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PROCEDURAL AND LEGAL MATTERS

CONSIDERATION OF THE ESTABLISHMENT OF A MULTILATERAL CONSULTATIVE PROCESS FOR THE RESOLUTION OF QUESTIONS REGARDING IMPLEMENTATION (ARTICLE 13)

Note by the interim secretariat

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I. INTRODUCTION

A. Convention provisions

1. Article 13 of the United Nations Framework Convention on Climate Change states that:

> "The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention."

B. Scope of the note

2. During the third, fourth and fifth sessions of the Intergovernmental Negotiating Committee, discussions took place in Working Group II with regard to the establishment of a procedure under the Convention whereby questions regarding implementation could be resolved amongst the Parties to the Convention. Owing to the heavy workload of the Committee and time constraints, completion of a procedure for inclusion in the Convention was not feasible. It was, therefore, decided that Article 13 would provide for the possibility of establishing such a process once the Convention entered into force.

3. Sections II - VII of the present note cover the following points:

- Section II briefly reports on the discussions that took place during the negotiations of the Committee at its third and fourth sessions;

- Section III attempts to describe the rationale behind a multilateral consultative process;

- Section IV examines the scope of application of such a process in relation to the provisions of the Convention;

- Section V looks at the relationship between a multilateral consultative process, the review of national communications within the Subsidiary Body for Implementation (SBI), and the dispute settlement regime established pursuant to Article 14 of the Convention;

- Section VI enumerates elements that could be considered in the design of a multilateral consultative process;

- Section VII concludes by presenting possible options to the Committee for recommendation to the Conference of the Parties at its first session (COP 1), to enable it to undertake the work relating to this issue.

4. The interim secretariat has reviewed several non-compliance, dispute resolution and implementation review procedures, for example, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the Second Sulphur Emissions Protocol to the United Nations Economic Commission for Europe (UN/ECE) Convention on Long-range Transboundary Air Pollution, the General Agreement on Tariffs and Trade (GATT) dispute resolution panels, and international labour and human rights conventions. The secretariat is at present preparing a review of these procedures which will be issued as an addendum to this note in due course.

5. This material is intended to serve as an initial background document for discussion by the Committee and for future discussions on this issue by the Conference of the Parties (COP). The note does not attempt to design a multilateral consultative process.

C. Possible action by the Committee

6. The Committee may wish to consider commencing a discussion on this item at its tenth session. However, owing to the heavy work schedule of its eleventh session (see A/AC.237/57), it may be advisable, once an initial airing of views has been completed at the tenth session, to defer further consideration to the first session of the Conference of the Parties (COP 1) (see paras. 33-34, below).

II. BACKGROUND

7. At the third session of the Committee, Working Group II considered the drafting of a procedure whereby the resolution of questions regarding implementation under the Convention would be cooperative rather than adversarial. The views expressed at that session were that such a procedure should be based on consultation and cooperation, with the aim of assisting Parties that were, for whatever reason, failing to fulfil their commitments under the Convention. In this regard, a number of proposals were presented to the Working Group.

8. At the fourth session of the Committee, the Co-Chairs of Working Group II proposed an alternative procedure to the traditional bilateral dispute settlement regime. In presenting this proposal they informed the Committee that they had concluded that traditional approaches were insufficient in resolving questions of this kind that, owing to the global nature of the issue, may arise under the Convention. They indicated that, as all Parties would be affected by the action or inaction of all other Parties, reliance on bilateral dispute settlement procedures would not be sufficient.

9. The proposal contained, inter alia, the following elements: 1/

(a) The COP would be the point of entry for any questions and the body responsible for all decisions;

(b) Questions relating to the interpretation and implementation of the Convention could be brought by Parties or by one of the subsidiary bodies;

(c) The COP would consider questions and could establish ad hoc panels drawn from members;

(d) In reviewing questions, the first step would be to consult the Party that was the subject of the question. The ad hoc panels could also consult with the subsidiary bodies under the Convention;

(e) The panels would report the results of their consultations to the COP within one year. These reports would include, if necessary, a recommendation for resolution;

(f) The COP would consider the reports and take whatever action it deemed necessary;

(g) If the Party did not comply with a decision of the COP, the latter could take any action it deemed necessary to further the objective of the Convention;

(h) If consensus were not practical, decision-making by the COP would be by a two-thirds majority;

(i) Details regarding the establishment of ad hoc panels would be elaborated in an annex which could be drafted by Working Group II or the COP once the Convention entered into force.

10. There was a wide range of views expressed by the Committee on the above-mentioned proposal. The main points in the discussion touched upon the following questions: (a) whether a traditional dispute settlement procedure would be adequate; (b) whether the proposal was an appropriate alternative to traditional dispute settlement procedures or whether it should complement such procedures; (c) whether the COP should perform a judicial or a political role; (d) whether there was a need to undertake friendly negotiations regarding a Party's compliance; (e) whether the establishment of ad hoc panels would be costly and time-consuming, and (f) whether decisions by the COP under this procedure should be taken by consensus or by a two-thirds majority of the Parties.

III. RATIONALE FOR A MULTILATERAL CONSULTATIVE PROCESS

11. There are several possible rationales for having a multilateral consultative process. First, as the phenomenon of climate change is of a global character, it can be argued that the interests of all States are involved. Second, since the negative effects of non-compliance with the Convention are subtle and cumulative and may manifest themselves only after a long period of time, preventative measures and remedies could result in more effective solutions

than post hoc dispute settlement. Third, a multilateral consultative process would emphasize cooperation among Parties in pursuit of a common goal, rather than confrontation. Although such procedures usually lack real enforcement power, their strength is manifested through peer pressure and regular accountability by Parties in an intergovernmental context. Finally, they encourage Parties to an agreement to seek consensus on issues and to strive for interpretations and decisions that will reinforce the stability and effectiveness of the regime as a whole. In this way, treaty compliance can be promoted through discussion and negotiation, rather than by adjudication of questions of law. 2/

12. Such a multilateral consultative process would be the forum for handling questions that Parties may have about the implementation of provisions by other Parties and their own implementation of the Convention. The process would be initiated by the act of raising a question. At times it may be used frequently, if there are many questions, while at other times it may be less active.

13. Parties would, of course, remain free to resort to traditional methods of dispute settlement as a means of settling questions of interpretation or application of the Convention. However, traditional dispute settlement procedures are rarely invoked in environmental contexts. In an area where legal rules are still developing and evolving, Parties may prefer non-adversarial negotiations as a more predictable way of balancing conflicting interests in resolving problems. By interposing a multilateral consultative process between the Parties' performance of their commitments and traditional dispute settlement, the latter could acquire a largely symbolic role as a deterrent.

14. Furthermore, establishing a multilateral consultative process could lead to a more effective Convention. In response to particular questions and concerns, such a process could lead to decisions and opinions in particular cases as to whether a Party is "in compliance" with the Convention and, where this is ambiguous, what constitutes compliance. Performing this function could lead to a more effective Convention in the following ways: 3/

(a) The process could help to build confidence in the Convention by demonstrating that implementation problems can be raised, made transparent and resolved satisfactorily;

(b) An authoritative interpretative process could set useful bounds on the diversity of legitimate interpretations;

(c) The process could offer a safety valve for considering and disposing of problem questions that might otherwise make it difficult to progress on other issues; and

(d) The process could help to point out areas where adjustment is needed and around which public opinion can be mobilized to push for policy change.

IV. SCOPE OF APPLICATION

15. A multilateral consultative process could consider any questions relating to the implementation of the Convention. The articles on commitments (Articles 4, 5, 6 and 12) would clearly fall within its purview, as would the functioning of the financial mechanism that is provided for in Article 11 of the Convention and any other article relating to implementation. This process would also apply to any amendments and annexes adopted pursuant to Articles 15 and 16.

16. If Parties were to decide to adopt protocols to the Convention, the scope of application of a multilateral consultative process established pursuant to Article 13 would need to be considered. Since protocols establish separate but related legal regimes, the Parties to the Convention and to the protocols may differ. Moreover, if more detailed commitments were elaborated in protocols, then the Parties to those protocols may consider creating additional or different review and assessment procedures, with powers that are commensurate with the additional commitments. 4/

17. Article 13 states that the process would be "available to Parties on their request, for the resolution of questions regarding the implementation of the Convention" (emphasis added). Parties would need to decide on the intended meaning of "available to Parties on their request". Further, Parties would need to decide whether "implementation" should include questions of interpretation as well. Questions of implementation and interpretation may be inextricably linked and may thus need to be considered in tandem. Article 14.1 makes it clear that its provisions are to be invoked "in the event of a dispute ... concerning the interpretation or application of the Convention". As the COP is the "supreme body" of the Convention, it would certainly be within its purview under Article 13 to respond to questions regarding interpretation of the Convention (see Article 7.2 and 7.2(m)).

V. RELATIONSHIP TO THE REVIEW PROCESS, THE SUBSIDIARY BODY FOR IMPLEMENTATION, AND THE DISPUTE SETTLEMENT REGIME UNDER ARTICLE 14

18. The provisions of the Convention relating to implementation may be seen as a continuum consisting of the communication of information and the review process at the beginning, a multilateral consultative process in the middle and the dispute settlement regime at the end. Taken together, these provisions and procedures will constitute a collective effort to promote learning and consultation, both broadly and in response to particular questions, concerns and, perhaps, even disputes.

A. Relationship to the review process

19. Regular review of information related to implementation communicated pursuant to Article 12 is the foundation upon which the rest of the continuum is built. Such reviews will

help promote a dynamic link between the actual experience and policies of the Parties and the evolution of the obligations under the Convention. The review process, whose details are still under design, might address some questions related to the national communication, such as methodologies and omissions, as they arise in particular communications. The interim secretariat has prepared a document for the tenth session of the Committee in this regard (see A/AC.237/63).

20. So far, the Committee, in preparing for COP 1, has favoured a review process that is facilitative, non-confrontational, open and transparent (see A/AC.237/63). Consequently, the review is not seen as a mechanism for verification or for determining whether a party is in compliance, but rather as a tool to ensure that the COP has the information necessary to carry out its mandate.

B. Relationship to the Subsidiary Body for Implementation

21. The Subsidiary Body for Implementation (SBI) will be the main mechanism for the review process. Consequently, there would inevitably be a close relationship between the SBI and a multilateral consultative process since both would be considering similar issues and drawing upon a similar base of information. If a question were in relation to the communication and review of information, the multilateral consultative process would only be invoked if the procedure under the review process could not resolve the question. Moreover, both the SBI and the multilateral consultative process would need similar technical support to some degree.

22. The functions of the SBI are still under review by the Committee, and consideration of its relationship to a multilateral consultative process will depend on the outcome of this review (see document A/AC.237/64). It should be noted, however, that the Committee, at its ninth session, included the function of "[advising] on issues such as resolution of questions, dispute settlement and compliance/enforcement mechanisms" as one of the possible tasks to be carried out by the SBI (A/AC.237/55, annex I, annex to decision 9/3).

23. It is thus conceivable that the COP could request the SBI to initiate a multilateral consultative process. The SBI could carry out the work itself or it could establish a subsidiary working group to do so and report back to it. The SBI could then report to the COP. This is one design option. Another would be for the COP to establish a subsidiary body for the multilateral consultative process, to be invoked whenever needed.

24. Whatever the option chosen, the SBI may well be in a position to identify questions that should be referred to a multilateral consultative process. Therefore, it would be important for the subsidiary bodies, and in particular the SBI, to be given some level of standing to raise questions and contribute to the proceedings of a multilateral consultative process.

C. Relationship to the dispute settlement regime pursuant to Article 14

25. The dispute settlement regime, at the other end of the continuum, exists to ensure that genuine disputes have a legitimate means of resolution. Although, ideally, disputes should be prevented, they may arise at any point in the continuum and Parties would be free to invoke Article 14 at any time during the review or multilateral consultative processes.

26. Article 14 establishes a traditional bilateral third-party dispute settlement procedure. The presence of a separate article in the Convention on dispute resolution suggests that the multilateral consultative process envisaged by Article 13 and the dispute settlement procedure under Article 14 are not mutually exclusive. Article 14 sets out the procedure that Parties would revert to when disputes need to be resolved by an institution existing outside the Convention but whose competence is recognized by the Convention, notably, by the International Court of Justice and arbitration and conciliation commissions. On the other hand, Article 13 would provide the procedure whereby Parties to the Convention could amicably resolve their differences, thus avoiding resort to Article 14. In practice, as stated earlier, given the facilitative nature of the review process and the availability of a possible multilateral consultative process, it is unlikely that many disputes will be settled by recourse to Article 14.

27. Unlike a non-compliance regime or a multilateral consultative process that aims to resolve problems within a system without reference to external adjudicators or institutions, dispute settlement relies heavily on outsiders to the system. Moreover, it is, in essence, confrontational. Its sharp edge, however, is blunted in most environmental conventions. For example, Article 14 of the Framework Convention on Climate Change provides for consensual or voluntary jurisdiction which is determined unilaterally, prior to the dispute. However, if Parties have made no such declaration and/or if a dispute has not been resolved after twelve months, the dispute "shall be submitted, at the request of any of the parties to the dispute, to conciliation" (see Article 14.5). A conciliation commission may be established to resolve the dispute but it may render only a recommendatory award which the Parties shall consider in good faith. (See also the Vienna Convention for the Protection of the Ozone Layer and the Convention on Biological Diversity.)

28. It is clear that, although rarely used in environmental treaties, dispute settlement procedures may serve a useful purpose as a last resort. In contrast, a multilateral consultative process would be intended for more frequent use. It would not be adversarial, as it would focus on assisting Parties in implementing their obligations under the Convention. Moreover, it would serve as a dispute prevention tool and would reflect a collective concern of the COP to ensure that all Parties fulfil their commitments under the Convention, rather than a bilateral concern as in the case of dispute settlement. The two procedures complement each other: respect for the requirements of a multilateral consultative regime would be strengthened by the knowledge that a dispute settlement procedure is always available to Parties and may be activated if necessary.

VI. POSSIBLE ELEMENTS OF A MULTILATERAL CONSULTATIVE PROCESS

29. It should be noted that the COP is not required to establish a multilateral consultative process. Article 13 of the Convention states that the "Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request" (emphasis added). Conceivably, COP 1 could, after consideration of this issue, decide that it is not yet opportune to establish such a process. Alternatively, after considering the establishment of a multilateral consultative process, the COP could decide that a different type of process is needed to deal with questions relating to implementation.

30. Assuming that the COP does decide to explore a multilateral consultative process, the type of procedure that could be developed would depend on whether the Parties decide to establish a procedure similar to that envisaged during the third and fourth sessions of the Committee (that is, panels), or one that uses a standing committee, like the non-compliance procedures adopted by the Montreal Protocol and the Second Sulphur Emissions Protocol. The COP would need to decide whether the process would entail a conceptual framework for a flexible process consisting of various consultative forums and/or measures to resolve questions in the implementation of the Convention, or whether it would be a process that establishes a standing institutional arrangement to resolve questions.

31. Issues that would need to be considered in designing such a process include the following: 5/

(a) What types of questions could be raised?

- about the Party's own compliance
- about another Party's compliance

(b) What entities other than Parties should be able to raise a question?

(c) What type of body will be required to resolve such questions?

- ad hoc/permanent
- relationship to the COP and/or SBI
- size and membership
- powers (fact-finding, etc.)

(d) In what ways could such questions be resolved?

- interpretations
- requests to financial mechanism for assistance
- recommendations

32. In the initial stages of developing a process, it may be best not to attempt to establish a procedure that is inflexible or that attempts to deal with all eventualities. From studies of a number of other international agreements, it appears that those which are most effective in achieving their objectives tend to incorporate processes that evolve over time, as knowledge of the issues increases and as Parties' perceptions of problems or objectives change. However, it appears to be equally important that a framework exists within which effective processes and mechanisms are able to develop. 6/

VII. OPTIONS FOR ACTION BY THE CONFERENCE OF THE PARTIES

33. The Committee may wish to recommend to COP 1 that it set up a procedure to explore further and, as needed, design a multilateral consultative process as envisaged by Article 13. This task could be assigned to:

(a) A group of technical and legal experts established by COP 1 and reporting to the COP;

(b) A group of technical and legal experts, established by and reporting to the SBI, which in turn would report to the COP.

34. The COP, at a subsequent session and in the light of the report on the subject, would decide whether to establish a multilateral consultative process.

Notes

1/ See "Revised single text on elements relating to mechanisms" (A/AC.237/Misc.13), pp. 30-31.

2/ Patricia W. Birnie and Alan E. Boyle, International Law and the Environment, (Clarendon Press, Oxford, 1992), pp. 137-139.

3/ See International Environmental Commitments (IEC) Project, "Design options for Article 13 of the Framework Convention on Climate Change", International Institute for Applied Systems Analysis (IIASA), Laxenburg, Austria, 1 May 1994.

4/ "Note on elaboration of Article 13 of the Climate Change Convention", Verification Technology Information Centre, May 1992, Carrera House, London, p. 3.

5/ See IEC/IIASA, supra, note 8, pp. 13-14.

6/ See, in general, IEC/IIASA, supra, note 8, pp. 3-17.

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