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PROPOSAL ON MINIMUM MEASURES TO ACHIEVE COMPLIANCE WITH THE BARCELONA CONVENTION AND ITS PROTOCOLS

UNEP/MAP
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I. Methodology/tool to identify whether Parties are complying with their obligations

1.1 Legal framework under the Barcelona Convention concerning compliance

The compliance procedures and mechanisms of the Barcelona Convention and its Protocols are based on a number of provisions which provide the basis for its operation.

Of particular significance are the following provisions concerning the "triggering" of the proceedings before the Compliance Committee:

Paragraph 23 of the Compliance procedures and mechanisms reads as follows:

"If the Secretariat becomes aware from the periodic reports referred to in Article 26 of the Convention and any other reports submitted by the Parties that a Party is facing difficulties in complying with its obligations under the Convention and its Protocols, the Secretariat shall notify the Party concerned and discuss with it ways of overcoming the difficulties. If the difficulties cannot be overcome within a maximum period of three months, the Party concerned shall make a submission on the matter to the Compliance Committee in accordance with paragraph 18 (a). In the absence of such a submission within six months of the date of the above mentioned notification, the Secretariat shall refer the matter to the Committee."

Paragraph 18 reads as follows:

"The Committee shall consider submissions by:

(a) a Party in respect of its own actual or potential situation of non-compliance, despite its best endeavours; and

(b) a Party in respect of another Party's situation of non-compliance, after it has undertaken consultations through the Secretariat with the Party concerned and the matter has not been resolved within three months at the latest, or a longer period as the circumstances of a particular case may require, but not later than six months."

Article 26 of the Barcelona Convention reads as follows:

"Reports

1. The Contracting Parties shall transmit to the Organization reports on:

(a) The legal, administrative or other measures taken by them for the implementation of this Convention, the Protocols and of the recommendations adopted by their meetings;

(b) The effectiveness of the measures referred to in sub-paragraph (a) and problems encountered in the implementation of the instruments as mentioned above.

2. The reports shall be submitted in such form and at such intervals as the Meeting of Contracting Parties may determine."

This article is of relevance for the work of the Compliance Committee in two regards: first it obliges Parties to provide reports in regular intervals and, secondly it asks the Parties to follow a reporting format which has been determined by the Meeting of the Contracting Parties.

In regard to the first question, the Compliance Committee is to deal with whether the Parties fulfill their obligation to report as requested by the Meeting of the Contracting Parties. This is rather a “formal issue” as it has only to be determined whether a Party has submitted a report within the timeframe set.

The second question concerns the reporting format. Here two things have to be distinguished: was the format determined by the Meeting of the Contracting Parties followed by a Party and then the question whether the Party’s report provides the substantive information on the measures it has undertaken to implement its obligations under the Barcelona Convention and its Protocols.

Under the Barcelona Convention and its Protocols a “reporting format” – as foreseen by Article 26 paragraph 2 - has been adopted by the Meeting of the Contracting Parties.

1.2 Different types of rules in the Barcelona Convention and its Protocols

The Barcelona Convention and its Protocols contain rules which provide for different types of obligations for the Parties. They range from very concrete obligations to mere policy goals. Each of the provisions has to be scrutinized in regard to its contents and only than may a conclusion be drawn in its impact for the compliance system. Therefore, an annex is contained to this document which provides for a detailed analysis of each individual provision.

This differentiation is also seen in the structure of the “new reporting format” which provides the framework for the Parties to report on the implementation measures taken as well as the difficulties and challenges they face.

The analysis on the provisions of the Barcelona Convention and its Protocols is based on the new reporting format. The author looked at all provisions contained in the Barcelona Convention and its Protocols, but has concluded that those provisions which are not referred to in the new reporting format are not relevant for the work of the Compliance Committee – with the exception of those which oblige the Parties to report at intervals and using a format which has been determined by the Meeting of the Parties (see Article 26 and its significance for the Compliance Committee above). The provisions which are not mentioned in the new reporting format are important for the operation of the Convention and its Protocols but they are not provisions which need to be implemented by the Parties on the national level. Thus these provisions have no relevance for the work of the Compliance Committee as the objective of the “Procedures and mechanisms on compliance under the Barcelona Convention and its Protocols” is “to facilitate and promote compliance with the obligations under the Barcelona Convention and its Protocols, taking into account the specific situation of each Contracting Party, in particular those, which are developing countries”.

Thus, as the new reporting format clearly states only a limited number of provisions of the Barcelona Convention and its Protocols fall within the reporting system and are of relevance for the compliance process.

1.3 Guideline for the analysis of the provisions of the Barcelona Convention and its provisions

As explained above the analysis is based on the “new reporting format” which provides the basis for the regular reporting of the Contracting Parties to the Barcelona Convention and its Protocols. The reporting format identifies those provisions of the Barcelona Convention and its Protocols where implementation measures are to be undertaken by the Parties. It asks Parties to provide information on whether implementing legislation has been adopted and to identify the difficulties/challenges encountered in implementing a specific international obligation. This is to be done by ticking the appropriate box in the reporting format. Furthermore, Parties are asked to provide remarks/comments on their answer given. Thus, in general it is to be stated that the ticking of a box will provide the information as to whether the Party faces difficulties in implementing its international obligations. From the report submitted by a Party it will only be possible to identify the difficulties/challenges by looking at the remarks/comments provided by the Party. This would be the basis for a dialogue between the Party concerned and the Secretariat on the (possible) difficulties concerning the implementation. Moreover, when looking at a particular provision the nature and wording of this provision has to be considered. In principle it may be stated that provisions providing for a general obligation are to be treated differently than provisions which provide for specific measures to be implemented.

Thus, it is necessary to look at each of the provisions of the Barcelona Convention and its Protocols which are to be implemented by measures on the domestic level in order to determine a Party’s compliance with its international obligations. It is necessary to scrutinize each provision in regard to its contents by analyzing its wording.

It should be noted that the status of the Barcelona Convention and its Protocols under domestic law may differ between the Parties. These international treaties may need to be implemented by domestic legislative measures or are directly applicable. In the latter case no domestic legislative measures are needed as the Convention and its Protocols are part of the law of the Party in question and are to be applied by the responsible authorities. Only if implementation by domestic legislative measures is needed in accordance with the legal system of a Party, will this Party have to report on its specific measures taken. In the context of this study any reference to “domestic legislative measures” is to be understood that the Party has to ensure that the international legal obligation is to be applied on the domestic legal level (regardless of whether it is applicable as a treaty being part of the domestic law or whether specific legal acts have to be adopted).

1.4 General comment on compliance with the Barcelona Convention and its Protocols

The issues raised in regard to compliance with the provisions of the Barcelona Convention and its Protocols are very similar to the questions raised in regard to other compliance procedures and mechanisms operating under international environmental agreements. The main issue discussed is how it may be determined whether a Party is in non-compliance with its obligations under the respective international agreement.

For this purpose two issues on compliance may be distinguished: “formal compliance” and “substantive compliance”.

As regards “formal compliance” the question is to be discussed whether a Party has put the necessary legislative measures to implement and apply the obligations of the international agreement on the domestic law level. Such a formal question may be answered by looking at the legal measures taken by the Party concerned. Under the Barcelona Convention and its Protocols, Parties will have to report on the legal measures taken. This it may be determined that they have taken steps, but the question remains whether this fully implements the international obligation. This could only be checked by looking at the legal measures taken themselves. A Party might report on the difficulties/challenges it faces in taking legal measures, thereby providing a basis for discussion on how these difficulties/challenges might be overcome in providing a domestic legal system in conformity with the international obligations.

To address “substantive compliance” is more difficult as this raises the practical application of the provision to particular instances. Under the compliance process this is only possible if sufficient information is available. This may either be concrete information provided that under specific circumstances a Party does not fulfill its obligation (e.g. by issuing permits in contradiction to its international obligations) or if statistical data provide information in this regard (e.g. concerning transboundary movements of hazardous wastes).

As regards the question of “formal” and “substantive” compliance the wording of the provisions have to be taken into account. In most cases the Parties are given some discretion as regards the implementation of the international obligations. Moreover, very often Parties are obliged to establish (administrative) procedures to deal with specific situations without setting a specific standard to be applied in the “substantive decision-making process”. Thus, the question will be rather a question of “formal compliance” than “substantive compliance”.

Furthermore, the nature of compliance procedures and mechanisms has to be taken into account. As regards their nature they are to facilitate and support compliance of the Parties. Thus, in practice (with the exception of the Aarhus Convention and to a certain extent the Montreal Protocol), compliance procedures are triggered by the Party concerned in order to be given advice and assistance in implementing and applying the provisions of the international agreement in question. Only under a small number of compliance mechanisms and procedures the Secretariat, or the report provided by the Party concerned on its implementation activities, may trigger the compliance procedure. As the practice of these compliance procedures and mechanisms demonstrate they have problems identifying potential situations of non-compliance by Parties, e.g. under the Aarhus Conventions compliance system, no case has been triggered by the Secretariat on the basis of reports by the Parties as it is difficult to identify when potential situations of non-compliance exist. As regards the compliance procedure under the Barcelona Convention and its Protocols the reporting format chosen may enable the Secretariat to identify situations which could be discussed with the Compliance Committee as Parties are asked not only to report about the implementation measures, but also to identify difficulties/challenges. These reports may be a starting point for discussions between the Party and the Secretariat which might lead to the “involvement” of the Compliance Committee. Under these circumstances it will be the main task of the Compliance Committee to seek for a solution in a dialogue with the Party. Thus, the compliance procedure will be future oriented in order to assist the Party concerned to fulfill its obligations in the future. By doing so the compliance procedure will work in a manner as set out in the objective of the compliance procedures and mechanisms. Moreover, it has to be noted that each of the compliance systems, have over their time of operation developed different methods on how to deal with potential situations of non-compliance. One of the most important issues is the building of trust in the operation of the compliance mechanisms and procedures. The Montreal Protocol may be taken as an example. The Committee was set up only by a rather “generally worded” decision by the MOP. Only through its practice has it established the trust of the Parties that it is helpful for the implementation efforts. In general it

operates in a “facilitative” manner (i.e. giving advice to the Parties concerned) and only resorts to “stronger measures” as a last resort.

In the case of the compliance mechanisms and procedures under the Barcelona Convention and its Protocols this would mean that the “facilitative” manner will be the starting point for addressing questions on compliance. As analysis of the wording of most of the provisions of the Barcelona Convention and its Protocols show the emphasis will be on “formal compliance”. Only very few provisions may lead to issues concerning “substantive compliance”. But it should not be overlooked that the issue of “formal compliance” may be seen as a starting point for the discussion on the implementation of the international obligations as it may help to elaborate a standard for compliance in general. The discussion on difficulties/challenges as well as whether the legislative framework chosen by a Party implements its international obligations will automatically give rise to questions how certain provisions are to interpreted, e.g. those referring to “appropriate” measures.

At the start of the work of the compliance committee it seems only possible to follow a “formal compliance”-understanding for most of the provisions. For the time being, only for specific provisions, where the wording provides for a very specific implementation measure a “substance compliance approach” seems feasible.

ANNEX I

I. Specific analysis of MAP Legal Instruments

1.1 Barcelona Convention

The structure used in this document is to analyze the obligations set in each of the provisions to which the new reporting format refers. It is intended to reach a conclusion which could be the basis to determine compliance with the specific provision.

Article 4 – General obligations
This article provides for general obligations of the Parties. Paragraph 3 lists the principles which shall be promoted and applied by the Parties. These principles are the precautionary principle, the polluter-pays-principle, the obligation to undertake environmental impact assessments and the integrated management of the coastal zones.

Although, the reporting format adopted by the COP provides for reporting of the Parties in regard to the implementation undertaken by the Parties. Nevertheless – as stated in the general remarks - the wording used in the Convention text has to be taken into account when dealing with the question whether a Party is in compliance or not.

The wording used in Article 4 paragraph 3 differs in regard to the different subparagraphs to a certain degree. But the wording used clearly indicates that the Parties are given flexibility in the application of these principles on the domestic level. This is clearly stated in regard to subparagraph (a) ("in accordance with their capabilities"), subparagraph (b) ("with due regard to the public interest"), subparagraphs (d) and (e) ("promote"). An exception is paragraph (c) which obliges Parties to "undertake environmental impact assessments for proposed activities that are likely to cause significant adverse impact on the environment and are subject to an authorization by competent national authorities".

Thus, only in the case of subparagraph (c) may it be established that a Party is not in compliance with its international obligations as the conditions are clearly set out when an environmental impact assessment is to be undertaken.

Article 12 - Monitoring
The wording used in this provision ("shall endeavour") implies that Parties shall try to establish monitoring systems, but it falls short of setting it as a target to be achieved by the Parties. Thus, this provision is not to be seen to establish a legal obligation to establish such monitoring systems. It rather asks the Parties to undertake efforts to do so. Thus, it will not be possible to determine that a Party is in non-compliance with its obligations under this Article. Parties could only be given advice in regard to their endeavours.

Article 15 – Public information and participation

Article 15 paragraph 1 – Public access to information
This provision establishes a legal obligation of the Parties to provide access to information on the environmental state. Exceptions concerning this obligation are laid down in paragraph 3 ("confidentiality, public security or investigation proceedings"), but in case access to environmental information is refused, reasons have to be stated.

Thus, Parties have to provide information on the environment and have to have a legal framework on the domestic level to deal with requests for information.

Article 15 paragraph 2 – Public participation in the decision-making process
This provision provides that the public is given the right to participate in the decision-making process, but it is conditional to the phrase “as appropriate”.

Thus, Parties are given flexibility in the implementation of this provision on the domestic level.

Concluding remarks:

The provisions of the Barcelona Convention are worded in a very broad manner. Thus, a lot of flexibility is given to the Parties in implementing their provisions on the domestic level. Therefore, it will be very difficult to establish that a Party is in non-compliance with its obligations. It will therefore be most likely that it is a specific Party that should identify difficulties/challenges itself and bring these to the attention of the Compliance Committee. The Secretariat might – when looking at the reports – identify areas which need to be discussed with the Party concerned.

1.2 Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircrafts or Incineration at Sea (Dumping Protocol)

Article 4 paragraph 1 – Prohibition of dumping of wastes and other materials with the exception of those listed in Article 4.2
This provision establishes a clear obligation of the Parties to prohibit dumping. Thus, this obligation has to be implemented on the domestic level by legislative measures. It is therefore easily established from the reports of Parties whether they have implemented this international obligation.

Of course, such legislative measures on the domestic level do not establish whether this also means in practice that dumping does not take place. But dumping then is “illegal” and would only be an issue for the Compliance Committee when a Party is “allowing” such illegal dumping.

Article 4 paragraph 2 (in connection with Articles 5 and 6) – Dumping of wastes and materials listed in Article 4.2 is subject to a prior special permit by competent authorities in conformity with requirements spelled out in the Annexes to the Protocol and the related Guidelines adopted by the Meeting of Contracting Parties.

This provision needs to be implemented by domestic legislative measures. Formal administrative procedures have to be established to implement these provisions concerning the granting of special permits.

According to the new reporting format Parties have to provide information on the permits granted. Thus, it will be possible to see how this is handled in practice.

Article 7 – Prohibition of incineration at sea
This provision is to be implemented by domestic legislative measures. Thus, it will be possible to establish by the reports of the Parties whether they have done so or not.

Articles 8 and 9 – Emergency situations
Under certain circumstances Parties may dump materials not in line with the procedures set out in Articles 4, 5 and 6. Parties have to report this to the Organization and Parties likely to be effected. If such a situation arises the Party must act in accordance with Articles 8 or 9. If it does not this will be an issue of compliance.

Moreover, Parties have to report under the new reporting format on these incidents.
Article 11 (a) – Application of measures to implement this Protocol to ships and aircrafts registered in the territory of the reporting Party or flying its flag

Article 11 (b) - Application of measures to implement this Protocol to ships and aircrafts loading in the territory of the Party wastes or other materials intended for dumping

Article 11 (c) - Application of measures to implement this Protocol to ships and aircrafts believed to be engaged in dumping in areas under national jurisdiction

The Parties have to report on how they have implemented these provisions. Thus, it is to be established easily whether the necessary legislative measures have been taken. Moreover, they have to apply this in practice. This may be seen in the reports when Parties describe which measures have been taken to ensure that ships and aircraft are not engaged in illegal dumping.

Article 12 – Issuing of instructions to maritime inspection ships and aircrafts and other appropriate services to report to the relevant national authorities any incidents or conditions giving rise to suspicions that dumping in contravention to the Protocol had occurred or was about to occur

Legislative measures have to be taken by the Parties. It is to be seen from the reports whether they have done so, whether these measures are sufficient and whether incidents are reported or not. Of course, such measures cannot exclude illegal dumping.

Article 4 – Notification procedures as provided for in the Guidelines on the dumping of uncontaminated inert materials and on the dumping of platforms and other man-made structures, adopted by the Meetings of the Contracting Parties in 2003 and 2005

Concluding remarks:

The provisions of this Protocol provide that Parties adopt legislative measures on the domestic level in order to implement their international obligations. Thus it may be concluded from the reports whether Parties have done so or not.

Another question – which is much more difficult to establish in practice – is whether these domestic measures are applied and complied with. In this regard the Compliance Committee might be able to provide advice to a Party concerned.

1.3 Protocol concerning the Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, combating Pollution of the Mediterranean Sea (Prevention and Emergency Protocol)

Article 3.1 (a)
This provision provides for the cooperation of the Parties to implement international regulations to prevent, reduce and control pollution of the marine environment from ships.

The “new reporting format” asks the Parties whether they have ratified the relevant international conventions dealing with maritime safety and prevention of pollution from ships. Furthermore Parties are asked to indicate the difficulties and challenges they face in the ratification and implementation process.

Comment:
The provision does not oblige, as such, the Parties to ratify the relevant international instruments, but once they have, they should cooperate. Thus, the reporting on this issue is for information purposes on the status of ratification and whether the Parties face any difficulties and challenges in implementing them. The Secretariat and the Compliance Committee are not in a position to undertake any measures to ensure ratification, but they could encourage the Parties to cooperate in the implementation and, if asked, could provide assistance in this regard.

Article 4 – Contingency plans and other means of preventing and combating pollution incidents

Article 4.1
This provision states that "the Parties shall endeavour to maintain and promote […] contingency plans and other means of preventing and combating pollution incidents". Thus, Parties undertake efforts to have such plans in place. Furthermore, they shall undertake efforts to have the necessary means ready to deal with emergency situations.

Parties will report on their efforts to do so. It will be hard to establish non-compliance as such as Parties will also report on the difficulties/challenges they face in doing so. It will be rather a question which advice may be given to a Party in order to improve their readiness to respond to emergency situations.

Article 4.2
Parties are asked to take measures in conformity with international law to prevent the pollution from ships in accordance with international conventions. Furthermore, Parties shall develop their national capacity to implement their international conventions and cooperate.

This is to be seen as an obligation of Parties deriving from being a party of other international conventions. It will be most difficult to establish whether Parties take measures to implement the obligations under other international conventions. Only if a Party reports on its difficulties/challenges may this situation be discussed.

Article 4.3
Parties have to report every two years on the measures taken.

Thus, the first question is whether Parties report as requested. The second question is whether Parties provide information on the efforts undertaken to fulfill the provisions set in Articles 4.1 and 4.2.

Article 5 – Monitoring
Parties are to "develop and apply […] monitoring activities". Thus, Parties have to undertake efforts to establish monitoring activities. It is to be seen from the reports whether they have done so or not. It will only be seen from reports what Parties have undertaken and only if the report shows shortcomings will it be possible to address this as a compliance issue.

Article 7 – Dissemination and Exchange of Information
It is to be seen by the information provided to other Parties whether a Party has complied with these provisions. It is to be presumed that the Secretariat also receives this information. Thus, it may be established whether a Party has fulfilled the obligations set under Article 7.

Article 14 – Port Reception Facilities
Parties are to report on what measures they have taken to ensure that port reception facilities are available. It will be again a formal question as it will be very difficult to establish

that Parties have not done so, unless Parties point out in their report the difficulties/challenges faced in implementing these provisions.

Article 15 – Environmental risks of maritime traffic
Parties have to report on the measures they have taken. As the article speaks about "appropriate measures" it will be difficult to establish that there is non-compliance with this provision.

Article 16 – Reception of Ships in Distress in Ports and Places of Refuge
Parties are to adopt strategies for such situations and inform the Secretariat. Thus, it will be easy to establish whether Parties have done so or not.

1.4 Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (LSB Protocol)

Article 5 – General obligations

Article 5 paragraph 1
This provision obligates Parties to "undertake to eliminate pollution from land-based sources and activities, in particular to phase out inputs of the substances that are toxic, persistent and liable to bioaccumulate listed Annex 1".

This is a very general obligation for Parties, but it sets the path for measures to be taken by the Parties in accordance with the provisions of the Protocol. The new reporting format does not explicitly refer to this provision, but the reporting required will establish whether a Party undertakes measures.

Article 5 paragraph 2
Parties are obliged to "elaborate and implement [...] plans and programmes, containing measures and timetables for their implementation". Thus, Parties report what they have already done and what will be done in the future. In doing so a Party is to be seen in compliance.

This provision has to be read in conjunction with Article 5 paragraph 3 which, among others, obliges Parties to review their priorities and timetables for implementing plans, programmes and measures.

Article 5 paragraph 5
Parties will report on the preventive measures taken. Whether they are to "reduce to the minimum the risk of pollution caused by accidents" may only be judged if this article is to read that these measures are to be "state of the art".

Article 6 – Authorization of regulation system

Article 6 paragraph 1
Parties are obliged to establish that point source discharges and releases are "strictly subject to authorization or regulation by the competent authorities of the Parties". Parties will have to report on the legal measures taken to implement this provision. Furthermore, they have to report on the practical application of these measures, i.e. issuing permits.

Article 6 paragraph 2
Inspection systems have to be established to assess compliance with authorization and regulation. Thus, legislative measures have to be taken by the Parties in order to provide for

inspection systems. Reporting on these measures will demonstrate what Parties have done to implement this provision "formally". This provision does not request to determine the effectiveness of such inspection systems.

Article 6 paragraph 4 – Sanctions in case of non-compliance
This provision obligates the Parties to "establish appropriate sanctions in case of non-compliance." Parties report on the legislative measures what kind of sanctions they have established. The provision determines what kind of sanctions have to established, as the provision only speaks of appropriate. Thus, it will be possible to determine whether the provision has been implemented "formally", but it will not be possible to establish whether these "sanctions are appropriate".

Article 7 – Common guidelines, standards and criteria
Under the new reporting format requests Parties to report on the implementation of "common measures" adopted by the Contracting Parties. Legislative measures are to be taken by the Parties in this regard.

Article 8 – Monitoring
Parties are to undertake monitoring activities and to make access to the public the findings. This provision has been read in connection with Article 12 and Article 15 of the Barcelona Convention.

The new reporting format requests Parties to report on the measures they have undertaken. But it has to be borne in mind that the provision states that these monitoring activities shall be carried out at the earliest possible date. Under this conditionality it will be difficult to determine whether a Party is in non-compliance with this provision.

Article 13 – Reporting
Parties are obliged to submit reports every two years. Whether a Party is in conformity with this obligation is easily established formally. As regards substance (Article 13 paragraph 2) the new reporting format asks Parties to provide "detailed" information. In substance the regular reports will demonstrate a Party's efforts to reduce and eliminate pollution from land-based resources, but it will be rather difficult to establish compliance or non-compliance.

1.5 Specifically Protected Areas and Biodiversity Protocol

Article 2 paragraph 1
It is up to each Party to designate "terrestrial coastal areas, including wetlands" to which the Protocol applies. It is not an obligation to do so for each Party, but if it does the provisions of the Protocol apply to it. If a Party reports on difficulties/challenges it faces, this might become an issue for the Compliance Committee.

Article 3 paragraph 1 (a)
This is a general obligation of each Party. How this is to be implemented in accordance with the provisions of the Protocol is up to each Party. The reports by the Parties may show which difficulties/challenges they face in implementing the Protocol.

Article 3 paragraph 1 (b)
The same as under Article 3 paragraph 1 (b)

Article 3 paragraph 3
Parties are obliged to identify and compile inventories of the components of (marine and coastal) biodiversity. They are asked to report on their activities under the new reporting

format. Thus, it is to be established whether a Party has undertaken the necessary measures or not. If a Party reports on difficulties/challenges this may be an issue which might be addressed by the Compliance Committee.
This provision is to be seen in connection with Article 3 paragraph 5 asks Parties to monitor the components of biological biodiversity.

Article 3 paragraph 4
Parties are to adopt national strategies and actions plans to protect the components of biological diversity. It is a formal obligation, but does not address the contents of such strategies and action plans.

Article 5 – Establishment of specially protected areas
This provision underlines that each Party may establish specially protected areas (SPAs).

Article 6 – Protection measures
Parties are obliged to take measures for the protection of specifically protected areas. This article lists particular measures which are to be taken in order to protect these areas. These measures are to be taken "in conformity with international law and taking into account the characteristics of each specially protected area." The article asks Parties to adopted regulations for this purpose. It is very likely that Parties will adopt a "general legislative measure" to implement this article, but will issue "specific regulations" in order to protect a SPA individually (taking into account the specific characteristics of the SPA in question). As regards the establishing of whether a Party is in compliance with the provisions of this Article these two issues need to be distinguished: is the "general regulation" adequate to provide the protection measures required, and are the "specific regulations" issued for each SPA adequate to ensure protection. The former may be established by the reports of the Parties as the new reporting format asks Parties to state what measures have been taken and what difficulties/challenges they face in this regard, but as regards specific measures for a SPA will be very difficult to address in regard to compliance.

Article 7 – Planning and management

Article 11 – National measures for the protection and conservation of species

Article 11 Paragraph 1 contains a general obligation which sets a goal for the Parties efforts – "with the aim of maintaining them in favourable state of conservation". This will be very difficult to deal with in regard to compliance as it does not set a concrete obligation. It is therefore not surprising that the new reporting format does not require Parties specifically to report on the measures taken under this provision.

Article 11 paragraph 2 – the first sentence requires Parties to "identify and compile lists of endangered or threatened species [...] and accord protected status to such species. This provision obliges Parties to undertake the required measures and activities. Reports submitted by the Parties will demonstrate what kind of measures and activities Parties have undertaken. Based on this information compliance or non-compliance may be established in a formal sense. It should be noted that difficulties/challenges mentioned in a Party's report may trigger a procedure before the Compliance Committee.

Article 11 paragraph 2 – the second sentence asks states to "regulate and, where appropriate, prohibit activities having adverse effects on such species or their habitats, and carry out management, planning and other measures to ensure a favourable state of conservation of such species." States have to undertake legislative measures in this regard, but there is no clear standard set as the provision speaks of "a favourable state of conservation of such species", thus leaving it to the Parties to determine which is to be

regarded under the specific circumstances of a Party as appropriate. This will make it difficult to determine by means of the reports received from the Parties whether Parties comply with their obligation.

Article 11 paragraphs 3 and 4 require legislative measures by the Parties.

Article 12 – Cooperative measures for the protection and conservation of species

Article 12 paragraph 1 has to read in connection with Article 11 paragraph 2 as is also requested by the new reporting format.

Article 13 – Introduction of non-indigenous or genetically modified species

Article 13 paragraph 1 obliges Parties to take legislative measures in this regard. Taking into account the debate on the international level about the species addressed by this paragraph it will for each Party determine which species are prohibited as they "may have harmful impacts on the ecosystems, habitats or species."

Article 17 – Environmental impact assessment
Parties are obliged to undertake an "environmental impact assessment" (EIA) on industrial and other projects and activities that could have a significant affect. In contrast to other international agreements this provision sets out the obligation to undertake an EIA if a certain condition ("could have a significant affect") is met and does not provide for a specific procedure to be conducted by the competent authorities.

Parties are requested to report on the measures taken in implementation of this provision. They are not asked to set up a specific procedure, but to take into account in their decision-making process the impact of the planned activity on the biological diversity.

Concluding remarks:

This Protocol contains provisions which deal with the protection of biodiversity. In order to determine the possibilities on how to address issues of compliance or non-compliance by Parties the experience gained by other international agreements have to be taken into account.

The CBD has not set up a compliance procedure as it was felt that the obligations set by the Parties are of a nature where it will be very difficult to establish whether a Party is in compliance with its obligation. Furthermore, under the Cartagena Protocol on Biosafety, a compliance mechanism was set up, but in practice its impact so far has been very little, as no situations of possible non-compliance were brought to its attention.

Under this Protocol it seems that the question of compliance will be raised primarily in a "formal" manner, i.e. whether a Party has adopted legislative measures as requested by the Protocol. In regard to the question whether these measures meet the "standards" set by the Protocol, it seems very unlikely that situations may be identified by means of the reports, unless a Party reports on difficulties/challenges faced in the implementation of the Protocol. As a consequence the task of the Compliance Committee will be to enter into a dialogue with the Party concerned in order to identify a way and manner how to ensure that the provisions of the Protocol are "best implemented".

1.6 Protocol for the Protection of the Mediterranean Sea Against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (Offshore Protocol)

Articles 4, 5 and 6 and Annex IV – Prior authorization for all activities for exploration and exploitation according to the requirements of Articles 5 and 6 and criteria set forth in Annex IV.

These provisions set out the procedure on granting authorizations for offshore installations. Parties are obliged to adopt legislative measures to ensure that these provisions are implemented. Parties are to report on the legal measures taken by them and also on the practical application. Thus, the "formal compliance" may be established as well as whether they are applied in practice.

Article 7 – Sanctions
Parties are obliged to prescribe sanctions for breaches of obligations set out in accordance with the Protocol or nationals legislative measures. Thus, Parties have to adopt legislative measures setting sanctions. If a Party does not do so, it is in non-compliance with this article.

Article 8 – General obligation
Parties are obliged to establish "a general obligation upon operators to use the best available, environmentally effective and economically appropriate techniques and to observe internationally accepted standards standards regarding wastes […]".
As this is set as a general obligation it would mean that Parties oblige operators to do their best to comply with this "general obligation". But the wording "general obligation" implies that there are exceptions to it.

Article 9 and Annexes I and II
Parties are obliged to take legal measures to implement the obligations set in this article. It may be established whether Parties are in "formal compliance" with this provision as legislative measures have been taken accordingly.

Article 11 – Sewage
The Parties have to adopt legislative measures. "Formal compliance" may be established.

Article 12 – Garbage
This article has to be implemented by legislative measures by the Parties. "Formal compliance" may be established.

Article 13 – Reception facilities
This article is to be implemented by legislative measures. "Formal compliance" may be established.

Article 14 – Exceptions
These provisions have to be implemented by legislative measures by the Parties. It may be established whether Parties apply this provision in practice as Parties are obliged to report such incidents to the Secretariat and to other Parties likely to be affected. It will therefore, be possible in practice to establish whether a Party has implemented and applies the obligations set under these provisions.

Article 15 – Safety measures

The implementation of this provision has to be implemented by legislative measures. "Formal compliance" may be established through the reports of the Parties.

Article 17 – Notification
Parties are required to establish procedures that operators in charge of installation report without delay to the competent authority events which may cause or are likely to cause pollution. Whether a Party has done so is a question of “formal compliance”.

Article 19 – Monitoring

Article 19 paragraph 1 obliges Parties to require operators to measure the effects of their activities on the environment and to report on them regularly. These reports are to used by the competent authority according to a procedure established by the competent authority in its authorization system.

Parties have to take legislative measures to ensure that such measuring and reporting by the operator takes place. This will be a rather general legislative framework which will provide the necessary legal basis to oblige operators to measure and report. Moreover, it has to be established by the competent authority how these reports are to be used in an evaluation procedure. This obligation is an issue of “formal compliance”.

Article 20 – Removal of installations
Parties are obliged to ensure the removal of installations which are abandoned or disused. The competent authority is to ensure that this is done by the operator. If the operator fails to do so, the competent authority has undertaken, at the operator’s expense, such action or actions as may be necessary.

The provision is drafted in a manner that under some domestic legal systems it is directly applicable. If not, necessary legislative measures have to be adopted that operators are under an obligation to remove installations. Parties have to report on the domestic administrative procedures in place and on the incidents when they were applied. On this basis it will be possible to determine whether a Party is in compliance with these provisions.

Article 21 – SPA
This Article has to be read in conjunction with the SPA Protocol. Article 21 obliges Parties to take special measures to protect SPAs from pollution resulting from activities in SPAs. The new reporting format obliges Parties to report on the legal measures they have taken for this purpose.

This will determine whether the Parties have undertaken measures to implement this provision. These measures might be a general regulation on SPAs in this regard or may be done be specific administrative acts when granting a specific authorization.
Compliance will be determined in a ”formal way”.

1.7 Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal (Hazardous Waste Protocol)

Article 5 – General obligations
As the title states, this Article contains “general obligations” and Parties are asked to take “appropriate measures” in order to work in achieving the goals set in these provisions. Overall, Parties are asked to take legislative measures. The new reporting format requires Parties to report on their activities in this regard. Reports will provide the basis to determine the “formal compliance” of a Party.

Article 5 paragraph 2 – Reduction to a minimum or where possible elimination of the generation of hazardous waste

Parties are asked to take measures to reduce or eliminate the generation of hazardous wastes. This will be on the one hand legislative measures which Parties are to report. On the other hand they are asked about the amount of hazardous wastes generated annually. Compliance may be determined in a formal way by the legislative measures taken, but also in a substantive manner as the amount of hazardous wastes generated by each Party will provide information on the effectiveness on the measures taken.

Article 5 paragraph 3 – Reduction of a minimum and possibly elimination of the transboundary movement of hazardous waste through bans on the import of hazardous waste, and refusal of permits for export of hazardous waste to States which have prohibited their import.

Legislative measures have to be taken by Parties in order to implement this provision. "Formal compliance" is to be determined on the basis of the reports provided by the Parties. Reports by Parties on the transboundary movement of hazardous waste will demonstrate whether a reduction or elimination was achieved by the measures taken by the Parties. Thus it may be possible to deal with the question of "substantive compliance" as well.

Article 5 paragraph 4 – Subject to the specific provisions referred to in Article 6 paragraph 4 relating to the transboundary movement of hazardous waste through the territorial sea of the State of transit, prohibition of the export and transit of hazardous waste, within the area under their jurisdiction, to developing countries

Parties have to implement these obligations by legislative measures. Formal compliance may be established. Reports by Parties on transboundary movements will also provide information on the substantive compliance.

Article 5 paragraph 5 and Article 9 – Prevention and punishment of illegal traffic in hazardous wastes, including criminal penalties for all persons involved in such illegal activities, in accordance with the terms of Article 5.5 and Article 9 of the Protocol.

These provisions have to be implemented by legislative measures. Formal compliance may be established. Furthermore, Parties have to report on the number of incidents which will provide information how they are applied in practice. It will be difficult on the basis of this information to determine non-compliance by a Party as only when violations of these provisions are known the competent authorities may react. The reference to "appropriate measures" leaves a wide margin to Parties in the implementation of Article 5 paragraph 5.

Comment:
The language used in Article 5 refers to "all appropriate measures" to be taken by the Parties to achieve the goals set. The appropriate measures are not determined in any way in the text of the Hazardous Waste Protocol. Thus, it is left to the Parties to decide which measures are to be considered appropriate. Unless it becomes clear that measures taken are not able to achieve the goals set in the provisions of the Protocol, it will not be possible to address this issue in regard to compliance. The Secretariat will not be in a position to identify potential weaknesses unless the Party concerned itself reports that it faces difficulties or challenges in achieving the goal. Moreover, Article 9 on "illegal traffic" has to be taken into account. Article 9 requests the Parties to introduce appropriate national legislation to deal with illegal traffic. It asks for appropriate national legislation to prevent and punish illegal traffic, including criminal penalties on all persons involved. Thus, the question of compliance has two sides: (1) does the Party concerned have national legislation in place to deal with illegal traffic; and (2) how is this applied in practice. As regards the latter it would be necessary to address individual

cases in order to see whether there are shortcomings in the legislation as such or whether there is a question of institutional shortcomings to apply and enforce the legislation in place.

Article 6 – Transboundary movement and notification procedures
This article has to be implemented by legislative measures.

Article 6 paragraph 3 – The transboundary movements of hazardous waste only take place (within areas beyond the territorial seas waters) with the prior written notification of the State of export and consent of the State of import as specified in Annex IV

These provisions need to be implemented by legislative measures. Formal compliance may be established. Substantive compliance may be determined on the basis of the reports whether such transboundary movements took place.

Article 6 paragraph 4 – The transboundary movements of hazardous waste through the territorial sea of the State of transit only takes place with the prior notification by the State of export to the State of transit as specified in Annex IV

The same applies as to Article 5 paragraph 4.

Article 7 – Duty to reimport
Compliance with this article may be established on the basis of incidents occurring involving the duty to reimport.

Comment:
Compliance with these provisions may be established as they require that certain procedures have to be put in place by the Party concerned. Whether these procedures have been applied may be seen by the reports of the Parties and specifically by a comparison of the reports of the Parties involving transboundary movements.

1.8 The Integrated Coastal Zones Management (ICZM) Protocol

Article 1 establishes as general obligations that the “Parties shall establish a common framework for the integrated management of the Mediterranean coastal zone and shall take the necessary measures to strengthen regional co-operation”.

This is a very general obligation which sets out an “objective” for the Parties. It is not suitable for determining compliance.

Article 6 sets out the general principles of integrated coastal zone management, which shall guide the Parties.

This article lists the general principles which are to be applied by Parties. Reports of Parties may give an indication how they have taken account of them when adopting legislative measures and how they are applied in practice. Because of the language used in this provision it will be very difficult to discuss compliance by a particular Party.

Article 7 - Coordination
Paragraph 1 asks Parties on the national level to ensure institutional coordination in order to avoid sectoral approaches and facilitate comprehensive approaches; organize appropriate coordination between the various authorities competent for both the marine and the land parts of coastal zones in the different administrative services; organize close coordination between national authorities and regional and local bodies in the field of coastal strategies, plans and programmes.

Paragraph 2 asks the Parties to work together for the cooperation of competent national, regional and local coastal zone authorities, insofar as practicable.

Parties may report on the measures taken on the national and international level to improve coordination. But it will be very difficult to establish on the basis of this general obligation, whether a Party is in non-compliance with these provisions.

Article 8 on protection and sustainable use of the coastal zone
Parties have to take legislative measures to implement these provisions. These measures also have to be applied on specific projects. The wording used gives a wide discretion to the Parties. Therefore, reports will form a basis for “formal compliance”, but it will be very difficult to discuss “substantive compliance” based on such reports.

Article 9 – Economic activities
These provisions are very general and give wide discretion to the Parties in their implementation and application. To discuss compliance with these provisions is rather a policy discussion and a question whether Parties comply with this provision in the legal sense.

Articles 10, 11, 12 and 13
From a legal point of view these provisions are very similar as they oblige Parties to undertake measures to protect. These measures will be in most cases of a legislative nature. Thus, “formal compliance” may be determined on the basis of the reports provided by the Parties.

Article 14 – Participation
Legislative measures are to be adopted by Parties to implement these provisions. Formal compliance may be established.

Article 16 – Monitoring and observation mechanisms and networks
The wording of this provision gives wide discretion to the Parties. It will be difficult to establish non-compliance with this provision.

Article 18 – National coastal strategies, plans and programmes
Formal compliance with this provision may be established as Parties have to adopt such actions.

Article 19 – Environmental Assessment
Formal compliance may be established as Parties are obliged to undertake environmental assessments. “Substantive compliance” will be very difficult to establish as Parties are given a broad discretion in the application.

Article 20 – Land policy
This provision leaves wide discretion to the Parties. It is a question of “formal compliance”.