6 May 1996

ENGLISH ONLY

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

Ad Hoc Group on Article 13
Second session
Geneva, 10 July 1996

RESPONSES TO QUESTIONNAIRE RELATING TO THE ESTABLISHMENT OF A MULTILATERAL CONSULTATIVE PROCESS

Submissions by intergovernmental and non-governmental bodies

Note by the secretariat

Addendum

In addition to the submissions already received, and contained in document FCCC/AG13/1996/MISC.2, the secretariat has received a submission from the Wuppertal Institute for Climate, Environment and Energy.

This submission is attached and, in accordance with the procedure for miscellaneous documents, is reproduced in the language in which it was received and without formal editing.

FCCC/AG13/1996/MISC.2/Add.1
GE.96-61744

WUPPERTAL INSTITUTE FOR CLIMATE, ENVIRONMENT AND ENERGY

Answers to the Article 13 Questionnaire
The Design of the Multilateral Consultative Process in Art.13 FCCC

Question 1: What should be understood by the term "multilateral consultative process" and what "Questions regarding the implementation of the Convention" should be covered by such a process?

The historical and systematical interpretation of Art.13 clearly indicates that the drafters of the FCCC intended to lay the ground for a non-compliance procedure (now used by several environmental agreements) but could not agree on its design. Any teleological approach to this treaty clause equally reveals that the FCCC lacks a procedure to deal with individual instances of non-implementation, apart from the never-used dispute settlement procedure.

A non-compliance procedure therefore is designed to cover those cases, where the Conference of the Parties (COP) deals with one Parties' inability or unwillingness to fulfil its obligations under the treaty. The overall implementation of the FCCC is subject to review by the Subsidiary Body for Implementation (SUBIM) and therefore does not have to be included under this multilateral consultative process.

The process or procedure to be developed should work on different levels and with different bodies: Whereas most of the information needed for the "routine review" is gathered and analyzed by the SUBIM, the individual implementation might be left to the subsidiary organ to be established under the non-compliance procedure. This body would probably have the function to look into the case, provide for a "right to hearing" and to adopt a recommendation with regard to the solution of the matter. The ultimate decision making power would have to rest with the Conference of the Parties as the supreme body of the Convention.

Question 2: What is meant by the word "process" in Article 13? Should it be understood as a sequence of events or as a mechanism or as an institution? Could it imply all of these?

The term "process" is a typical "variable" to which negotiators resort if they do not reach a common understanding as to the character of an institution or procedure (like the increasingly used term "mechanism"). Therefore this term could have any of the meanings listed above.

However, for the purpose of a non-compliance procedure (used as a technical term), the process or procedure would have to be institutionalized in order to be effective. A part of this process is necessarily institutionalized, since

the COP would have to be part of it as the supreme body of the Convention. A subsidiary body would nevertheless have to be established in addition to the COP, which is unable to deal with all possible problems of individual non-compliance. This implies a certain membership, structure, sessional arrangements and a budget. The Implementation Committee of the Montreal Protocol might serve as an example with its 10 members from five regional groups.

Question 3: What principles should govern the process? Is it sufficient that the process should be simple, transparent, facilitative and non-confrontational in character?

The first three of these principles are certainly necessary ingredients of this process, the latter seems to be too strongly formulated. It should probably be termed "non-adversarial" in the sense that it is not meant to provide for bilateral disputes where the process is adversarial in character. The term "non-confrontational" might also be understood to complement the "facilitation principle", since a non-compliance procedure is characterized by its multi-purpose functions: It should provide for "carrots and sticks", including a genuine function to assist those Parties which are unable to fulfil their obligations and a function to bring about compliance in case of intentional non-compliance.

Question 4: Is it necessary to establish such a multilateral consultative process? If so, what measures should the Conference of the Parties take for its adoption: Decision of COP? Amendment? Protocol?

Such a non-compliance procedure is certainly necessary for the effective functioning of the Convention, as indicated above, and even more for any protocol that contains legally binding targets. Because of the need for universal application of this process a decision of the COP to the instrument concerned would be best-suited. The basis for this secondary legislation is clearly constituted by Art.13 and Art.7.2 (m) FCCC.

Question 5: If a new mechanism or institution were to be established under Article 13, should its membership be general or restricted to specialists such as legal, economic, social or technical experts? In this context, should a roster of experts to provide advice be envisaged?

The membership of a subsidiary body established by this process would clearly have to be limited in numbers if it is supposed to work effectively. As indicated above, 10 members would appear to be the optimal size - broad enough to allow a representative number of Parties from all regions to take part in it and small enough to work effectively. The membership should probably not be restricted to "experts" of a certain profession or from a certain background. In most cases the parties concerned will ensure that the representative has

the necessary skills to deal with the problems, although the example of the Implementation Committee of the Montreal Protocol indicates that most of the members will not have technical expertise. The establishment of a roster of (mostly technical) experts could mend some deficiencies in this area - although the Secretariat will always be in a good position to provide technical advice.

Question 6: What linkages would need to be established with other Articles of the Convention, notably, Articles 7.2(c), 8.2(c), 10, 12, 14?

Art.7.2(c): There seems to be no obvious role for the multilateral consultative process in this coordinating function of the COP.

Art.8.2(c): This facilitation function of the Secretariat is best handled by this organ and by the Subsidiary Body for Implementation. If, however, the difficulties encountered by a Party might lead to its non-compliance, the procedure could be triggered by this country.

Art.10: Close cooperation between the non-compliance procedure and the SUBIM is probably required, since they might otherwise duplicate their work. Furthermore, the implementation review of the SUBIM appears like a necessary first step for the non-compliance procedure: The data on which much of the work of the non-compliance procedure will rely will come from the national communications via the SUBIM. Some procedure for processing and evaluating the information received would have to be established, relying on the in-depth review.

Art.12: See above, the national communications, the in-depth review and a future non-compliance procedure are interlinked and should be connected expressly in the decision of the Parties establishing the process.

Art.14: The relationship between dispute settlement mechanisms and the non-compliance procedures are an intricate legal problem which has as yet not been tackled sufficiently. Therefore the issue cannot be resolved here. Some preliminary conclusions are, however, possible: The relationship between Art.14.1 and the Art.13 process is unproblematic, since these negotiations may take place within the non-compliance procedure. Out of respect for the authority of the International Court of Justice or an Arbitration Tribunal, no definite decision should probably be taken if one these organs is acting according to Art.14.2. On the other hand, any process established in accordance with Art.13 and the conciliation procedure under Art.14.6 do not appear to be mutually exclusive.

Question 7: Is there a gap between the processes on review of implementation and on settlement of disputes? If so, what is the extent of that gap and how could Article 13 contribute to narrowing it?

There is an obvious gap (see also the answer to question 1), because the implementation review does first of all not deal with the individual implementation (except rather incidentally by the in-depth review, which could be made part of the non-compliance procedure) and - most important - there is no procedure for dealing with cases of non-compliance. The Art.14 Dispute Settlement Procedure fulfils quite another function of bilateral dispute resolution (and will probably never be used). Apart from this, a non-compliance procedure would not only function as a mechanism to resolve disputes, but even more like a "dispute avoidance" procedure, which does not exist so far.

Question 8: Is there a relationship between the Article 13 process and the subsidiary bodies established under the Convention, for example, the AGBM?

For the relationship to the SUBIM, cf. the answer to question 6. As regards the AGBM, there is no explicit or formal relationship to the Art. 13 process. However, the COP may decide to enlarge the mandate of the AG 13 and to include the consideration of a non-compliance procedure for the protocol (or another legal instrument) to be drafted by the AGBM. (It has already been obvious at the first session of AG 13 last October that the future Protocol was on the mind of many delegates.)

Nevertheless, any process or procedure to be developed by the ad hoc group on Art.13 would have to adopted by the supreme decision making bodies of the instrument concerned. Therefore it might make sense to leave the consideration of a non-compliance procedure for a future protocol to the legal experts of the Parties to this instrument. This could avoid unnecessary work, since the parties to this agreement will be in a better position to be aware of the necessary procedures and institutions for this particular treaty.

Question 9: What is the legal status of this process?

The legal status of the non-compliance procedure is partly determined by the way it is enacted and partly by the powers transferred upon the different institutions by the process. It is submitted here, that one of the possible results of such a process could be a binding decision of the COP adopting particular measures with regard to an individual Party.

Question 10: What is meant by the Article 13 phrase: "Parties on their request?" Who may trigger the process apart from the Parties themselves? Is this process compulsory or optional?

The phrase is clearly intended to restrict the right to "trigger" the process to the Parties to the Convention (but it is not clear, whether it means that only Parties which are experiencing difficulties should be able to initiate

the process themselves). This wording does, however, in no way bind the AG 13, since Art.13 only requests the "consideration" of this process at the first COP. This has been done and it has been decided to establish a working group to look further into the issue. The result of these considerations may well be a process that cannot only be initiated by the parties.

The phrase could also mean that only the Parties experiencing difficulties themselves should be in the position to trigger the process. In this case the whole exercise under Art.13 would loose much of its potential. The possibility to turn to the Conference of Parties in such a case does already exist now. Therefore it would be preferable it all other Parties to the Convention (Protocol) were able to initiate the non-compliance procedure, with or without the consent of the Party or Parties concerned. Since the process is supposed to be an open and "non-adversarial" procedure, such an initiation and the subsequent proceedings would not occur in secrecy.

Moreover, the right to initiate the procedure should be given to the Secretariat, which is in a particularly good position to overlook the implementation and has the necessary skilled personal. Such a right of the Secretariat is usually necessary in international environmental law and policy, because there is a rather widespread reluctance by most States to point the finger at another State. This could be done more discreetly via the Secretariat, if this were able to trigger the process. The Secretariat would also be in the position to receive information from non-governmental sources - an invaluable source, as it is visible in other environmental treaties and especially the European Community, where the European Commission receives most of its information from concerned citizens.

The non-compliance procedure would necessarily have to be compulsory in the sense that the Conference of the Parties could deal with particular cases in a compulsory manner. It does not need to be compulsory in most cases, however, firstly because in many instances it would be the Parties in non-compliance that initiated the process and, secondly, the outcome of the process could very well be the support of the Party found to be in non-compliance unintentionally.

Question 11: Should the multilateral consultative process be made to apply to related legal instruments in addition to the Convention?

As indicated above the multilateral consultative process could be drafted in a way that would adapt it to the different needs of the Parties to a future protocol or amendment. It would have to be substantially different procedure though, if the new instrument would contain specific legally binding reduction targets. Therefore it might be advantageous to leave this question to the Parties of the new protocol or amendment.

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