starts, also the compliance regime should be in place in order to support Parties to meet their obligations. Switzerland therefore favours an early start of the negotiations on the text of the said regime.

- The regime to be established in the framework of the POPS Convention should at the same time respect widely accepted principles and take into account the specific characteristics of the POPS-Convention.

The following remarks follow the structure of document UNEP/POPS/INC.6/17:

- **Objective**
  Apart from incentives to facilitate compliance and disincentives to prevent cases of non-compliance, the mechanism should also provide for procedures to deal with cases where non-compliance has already occurred.

- **Institutional mechanism**
  The role of the COP as the supreme body of the Convention will be to supervise the mechanism and adopt the reports on the functioning of the compliance regime. On the other hand, the COP, being a political body not qualified for dealing with technical questions, should not be involved in the treatment of individual cases. Individual cases should be dealt with by a standing body (Compliance Committee), which has the necessary technical, legal and scientific knowledge.

- **Invocation of procedures**
  The procedure may be invoked by a Party or a group of Parties, the Party whose compliance is in question or the Secretariat (on the basis of the reports it gets pursuant to Art. 15 of the Convention)

- **Obligations**
  In Switzerland's view, it will actually be one of the objectives of the mechanisms to determine whether there is a breach of an obligation under the Convention. Therefore, it can not be the breach itself that triggers the mechanism, but only the assumed breach, except for cases where already a preliminary examination shows that there is no breach. All obligations under the Convention should be subject to the compliance mechanism.

- **Collection of information**
  One of the main sources of information to the compliance regime will be the reports submitted by the Parties pursuant to the provisions of the Convention. The assessment of Parties' implementation of the Convention will mainly be made based on these reports.
  It will be crucial to assure full participation of the Party or Parties concerned in the compliance procedure, including the possibility to comment on any information considered by the Compliance Committee.

- **Relationship with other provisions of the Convention**
  While there is a close relationship between the compliance regime and reporting (Art. 15), reporting being the main basis of the assessment of compliance by individual Parties, Art. 16 (evaluation of the effectiveness of the Convention) seems to deal more with the global impact of the Convention, while the Compliance regime examines the implementation of the Convention by individual Parties.
  The compliance regime being a multilateral mechanism, it should be (as this is the case in most other MEA's) without prejudice to the dispute settlement procedures under the Convention.

- **Treatment of Parties found to be in non-compliance**
  There will be many different possible forms of non-compliance, not all of which will involve liability. Therefore, the question of liability is only one aspect to treat in the context of the issue of treatment of Parties found to be in non-compliance.

- **Further work**
  Based on the submissions by Parties pursuant to Decision INC 6/18, the Secretariat should establish a first draft text, identifying the different options put forward by Governments. This draft text could serve as a basis for the negotiations of an open-ended working group, which should start its work as soon as possible and shall submit the results of its deliberations to the Committee or the Conference of the Parties. As has already been said at the beginning, the Compliance regime should be in place preferably at the time of the entry into force of the Convention.

VII. UNITED STATES OF AMERICA

Submission of the
United States of America
on Non-compliance in the Stockholm Convention
January 2003

Introduction

- The United States submits these comments in connection with Decision INC-6/18, which invited governments to provide the secretariat with their views on non-compliance by 31 December 2002.

- The United States emphasizes the importance that it attaches to compliance with multilateral environmental agreements.

Process for Developing the Non-Compliance Procedures

- Provided that other agenda items that must be resolved before COP 1 are being fully addressed, the United States supports a process that would work to elaborate a non-compliance mechanism during the Convention's interim phase, rather than postponing such work until after the Convention has entered into force.

- The United States believes that the legal drafting group should give priority in its work to those Convention items that must be resolved at COP 1 or COP 2. Unlike other provisions in the Convention, the procedures for non-compliance need only be developed "as soon as practicable."

General Points

- *Transparency*: The system should be transparent and provide appropriate opportunities for participation by civil society. Transparency is likely to foster compliance as well as confidence on the part of both Parties and the public that the non-compliance procedures are credible, fair, and effective.

- *"Clustering/Synergies" with Other MEAs*: The United States does not support the proposal to develop linkages between this compliance mechanism and those of other Conventions.

    -- The substantive obligations and membership of each MEA are distinct; similarly, the compliance institutions and procedures will differ depending on the needs of the particular MEA. The Stockholm Convention procedures must be designed to fit the specific needs and unique features of the Convention. Although elements from other regimes may be adapted for Stockholm features, the wholesale adoption of a different regime would not be appropriate.

    -- Among other factors, the work of each compliance body will be directly tied to the particular obligations of a single MEA. As a result, we see no value in -- in fact we see problems with -- pursuing vague proposals to "link" various compliance procedures among various MEAs.

- *Differentiation within the Non-Compliance Mechanism*:

    -- The non-compliance procedures should apply equally to all Parties to the Convention. The Convention does not differentiate among categories of Parties with respect to the core control obligations, and the non-compliance procedures should not do so either. Indeed there is no treaty basis providing otherwise.

-- At the same time, the procedures should take account of the various different kinds of obligations under the Protocol. For example, some obligations are collective rather than individual. Some obligations are susceptible to more objective assessment (e.g., an obligation to submit a report) than other obligations of a more qualitative nature (e.g., an obligation to cooperate). Certain obligations may not be appropriately addressed under the non-compliance regime or might be subject to different procedures or consequences.

Objective of the Procedure

- The United States supports a non-confrontational mechanism focusing on assisting any Parties experiencing difficulties meeting their obligations.

- The non-compliance procedures for the POPs Convention should be simple, flexible, and primarily facilitative in nature.

- The procedures should clearly state that the Committee's mandate and functions are limited to those specified expressly in the procedures themselves.

Institutional Issues

- The United States envisions the establishment of a compliance body after the Convention's entry into force. Whether it would need to be a standing body or an ad hoc body (or whether it might start out ad hoc and evolve into a standing body, if warranted), however, is a question that will require careful consideration in the context of the Stockholm Convention. We should take into account the recent guidance from UNEP's International Environmental Governance (IEG) process, which called on states and COPs to avoid the undue proliferation of meetings and subsidiary bodies. We recognize that standing bodies have been useful in some MEAs, particularly those that have been in force for some time.

- With respect to composition:

  -- The compliance body should be composed of Parties elected by the COP who then designate individuals to represent them. Such composition has been the norm in this area: several longstanding and effective compliance committees of a non-judicial variety are composed of government representatives, including the implementation committees of both the Montreal Protocol and the UNECE Convention on Long-Range Transboundary Air Pollution.

  -- The elected Parties should be required to designate representatives who have expertise in the subject matter under the Convention.

  -- The size of the body should be limited to about 10 members in order to perform its functions effectively and expeditiously.

- The Committee should meet only as often as necessary to perform its functions. When it does meet, it should do so in conjunction with meetings of the COP. That structure would be in keeping with the recent IEG decision, which called for holding relevant meetings back-to-back.

- Obviously, the Committee would be established as a subsidiary body of the COP.

Authority to Refer Matters to the Compliance Body

- As an initial matter, we note that the terminology used in the Secretariat's paper is inaccurate. Rather than authority "to invoke non-compliance procedures," the relevant issue is who has authority *to refer* matters to the compliance body. It is the compliance body itself that would decide whether any procedures are triggered.

- In our view, referral submissions could be made by a Party with respect to its own compliance or by the Conference of the Parties.

- With respect to a Party's ability to refer matters to the compliance body vis-a-vis another Party's compliance, we believe that this issue will require careful consideration.

- With respect to the Secretariat's ability to refer matters to the compliance body, we believe that if such a procedure is included, it should apply to specific, identified Convention obligations that are amenable to empirical assessment, such as submission of timely reports.

Outcomes/Treatment of Parties by the Compliance Body:

- The outcome of the compliance body's work should generally consist of a recommendation to the COP, which would then decide whether and how to act on the compliance body's recommendation. An exception should be made in cases where the Party at issue requests the views of the compliance body (e.g., for binding views and information about how to structure a domestic implementation program).

- The compliance body's recommendation to the COP should reflect consensus among its members; where consensus cannot be reached, the report and recommendation should reflect the views of all members of the compliance body.

- With respect to the types of outcomes that the compliance body can recommend:

  -- We believe that the outcomes should be closely tailored to the specific obligations for which there may be indications of a Party's non-compliance. For example, where a Party has failed to report as required by the Convention, one reasonable outcome might be a recommendation to the COP that the Party be requested to develop a plan to restore compliance with that obligation.

  -- Other outcomes that might be appropriate include recommendations that the COP consider issuing a statement of concern regarding future compliance or a "cautionary statement" to a Party where there are serious questions raised about past compliance.

  -- We do *not* support the inclusion of a potential outcome that would purport to allow the "suspension of rights and privileges" of a Party.

Liability

- The United States does not support the suggestion in the Secretariat's paper (INC.6/17) that non-compliance issues might be treated "in conjunction with the issue of liability under the Stockholm Convention", with reference to a future "decision on the issue of liability." Indeed, we do not even understand the reference to a future decision, because the "issue of liability" is not addressed in the Convention. In any event, the non-compliance procedures are completely separate from any issues of "liability" that might arise under this Convention.

Relationship to Dispute Settlement

- The procedure should make it clear that its operations are without prejudice to dispute settlement, as is done in other agreements.

VIII. EUROPEAN COMMUNITY

Submission by the European Community and its Member States

A Compliance Mechanism under the Stockholm Convention

The European Community and its Member States note that the Conference of Plenipotentiaries in its Resolution on interim arrangements[1] invites the Intergovernmental Negotiating Committee to focus its efforts during the interim period on those activities required or encouraged by the Convention that will facilitate the rapid entry into force and effective implementation of the Convention upon its entry into force, including the development of modalities and procedures relating to non-compliance. We, therefore, welcome the invitation by the Intergovernmental Negotiating Committee[2] to provide the secretariat with our views on a non-compliance mechanism, as referred to in article 17 of the Stockholm Convention on Persistent Organic Pollutants[3].

This submission lays down the views of the European Community and its Member States on the structure and elements of a compliance mechanism. In many sections we have also provided a possible draft legal text to show how a corresponding paragraph in a decision by the Conference of the Parties (CoP) on the compliance mechanism could look like. In this regard, we have assumed that the compliance mechanism under the Stockholm Convention would be established by a CoP decision as is the case with most compliance mechanisms. Given the advanced state of discussion on compliance mechanisms under an ever larger number of Multilateral Environmental Agreements, our views and drafts draw on those discussions, in particular on the discussions on the compliance mechanism for the PIC Convention at INC-9 (30 September - 4 October 2002 in Bonn).

It should be noted that almost all elements of a compliance mechanism are closely linked with each other. Therefore, changes to one element will almost certainly require adaptations to one or more of the other elements.

1. Objective of the non-compliance regime

Parties to the Convention are obliged under international law to comply with their obligations under the Convention. The objective of the compliance mechanism is to determine non-compliance and provide for the treatment of Parties found to be in non-compliance and thereby contribute to the effective implementation of the Convention. With a view to addressing non-compliance expeditiously, the non-compliance procedure should provide a vehicle to foster common treaty interests and to identify, at the earliest stage possible, difficulties encountered by Parties with the fulfillment of their obligations under the Convention and the causes thereof. The procedure should be non-adversarial and forward-looking. It could facilitate the provision of different types of assistance to Parties in non-compliance, although it would not provide such assistance directly.

The compliance mechanism would complement and be complemented by other provisions in the Convention, e.g. technical assistance (Article 12), financial mechanisms (Article 13), and implementation plans (Article 7). We would like to underline the importance of the reporting obligations under Article 15 for the functioning of the compliance mechanism as well as the

[1] Resolution on interim arrangements, II 4, Doc. UNEP/POPS/CONF/4, 5 June 2001, Appendix I, p. 6
[2] Decision INC-6/18, Doc. UNEP/POPS/INC.6/22, 21 June 2002, p. 34
[3] The European Community and its Member States had submitted their initial views on the subject to the sixth session of the Intergovernmental Negotiating Committee in document UNEP/POPS/INC.6/CRP.2, 17 June 2002

contribution of non-compliance information to the effectiveness evaluation under Article 16 paragraphs 1 and 3 (c).

As the objective of the mechanism is clearly spelt out in Article 17 of the Convention and is inherent in the design and the provisions of the envisaged CoP decision, we do not believe it necessary to introduce specific text on this point.

2. The Compliance Committee and its composition and tenure

We believe that the CoP should establish a standing committee (the "Committee") to administer the compliance mechanism. In order to work efficiently and be cost-effective, the Committee should comprise a relatively small number of experts, bringing together technical and legal expertise relevant for this Convention. The experts, who should act in their individual capacity, should be nominated by Parties and elected by the CoP. Due consideration should be given to an equitable geographical distribution in electing the members. There should be a system of staggered terms of office, to guarantee a good mixture of fresh thinking as well as the necessary continuity in the process.

The relevant paragraphs of a CoP decision might read as follows:

A Compliance Committee, hereinafter referred to as the "Committee", is hereby established.

The Committee shall consist of ten members. Members of the Committee shall be legal and technical experts, drawn from a list of individuals nominated by Parties and elected by the Conference of the Parties, who have expertise and specific qualification in the subject matter under the Convention. Members shall serve in their personal capacity.

In appointing members due consideration shall be given to an equitable geographical distribution.

At the meeting at which this decision is adopted, the Conference of the Parties shall appoint five of the members for one term, and five members for two terms. The Conference of the Parties shall, at each ordinary meeting thereafter, appoint for two full terms five new members to replace those members whose period of office has expired, or is about to expire. Members shall not serve for more than two consecutive terms. For the purpose of this decision, "term" means the period that begins at the end of one ordinary meeting of the Conference of the Parties and ends at the next ordinary meeting of the Conference of the Parties.

The Committee shall elect its own Chairperson and any other officers it deems appropriate.

The Committee should have the function to examine specific and general compliance issues, advise Parties and facilitate assistance to Parties experiencing difficulties in meeting their obligations under the Convention, and decide on the treatment of Parties found to be in non-compliance. The Committee should be enabled to decide as much as possible on its level in order to provide for timely response and to avoid politicization of cases of non-compliance at the level of the CoP. Some of these elements will be spelt out in more detail in some of the following sections.

3. Meetings of the Compliance Committee

The Committee should meet as often as necessary to fulfill its functions, but at least once a year, taking into account the meeting schedules of the CoP and other relevant bodies under the Convention. The Committee should try to reach all decisions by consensus, but may resort to a two-thirds majority vote if no agreement can be reached otherwise. A high quorum should guarantee the involvement of most if not all members of the Committee.

The relevant paragraphs of a CoP decision might read as follows:

> *The Committee shall hold meetings as necessary, at least once a year. In determining the dates of the meetings, due consideration should be given to the meeting schedules of the Conference of the Parties and other relevant bodies under the Convention.*
>
> *The members of the Committee shall make every effort to reach agreement on all matters by consensus. If all efforts to reach consensus have been exhausted and no agreement has been reached, the decision shall, as a last resort, be taken by a two-thirds majority vote of the members present and voting. Decisions on matters of procedure shall be taken by a majority vote of the members present and voting. If the question arises whether a matter is one of procedural or substantive nature, the Chairperson shall rule on the question. An appeal against this ruling shall be put to the vote immediately and the Chairperson's ruling shall stand unless overruled by a majority of the members present and voting. If on matters other than elections a vote is equally divided, a second vote shall be taken. If this vote is also equally divided, the proposal shall be regarded as rejected.*
>
> *Eight of the members of the Committee shall constitute a quorum.*

4. Secretariat

The Secretariat referred to in Article 20 of the Convention should be the secretariat of the Committee.

5. Report on the Activities of the Committee

The Committee should submit a report on its activities to each ordinary meeting of the Conference of the Parties. The report should be made available to the public.

6. Relationship with other provisions of the Convention and other bodies

Non-compliance procedures differ fundamentally from dispute settlement procedures. The non-compliance procedure would, therefore, not prejudice the dispute settlement procedure under the Convention. The relevant paragraph of a CoP decision might read as follows:

> *This mechanism shall be without prejudice to the provisions of Article 18 of the Convention on settlement of disputes.*

The European Community and its Member States support the consideration of possible synergies and linkages, including through organizational and practical cooperation, between the compliance mechanism to be set up under the POPs Convention and comparable mechanisms under other Conventions, for example the PIC Convention.

7. Initiation of the procedures and procedural safeguards

The CoP decision on the compliance mechanism should spell out who may initiate the process and bring matters to the attention of the Committee ("triggering"). We believe that the system of submissions regarding individual cases of non-compliance should in any case include self-trigger procedures, party-to-party trigger procedures, submissions by the secretariat and the Committee itself.

The European Community and its Member States regard it as necessary that procedural safeguards are incorporated to prevent any possible abuse of the compliance mechanism. Clear and sufficient procedural safeguards must include provisions on

- the need for submissions to be supported by corroborating information,
- the opportunity for Parties concerned to make representations,
- clear time-limits for procedural steps to make the process predictable,
- the possibility for the committee to exclude ill-founded submissions and *de minimis* cases,
- the openness of the process, and
- the handling of confidential information.

The relevant paragraphs of a CoP decision might read as follows:

Any submission shall be addressed in writing to the secretariat, and shall set out:

(a) The matter of concern;

(b) The relevant provisions of the Convention; and

(c) Information substantiating the matter of concern.

The secretariat shall forward all submissions within two weeks upon their receipt to the Committee. In cases of submissions other than by a Party with respect to its own compliance, the secretariat shall send within two weeks upon their receipt a copy to the Party whose compliance is in question.

The Party whose compliance is in question may comment on the submission within three months upon its receipt, unless the circumstances of a particular case require an extended period of time, but in any event not later than six months. The Party shall send such comments to the secretariat, which shall immediately forward it to the Committee for its consideration.

A Party whose compliance is in question shall be entitled to participate in the discussions of the Committee with respect to the issues raised. For this purpose the Committee shall invite such a Party to participate in the discussions no later than eight weeks beforehand. Only the members of the Committee may participate in the elaboration and adoption of a recommendation or decision of the Committee.

The Committee shall consider any submission made to it as well as any other relevant information with a view to determining the facts and possible causes of the matter of concern and the resolution of it.

The Committee shall reject submissions which it considers are:

(a) De minimis; or

(b) Manifestly ill-founded.

The Committee shall share its draft conclusions and recommendations with the Party concerned for consideration and an opportunity to comment within three months upon receipt of the draft by the Party concerned. Any such comments may be included in the report of the Committee.

The handling of information under the compliance mechanism should be based on the principle of openness with confidentiality as an exception. Article 9 paragraph 5 of the Convention lays down a general rule on confidentiality. The European Community and its Member States believe that the issue of confidentiality requires further and careful consideration in the context of the compliance procedure.

The Committee should base its considerations on information from all sources. It should be able to draw on information available from any source it considers relevant, including information obtained through reporting and monitoring under Articles 15 and 16 of the Convention and information provided by the public. Furthermore, in carrying out its functions, the Committee may consult with other Convention bodies, draw upon outside expertise and undertake information gathering on the territory of a Party with the consent of that Party.

8. General issues of compliance

Besides dealing with specific issues of non-compliance the Committee should also have the function to examine general compliance issues in the context of the Convention. The relevant paragraph of a CoP decision might read as follows:

The Committee may furthermore examine general issues of compliance where:

(a) The Conference of the Parties so requests;

(b) The Committee decides there is a need for an examination and report to the Conference of the Parties; or

(c) The secretariat on the basis of information received so suggests.

9. Measures regarding non-compliance

Regarding the treatment of Parties found to be in non-compliance, the compliance mechanism should provide for a wide range of possible measures that gives the flexibility to react, as appropriate, taking into account such factors as the cause, type, degree, duration and frequency of the non-compliance. There should be an appropriate balance between carrots and sticks. The measures should be described as exactly as possible, leaving space for flexibility with regard to facilitative measures.

The measures should range from the provision of advice to stronger measures. The measures should include in particular the provision of advice, the facilitation of technical and financial assistance, the request to the Party concerned to develop a compliance action plan, including targets and timelines, and to submit progress reports and a formal statement of concern regarding possible future non-compliance. Further possible measures could include the issuance of cautions, declarations of non-compliance and, where necessary, the partial or full suspension of the specific rights and privileges of the Party concerned under the Convention. All measures should be in accordance with international law.

10. Monitoring and review

We consider it important to monitor the consequences of any action taken to resolve the issue of non-compliance. We also think that it is important that the Conference of the Parties reviews the effectiveness of the compliance mechanism at intervals.
