UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

MP.EIA/WG.1/1999/7
28 July 1999

ORIGINAL : ENGLISH

ECONOMIC COMMISSION FOR EUROPE

Meeting of the Parties to the Convention
on Environmental Impact Assessment
in a Transboundary Context
Working Group on Environmental Impact Assessment
(First meting, Geneva, 4-6 October 1999)
(Item 4 of the provisional agenda)

COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS

Submitted by the delegation of the United Kingdom

Introduction

1. At the first meeting of the Parties to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, it was agreed that the work plan for the implementation of the Convention during the period 1998 to 2000 should include work on non-compliance guidelines. The lead country for this activity is the United Kingdom. It will convene two meetings of a task force that will develop a report containing possible approaches for non-compliance guidelines. They will take place between the first and second meetings of the Working Group on Environmental Impact Assessment. The dates are likely to be fixed before or during the first meeting of the Working Group.

2. This paper summarizes compliance procedures established under other multilateral environmental agreements ("MEAs"), and is intended to inform the Working Group and to assist the task force with its deliberations.

Compliance

3. Although the terms are nowhere expressly defined for the purposes of international environmental law, “compliance” is generally understood to relate to the observance of its obligations by a Party to a treaty, whilst “implementation” and “enforcement” relate to the legislative and other action taken internally by a Party to enable it to demonstrate that it is in compliance. Compliance procedures have been developed under a number of MEAs because of an understandable desire on the part of Parties to know whether their fellow Parties are actually fulfilling their treaty commitments. Although the submission of an annual report describing the action a Party has taken is very useful for this purpose, the data provided may be seen as subjective. What many Parties want is an objective assessment of such data.

4. All MEAs contain dispute settlement provisions. In principle, these could be used for supervising the performance of individual Parties. To date, however, they have never been used. There would seem to be four main reasons for this:

- Dispute settlement procedures are expensive, time-consuming and confrontational;
- Even when successful, they do not ensure results that will safeguard the environment or improve it;
- With rare exceptions, the procedures will apply only if there is “common agreement” to their use between the Parties to the dispute and in most cases such common agreement is unlikely to be forthcoming; and
- Compliance procedures are multilateral, whilst dispute settlement procedures are bilateral; most MEA breaches of obligation are inherently multilateral in nature.

5. To bypass the confrontational and judicial nature of dispute settlement procedures and place more emphasis on getting Parties to fulfil their commitments, the compliance regimes that have been developed have deliberately focused on:

- Avoiding complexity; and
- Being non-adversarial, transparent, and cooperative.

The regimes all place much emphasis on the fulfilment by Parties of their reporting obligations.

6. To date, four MEAs have compliance regimes in operation:

- The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer;
- The 1979 Convention on Long-range Transboundary Air Pollution;
- The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”); and
- The 1979 Convention on the Conservation of European Wildlife and Natural Habitats (“Berne Convention”).

The negotiations of two other MEA compliance regimes are not yet completed:

- The 1992 United Nations Framework Convention on Climate Change (in that case called a “multilateral consultative process”); and

- The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

Work is about to start on developing a compliance regime and a multilateral consultative process for the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

Montreal Protocol

7. The Montreal Protocol's compliance regime (developed between 1989 and 1992; reviewed in 1998) has accumulated the most operative experience. Its procedure is generally considered to provide a successful blend of stick and carrot.

8. Where there are concerns as to a Party's compliance with its Protocol obligations, scrutiny of its performance may be triggered in one of three ways:

- By another Party;
- By the secretariat; or
- By the Party in respect of itself.

9. All references are forwarded to an Implementation Committee composed of 10 members chosen from the Parties on an equitable geographical basis.

10. The Implementation Committee aims to bring about an "amicable solution", but cannot take decisions itself. The most it can do is make recommendations to the Protocol's governing body, the Meeting of the Parties.

11. Unlike the Implementation Committee, the Meeting of the Parties does have decision-making power. To date it has used it in a restrained way (i.e. offering assistance and advice rather than threatening suspension).

12. The Implementation Committee has worked well. In seven years and twenty-one meetings, the cases it has considered have been referred either by the secretariat or by Parties in respect of themselves. No Party has reported another to the Implementation Committee, thereby echoing the reticence of Parties about directly challenging other Parties under the dispute settlement procedure. To date, the Implementation Committee has reviewed and made recommendations on the performance of many Parties. The Meeting of the Parties has consistently accepted the advice forwarded to it by the Implementation Committee.

Convention on Long-range Transboundary Air Pollution

13. The Parties to this Convention have recently concluded that the time has come for them to move from producing new protocols to focusing on better compliance with the Protocols that are already in place. They have been sufficiently impressed by the Montreal Protocol model to copy it almost totally.

14. The Convention on Long-range Transboundary Air Pollution's compliance regime operates through an Implementation Committee composed of eight

members. To date, the Implementation Committee has met three times. Much of its energies so far have been concentrated on organizing its working methods. The obligations in the Convention are, for the most part, less specific than those of the Montreal Protocol and hence the scope for making clear-cut assessments of compliance will be harder. However, Protocols concluded under the Conventions contain more specific obligations.

CITES

15. In 1992, the Conference of the Parties adopted a Resolution directing its secretariat to identify Parties with insufficient implementing legislation. In fulfilling its task, the secretariat has employed outside consultants to analyse national compliance. To date two reviews have been completed; a third is currently under way.

16. The first review resulted in the Conference of the Parties recommending that those Parties whose legislation was found to be incomplete, should take steps towards improvement by the time of the next Conference. Technical assistance was available to those that requested it. Several countries took up the offer.

17. Though initially reluctant to take stronger action, the Conference of the Parties in 1997 decided temporarily to suspend CITES trade with Parties that had a substantial trade in Convention species but which were believed generally not to meet any of the CITES implementation requirements. This stronger approach worked well. Certain Parties have now introduced the necessary legislation and their suspensions have been lifted. The process is continuing with a number of countries currently facing suspension unless improvements are made by the autumn.

Berne Convention

18. The Standing Committee of the Council of Europe’s Berne Convention (its Conference of the Parties) operates a compliance procedure based on the receipt of complaints or grievances from individuals, NGOs or Parties themselves alleging failure by a Party to comply with the provisions of the Convention. The decision to “open a case file” rests with the Standing Committee, which has discretion regarding the procedures to be followed. The Standing Committee closes files once complaints or grievances have been resolved to its satisfaction. Success with this procedure, which operates at an administrative rather than legal level, depends largely upon the degree of peer pressure that can be brought to bear on a non-complying Party through the Standing Committee.

Convention on Climate Change

19. The original aim of some Parties to the Convention on Climate Change was that the Convention should have a compliance regime similar to that of the Montreal Protocol. During the negotiations, however, a significant number of countries doubted the need for such a regime, with the result that the Convention provides merely for a multilateral consultative process to be developed.

20. The multilateral consultative process developed for the Convention on Climate Change differs from the Montreal Protocol's compliance regime principally in that it focuses on providing Parties that seek help with advice and recommendations on the procurement of technical and financial resources for the resolution of difficulties encountered in the course of implementation.

21. It is, thus, an advisory system (i.e. a "help desk"), while the Montreal regime is supervisory. Given the very general nature of the Convention on Climate Change's commitments, on an advisory approach may prove to be the most appropriate. It is expected that the multilateral consultative process will be used principally by developing country Parties.

22. The process is not yet in operation because of continuing disagreement on one point concerning the composition of its Multilateral Consultative Committee. It is hoped that this issue can be resolved at this year's meeting of the Conference of the Parties.

Basel Convention

23. There is no requirement in the Basel Convention for a compliance regime to be developed. Some Parties have, nevertheless, been pressing for one to be drawn up under the general powers of the Conference of the Parties. Three meetings on the matter have already taken place, but progress is slow.

24. This paper has been prepared immediately before the meeting of the open-ended ad hoc committee for the implementation of the Basel Convention in June. At the time of writing, it appeared likely that the committee would propose that the Parties to the Basel Convention should decide on the commencement of serious work to establish a compliance mechanism at their meeting in December.

Kyoto Protocol

25. The Kyoto Protocol provides for the development of both a compliance regime and a multilateral consultative procedure. The range of its obligations is considerable, varying from "ordinary" requirements whose details are fully spelled out in the Protocol (e.g. duty to achieve the emissions target; duty to report to the Conference of the Parties) to more complex obligations whose detail will, to a large extent, result from rules and procedures that have yet to be drawn up and agreed by the Parties.

26. There will, no doubt, be a continuing role for an advisory multilateral consultative process and a supervisory compliance regime for the Kyoto Protocol. Yet a complicating factor in developing such regimes is likely to be the wish of certain Parties to see breaches of a number of the obligations made subject to legally binding penalties, while others continue to be nervous about the prospect of supervision of their compliance.

Trends and conclusions

27. Experience in the design and operation of compliance regimes to promote better protection of the environment under MEAs remains limited. The process remains very much in its infancy. Nevertheless, certain trends can be detected and conclusions drawn:

(a) **Sovereignty**. The negotiation of compliance procedures to date has demonstrated that some countries remain sensitive about external scrutiny of the quality of their performance in meeting their MEA obligations. As a result, it has been necessary to overcome their sensitivities by designing procedures that are supportive, constructive and respectful of national sovereignty rather than ones that lead to individual Parties being found "guilty" and penalized;

(b) **Tailoring**. There is no single compliance procedure for all MEAs. Every treaty is different. The balance of obligations and the list of Parties will vary from one instrument to the next. The procedures developed may well need to be tailored to suit individual cases;

(c) **Composition of the Implementation Committee**. It has been suggested that implementation committees would be more efficient if composed of elected individuals rather than elected countries. Such nominations, it is said, would result in increased objectivity, greater expertise and more consistent attendance at meetings. Some countries, however, have been nervous of such a step, although it has been shown to work well in other contexts. A change of this kind may be unlikely in the near future;

(d) **Need for precise obligations**. It is much easier to design and operate a compliance regime for an MEA (such as the Montreal Protocol) that lays down precise standards to be met by Parties, than for a framework instrument with unspecific and, even, unclear obligations (such as the Convention on Climate Change);

(e) **Confidence building**. It takes time for implementation committees to establish themselves in the eyes of the Parties to an MEA and for the Parties to get used to their performance being reviewed on a regular basis and not fear the process. Every MEA that incorporates a compliance regime is likely to have to go through such a confidence-building process and the resulting slow start should not be seen as a failure.