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COMPLIANCE COMMITTEES WITHIN MEAS AND THE DESIRABILITY AND FEASIBILITY OF ESTABLISHING SPECIAL COMPLIANCE BODIES UNDER CITES

I. Introduction

1. This paper has been drawn up under special service agreement for a consultancy with the Secretariat of CITES.
2. The paper has two purposes:
 - to examine the structures and functions of compliance committees within MEAs
 - to examine the desirability and feasibility of establishing special compliance bodies under CITES and to make appropriate suggestions in that regard.

II. Background

3. The immediate background for the paper is the proposal of Germany, within comments it submitted in September 2003 on behalf of the EU regarding draft Guidelines on Compliance with the Convention, to create a separate and independent compliance committee¹. This proposal was repeated in a (draft) document by the EU to be submitted to CITES COP 13², and sent to the Secretariat for comments in April 2004. Although the EC has decided not to go forward with this proposal, the Secretariat has decided that the above issues need further analysis. This should also be seen in the light of a similar NGO proposal in the past³ suggesting that formal proposals in this respect might be put forward in the future.

III. Scope of the paper

4. It is not the purpose of the paper to examine in a detailed manner the present compliance system of CITES. A detailed overview of the CITES compliance system is available in a recent Secretariat document, prepared for COP 12⁴. Most of the comments and observations in that document still stand, although some of the basic resolutions or decisions have been amended or succeeded by other resolutions (e.g. Resolution Conf. 8.9 (Rev.) on Significant trade in Appendix II Species has been succeeded by Resolution Conf. 12.8) or decisions. However, the present paper relies on the Secretariat document, and refers to the document whenever necessary.

¹ *Comments on Draft Guidelines on Compliance with CITES, as presented by the Secretariat in Notification 2003/031, sent to the Secretariat in September 2003.*

² *COM 30/COP 13 Doc. XX, Interpretation and Implementation of the Convention, General compliance issues, Guidelines on Compliance with the Convention.*

³ *Rosalind Reeve, Policing International Trade in Endangered Species, The CITES Treaty and Compliance, Earthscan 2002 (hereinafter Rosalind Reeve 2002) pp. 269.*

⁴ *COP 12 Doc. 26, Interpretation and Implementation of the Convention, General Compliance Issues, Compliance with the Convention.*

5. In conformity with Decision 12.84, draft Guidelines on Compliance with the Convention were elaborated by the Secretariat for consideration by the Standing Committee at its 49th meeting (April, 2003). Following instructions by the Standing Committee¹ the draft was then sent to the Parties, inviting them to provide comments². The Standing Committee further instructed the Secretariat to compile and prepare a summary of the comments received from Parties and to prepare a revised draft³, which was submitted to the Standing Committee at its 50th meeting⁴. The Committee established an intersessional working group and process to create a document for consideration at its 53rd meeting (2005), without, however, excluding the possibility of discussions on draft guidelines for compliance at COP 13⁵.
6. The draft guidelines, based upon the existing CITES compliance system, are not the subject of the present analysis. However, as the guidelines in some respects respond to criticisms of the present system, which argue for the establishment of special compliance bodies under CITES, they will be referred to below.
7. The issue of compliance with MEAs has been very much in the centre of deliberations and discussions about the effectiveness of MEAs for some years. Books and articles on this topic are therefore numerous, but the present paper does not deal with compliance theory. Nor does it pretend to be a scientific analysis.
8. A number of official documents from convention bodies and international organizations are also available. The present paper builds on some of these documents. As some of them contain up to date information on and overviews of existing compliance committees and similar bodies under MEAs and arrangements for such bodies that have not yet entered into force or are still under negotiation, reference is made to such documents with regard to details about these compliance mechanisms⁶.
9. Finally, reference is made to the UNEP Guidelines on Compliance⁷ and the ECE Guidelines on the same subject⁸ which address *inter alia* the structures and functions of compliance bodies. The following section of this paper contains a related summary of the UNEP Guidelines.

IV. Structures and functions of compliance committees within MEAs

10. The structure and functions of a compliance mechanism under a MEA must be tailored to suit that specific MEA. The reasons are obvious. Each MEA has its individual objective and obligations to further the objective. The composition of Parties to MEAs varies, and other elements also need to be taken into consideration. So, there is not a single compliance mechanism for all MEAs, and existing

¹ SC 49 Summary Report (Rev. 1) pp. 14 (point 16).

² Notification 2003/031 of 6 May 2003.

³ See, *supra*, note 5.

⁴ SC 50 Doc. 27, *Interpretation and implementation of the Convention, Guidelines on Compliance with the Convention, with Annex 3, Revised draft Guidelines on Compliance with the Convention*, pp. 15.

⁵ SC 50 Summary Report, agenda point 11: [...]The Committee] agreed that, if there were discussions on compliance at the 13th meeting of the Conference of the Parties, they should take into consideration document SC 50 Doc. 27, Annex 3, with the understanding that this document was not agreed and was still under consideration.

⁶ E.g. the following documents: CEP/WG.5/2000/4, ECE/Committee on Environmental Policy, Report on the First Meeting of the Task Force on Compliance Mechanisms (Meeting of the Signatories to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention), Annex 15, Part I: Compliance Procedures under other MEAs, pp. 15 (hereinafter Aarhus Convention Report 2000), UNEP/CBD/ICCP/1/7, 19 September 2000/Intergovernmental Committee for the Cartagena Protocol on Biosafety, Compliance (Article 34), II Review of Existing Compliance Regimes in Multilateral Environmental Agreements, pp. 2, WT/CTE/W/191, 6 June 2001/World Trade Organization, Compliance and Dispute Settlements Provisions in the WTO and in Multilateral Agreements, note by the WTO and UNEP Secretariats, B. Compliance and Dispute Provisions in Selected Multilateral Environmental Agreements and MP. Wat/WG. 4/2004/2 (EUR/5047016/2004/2), 19 February 2004, ECE and WHO, Regional Office for Europe, Establishing a Compliance Review Mechanism under the 1999 Protocol on Water and Health (hereinafter Water and Health Protocol, doc. 2004).

⁷ UNEP (DEP1)/MEAs/WG 1/3, Annex II, Guidelines on compliance with and Enforcement of Multilateral Environmental Agreements (hereinafter UNEP Guidelines).

⁸ ECE/CEP/107, 20 March 2003, Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements in the ECE Region, endorsed by the Fifth Ministerial Conference "Environment for Europa" in Kiev on 23 May 2003.

mechanisms or those being negotiated reflect the particular normative features of the instrument to which they apply or are going to apply¹. In spite of that there are a number of common issues and elements to be considered in almost every negotiation process regarding the establishment of a compliance committee or a similar body (CC).

11. The UNEP Guidelines² recommend that the following elements be considered:

- the objective
- size and composition of the CC
- other organizational issues
- functions
- mandate
- actors who can trigger the mechanism
- sources of information
- potential measures
- procedural safeguards

In addition there is a need also to consider

- administrative resources and
- budgetary implications.

12. Under the heading of “the structure of the committee”, the task force whose mandate was to elaborate draft elements for a compliance mechanism under the Aarhus Convention considered

- whether the committee membership should be limited to a particular number, and if so, what number?
- whether members should represent Parties and/or observers, or be independent experts, or a mixture of such members?
- whether members should have any particular qualifications?
- whether members should reflect the geographical distribution of the Parties?
- how members should be appointed?
- how often the committee should meet?³

Likewise under the heading “functions of the committee” the task force examined *inter alia*

- which kinds of submissions and referrals the committee should be entitled to consider
- to which body it should report
- which body should take final decisions
- whether the committee should have power to gather information
- the issue of confidentiality⁴

13. Virtually all of the above elements have the potential to cause considerable political difficulties. Thus the existing regimes or those under negotiation demonstrate a high degree of variation. However, a common feature for all compliance mechanisms is that their objective is to promote and facilitate compliance and that the arrangements are of a non-confrontational, non judicial and consultative nature.

14. Some of the most controversial issues undoubtedly are the (size and) composition of the CC, who can trigger the mechanism and potential measures, including the extent to which the CC itself is competent to apply potential measures. It is foreseeable that these issues also will raise considerable discussions within CITES, if a CC was to be established, all the more because most of the issues are closely interrelated. It seems that most issues pertaining to existing compliance regimes have been

¹ *Water and Health Protocol, doc. 2004, supra note 10, at p. 10.*

² *Supra, note 11.*

³ *Aarhus Convention Report, 2000, supra, note 10, pp. 5*

⁴ *Aarhus Convention Report, 2000, supra, note 10, pp. 6.*

resolved thus far by means of “package deals”, and this is probably why it is possible to identify a common pattern.

15. Thus it is, with regard to some of the most recent compliance mechanisms, quite striking that compliance committees composed of members serving in their personal or individual capacity have a rather limited competence to apply more severe measures in cases of non-compliance. This is the case for the Aarhus Convention CC (8 members) which (only) has the power, with a view to addressing compliance issues without delay, to provide advice in consultation with the Party concerned and, subject to agreement with the Party concerned, to make recommendations to the Party and/or to request the Party to submit a strategy¹.

The same is true regarding the Cartagena Protocol CC² (15 members) which has the power to provide advice or assistance, assist the Party concerned to develop a compliance action plan, and to invite the Party to submit a compliance action plan³. The Basel Convention CC, which consists of 15 members nominated by the Parties, serving objectively and in the best interest of the Convention, may provide a Party, after coordination with the Party, with advice, non-binding recommendations and information⁴.

It is a common trait for the above three compliance mechanisms that more severe measures can only be applied by the governing body (COP) upon a recommendation of the CC.

The Kyoto Protocol⁵ CC (20 members – 10 of them serving its Facilitation Branch and 10 its Enforcement Branch) constitutes an exception, because it may issue cautions and publish non-compliance in spite of the fact that members are serving in their individual capacity⁶. However, this mechanism is not operational pending the entry into force of the Kyoto Protocol, and adoption by the COP-MOP.

16. It is also, irrespective of the composition of CCs, a rather common trait that the compliance mechanism can only be triggered by a Party with respect to either itself or another Party. So, it is not unusual that even the Secretariat cannot trigger the mechanism⁷. Exceptions exist in the Aarhus Convention compliance mechanism⁸ and the Long-Range Transboundary Air Pollution Treaty compliance mechanism⁹. The Basel Convention compliance mechanism¹⁰ may also be triggered by the Secretariat, but only under specific circumstances. The same is true regarding the Montreal Protocol compliance mechanism¹¹. In some cases the CC is not even entitled to receive information from the Secretariat¹²

V. What are the characteristics of the CITES compliance system compared to other systems?

¹ Decision BS-I/7 (2002) of the First MOP, Annex, paras. 36 and 37. Members of the CC shall serve in their personal capacity (Annex, para. 1).

² 2000 Cartagena Protocol on Biosafety (hereinafter Biosafety Protocol).

³ Decision BS-I/7 (2004) of the First COP-MOP, Annex para. IV (1). Members of the CC of the Biosafety Protocol shall serve objectively and in a personal capacity (Annex para. II (3)).

⁴ 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Water and their Disposal (hereinafter Basel Convention), Decision VI/12 (2002), Appendix, para. 5.

⁵ 1997 Kyoto Protocol to the 1992 Framework Convention on Climate Change (hereinafter Kyoto Protocol).

⁶ Doc. FCCC/CP/2001/13/Add. 3, Annex.

⁷ E.g. Biosafety Protocol, *supra*, note 19, Kyoto Protocol, *supra*, note 22 and 1991 Convention on Environmental Impact Assessment in a Transboundary Context, Decision II/4 (2001), Appendix, para. 4.

⁸ *Supra*, note 17.

⁹ 1979 Long-Range Transboundary Air Pollution Treaty. See, note 4, Water and Health Protocol, doc 2004, *supra*, note 10. The implementation committee of the treaty consists of 9 Party representatives.

¹⁰ *Supra*, note 20.

¹¹ The compliance mechanism of the 1987 Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer (hereinafter the Montreal Protocol, (10 representatives of Parties) may be triggered by the Secretariat via the MOP informing at the same time the Implementation Committee (Decision IV/5 (1992)).

¹² E.g. Biosafety Protocol, *supra*, note 19, and Kyoto Protocol, *supra*, note 22.

17. An evaluation of the need for and benefits of special compliance bodies under CITES necessitates an examination of the specific features of the present system compared to other mechanisms.

Some of the relevant specifics of CITES in this regard are:

- CITES has undoubtedly a better reporting system than many other MEAs
- The CITES Secretariat has an explicit mandate to pursue apparent non-compliance by virtue of Art. XIII of CITES
- CITES is characterized by considerable NGO involvement, which serves as a source of information. The Secretariat has also a formalized cooperation with key organizations like TRAFFIC, IUCN and UNEP-WCMC
- The compliance measures applied by CITES are largely effective
- The CITES compliance system is to a large extent dealing with rather precise standards
- The CITES compliance system has evolved over time, but in essence it is well established and Parties are accustomed to the system
- CITES has a special compliance and enforcement unit within the Secretariat
- The CITES compliance system also addresses compliance with Resolutions and Decisions of the Conference of the Parties and with specific recommendations to Parties.

18. Reporting by Parties is an essential tool for monitoring compliance with the provisions of a MEA. Therefore non-fulfilment of reporting requirements constitutes a compliance problem.

Although reporting is a persistent problem within CITES (as within most other MEAs), and there are difficulties in obtaining current, complete and accurate information, the fact that the annual reporting system is by and large functioning, is being taken seriously and is constantly monitored provides a better basis for assessing compliance, than reporting systems in a number of other MEAs. These opportunities have to a large extent been exploited, mainly by the Secretariat according to its mandate in Art. XII, 2 (d) in combination with subparas. (e), (g) and (h).

Under the present system, failure to submit an annual report within a set deadline shall according to Resolution Conf. 11.17 (Rev. CoP12) be referred to the Standing Committee by the Secretariat for a solution in accordance with Resolution Conf. 11.3.

It seems doubtful whether a special compliance body under CITES could play a meaningful role supervising compliance with reporting requirements (Art. VIII, paragraph 7), unless it would have at its disposal the same measures as the Standing Committee according to Decision 11.89. In addition the reporting requirements themselves belong to the relatively precise standards laid down by CITES, see para. 22 below.

Furthermore the Standing Committee has by Decision 12.87 been given the task to review the reporting requirements under the Convention including consequences of persistent late or non-submission of annual reports, despite assistance being provided.

It is not likely that such power would be given to a special compliance body under CITES if members were to serve in their individual/personal capacity. If the body was to be established as a political body, it would not differ significantly from the Standing Committee.

19. The Secretariat is a rather powerful institution, due to *inter alia* the provisions in Art. XIII and the functions outlined in Art. XII.

Most MEAs do not authorize their secretariats "to ensure implementation of the [...] Convention" (Art. XII, 2 (d)) or "[...] in the light of information received [to be] satisfied that any species included in [...] is being affected adversely by trade in [...]" (Art. XIII, 1), or to draw the conclusion, that "the provisions of the [...] Convention are not being effectively implemented [...]" (Art. XIII, 1), which powers are further detailed in Resolution Conf. 11.3. In fact, under other MEAs such powers are often conferred on the CCs in decisions related to compliance procedures.

If a special compliance body was to be established under CITES the procedures would have to respect the powers of the Secretariat, vested in the provisions of CITES itself. It would be possible,

however, from a theoretical point of view to establish a body to review decisions of the Secretariat in a factual/technical sense.

20. CITES has – through the Secretariat – extensive and reliable information sources, mainly through TRAFFIC, IUCN and UNEP-WCMC, which functions by virtue of well established cooperation procedures¹. In addition the Secretariat liaises with the World Customs Organization and ICPO-Interpol. Therefore, it is not easy to identify any specific role for a special compliance body under CITES with regard to information gathering which, traditionally, is one of the tools at the disposal of CCs.
21. It has been suggested that the compliance measures applied by CITES are largely effective². The same might be true with regard to measures applied by other compliance systems with specific compliance bodies³. However, if it is a fact that compliance measures applied by CITES are effective, at least lack of effectiveness cannot be an argument for the creation of special compliance bodies under CITES.
22. It is difficult to assess and monitor compliance with broad and/or vague treaty provisions. The more precise the standards laid down by a treaty are, the easier it is, *ceteris paribus*, to assess and monitor compliance. Thus, the very broad and/or vague provisions of the Convention on Biological Diversity⁴ explain to some extent why no serious efforts have been made to establish compliance procedures under that Convention.

Most of the key provisions of CITES lay down relatively precise standards, and it is, objectively seen and from a formal point of view, in most cases not that difficult to assess the extent to which they have been complied with. Furthermore, the application of the standards has been clarified by the means of interpretative resolutions, whenever needed, and long and well-established practices exist. This is probably not the case in the context of several other MEAs with special compliance bodies, *inter alia* because they are younger. Added to this is the knowledge and expertise of the Secretariat.

Therefore, it is rather doubtful whether special compliance bodies under CITES would be an asset with regard to alleged infractions of the provisions of CITES, including non-compliance with Art. IX, 1 relating to the designation of Scientific Authorities (re. Resolution Conf. 10.3). However, it might be worthwhile considering a revival of the Secretariat's former reports for the COP based on Art. XII, 2 (g)⁵.

23. It is true that some compliance issues within CITES are related either to standards that are not precise or to issues where precise standards only play an indirect role. The two most relevant examples of this kind relate to

- national laws for implementation of the Convention, and
- significant trade in Appendix -II and -III species.

Art. VIII requires Parties to take appropriate measures to enforce the provisions of the Convention and to prohibit trade in specimens in violation thereof⁶. Virtually all MEAs contain general provisions compelling parties to implement their obligations, but it seems to be rare, that other MEAs, leaving

¹ The cooperation is well established due to MoUs and practices. See, also Rosalind Reeves, *CITES and Compliance: Past, Present and Future*, David Shepherd Conservation Foundation, 2000 (hereinafter Rosalind Reeves 2000) at p. 61: “[T]he studies also demonstrate the extent and effectiveness of NGO involvement [...].”

² COP12 Doc. 26, *supra*, note 4, para. 5, and Rosalind Reeve 2000, *supra* note 29, p. 60.

³ E.g. the compliance mechanism of the Montreal Protocol, *supra*, note 27.

⁴ 1992 Convention on Biological Diversity (CBD).

⁵ Rosalind Reeve 2000, *supra*, note 29, pp. 70.

⁶ Also other provisions are relevant in this context, e.g. Art. II, para. 4 prohibiting trade that is not in accordance with the Convention, Arts. III, IV, V, VI and VII regarding the regulation of trade and Article IX on authorities. All of these provisions contain rather precise obligations with which Parties must comply, reflected *inter alia* in Art. XIII, para. 2 which obliges a Party to react, as soon as possible, when it receives a communication from the Secretariat on unsustainable trade or ineffective implementation of the provisions of the Convention.

aside instances of obvious non-compliance with such provisions, undertake a systematic review of the legislation of all Parties like CITES is doing.

Review of national legislation is difficult and time consuming and every compliance body, meeting perhaps only twice annually, would have to rely heavily on preparatory scrutiny carried out by the Secretariat or consultants.

24. The facts about the work of CITES related to the legislation of Parties are well known¹, but the crucial question is, whether a special compliance body under CITES in this respect would be beneficial. It is not likely that Parties would accept a body of individuals serving in their personal capacity authorized to apply the same measures as the Standing Committee is entitled to do², and a compliance body of a political nature would represent a kind of duplication of the Standing Committee. So, the task of a special compliance body under CITES with members serving in their personal capacity would probably be restricted to look into referrals by the Secretariat, and to recommend appropriate action to the Standing Committee. However, taking into consideration the expertise of the Secretariat, it is not likely that recommendations of a compliance body would differ considerably from those made by the Secretariat.
25. The various provisions in Art. IV relating to the significant trade issue cannot be characterized as precise standards, because key concepts like "detrimental to the survival of the species concerned"³ are difficult to assess from a scientific/technical perspective. This is also demonstrated by the procedures set out in Resolution Conf. 12.8. However, as a consequence of that Resolution, scientific/technical expert bodies are in place to assess and to make appropriate recommendations, as necessary, namely the Animals and Plant Committees. Through their chairpersons, they are charged with the task of evaluating whether recommendations have been implemented properly, and to recommend to the Standing Committee appropriate actions if this is not the case.

It is not likely that a special compliance body under CITES of a non-political nature would be given the same authority as the Standing Committee in respect of applicable measures in case of non-compliance with recommendations. And there is no need for a special body for technical/scientific review. Hence, it is difficult to see any reasonable role for special compliance bodies under CITES relating to the significant trade issue as such bodies would simply duplicate the Standing Committee.

26. The CITES compliance system has evolved over time and has been well established for a long period. Furthermore it is still evolving, adapting to changing circumstances and expectations and desires of the Parties. Nevertheless, the key actors of the compliance system, namely the Secretariat, the Animals and Plant Committees and the Standing Committee, are relatively stable elements.

It takes time for a compliance body to establish itself in the eyes of the parties to a MEA and for parties to get used to the body. Every compliance body is therefore likely to go through a process of confidence-building. This is probably even more likely to be the case if a compliance body consists of members serving in their personal capacity. Compliance bodies under CITES would probably also have to face a period of confidence-building which might have, generally speaking, a negative impact on efforts to improve compliance.

The compliance system of CITES cannot be described as a simple system. Some of the comments to the draft Guidelines on Compliance with the Convention indirectly reflect this⁴. There is probably no doubt that the creation of special compliance bodies under CITES would add to the complexity of the compliance system, rather than the opposite.

27. A Legislation and Compliance Unit has been created within the Secretariat to strengthen its capacity to address compliance issues and to provide relevant advice or assistance. This unit has been

¹ See, *Resolution Conf. 8.4 and Decisions 11.20, 12.80, 12.81, 12.82 and 12.83*.

² E.g. *Decision 12.81*.

³ E.g. *Art. IV, 2 (a)*.

⁴ *SC 50 Doc. 27, supra, note 8, para. 8 on suggestions on ways of clarifying the roles of the COP, the Standing Committee and the Secretariat*.

described as unique among MEAs¹, an element which would need to be taken into consideration if special compliance bodies under CITES were to be created. A unit of this nature, combined with adequate procedural safeguards², is likely to increase the integrity and quality of the recommendations of the Secretariat and thereby its ability to withstand criticism.

28. Most compliance bodies of MEAs report to their governing bodies, especially with regard to measures going beyond their role to facilitate compliance and provide advice. This implies that the process from consideration of issues of non-compliance to the actual application of measures can be time consuming, because governing bodies (COPs/MOPs) only meet on an annual, biennial or triennial basis³. In addition parties are probably often reluctant to discuss non-compliance issues related directly to other parties at meetings of CoPs/MoPs.

The basis of the present compliance system of CITES is the Secretariat as a reviewing and recommending body, either in tandem with or through the Animals and Plants Committees, with the Standing Committee in most instances being the decision-making body as far as (more severe) compliance measures are concerned. The legal background is delegation of authority by the COP to the Standing Committee under many decisions. This system has the advantage of being more expeditious than several other compliance mechanisms. It also takes into consideration the time constraints that every COP is facing, thereby furthering the possibilities of more discussion of non-compliance issues related to specific parties.

Therefore, it seems logical to keep the present structure even if special compliance bodies were to be created. It would, however, be necessary to decide to what extent reports of such bodies should be submitted to both the Standing Committee and to the COP, which would, of course, still receive reports of the other committees.

Also, the question of whether recommendations of the Animals and Plants Committees related to compliance issues should be scrutinized by the special compliance bodies would need to be settled (re. para. 25 above).

29. Almost all compliance procedures based on provisions of MEAs are, formally speaking, restricted to consider compliance with "the convention" or with "provisions of the Convention" or wording of a similar nature⁴.

The compliance system of CITES is not restricted in the same manner, because it also deals with compliance with Resolutions, of an interpretative character, and Decisions, as indicated in the draft Guidelines on Compliance with the Convention⁵. Furthermore, it monitors compliance with specific recommendations to Parties⁶.

This unique feature of the CITES compliance system could "survive" the creation of special compliance bodies under CITES, although there would certainly be a risk of weakening the system in this regard by copying (too closely) other compliance mechanisms.

VI. Problems and questions related to the creation of special compliance bodies under CITES

30. As indicated above (section IV) the composition of any compliance body would need thorough discussion, especially regarding the size and the status of its members. It is unlikely that parties will agree to a very small body. A membership based on the same number and criteria as either the Standing Committee or the Animals and Plants Committees would not be unlikely⁷. However, the

¹ COP 12 Doc. 26, *supra*, note 4, at p. 4 (para. 17).

² Such safeguards are foreseen in the draft Guidelines on Compliance, SC 50 Doc. 27, *supra*, note 8, Annex 3, paras. 6 and 8.

³ COP 12 decided that after COP 13 the COP shall take place only every three years.

⁴ Veit Koester, *Global Environmental Agreements: Drafting, Formulation and Character* (*in print*).

⁵ *Supra*, note 8, Annex 3, para. 2.

⁶ E.g. para. q in Resolution Conf. 12.8.

⁷ As indicated in the EC Proposal, *supra*, note 2 and 3.

wisdom of such a decision could be questioned. If members were to serve in their personal or individual capacity, this ideally should exclude regional considerations.

It would probably not be that difficult to arrive at a decision to the effect that members shall serve in their personal or individual capacity and/or objectively (in the best interest of the Convention)¹, provided that the Standing Committee would continue playing a central role with regard to non-compliance response measures². It should, however, be noted that there are doubts within the Basel Convention Compliance Committee regarding the capacity in which members are serving³.

Within the Aarhus Convention⁴ and the Biosafety Protocol⁵ the notion of "individual" or "personal capacity" are interpreted in different ways⁶.

31. Powers assigned to compliance bodies under CITES would properly be rather limited, if they were to be established according to the above criteria. Still, however, the functions might be debatable. Should compliance bodies only act vis-à-vis submissions by Parties and perhaps the Secretariat? Should they consider all issues of non-compliance, including those in respect of the national legislation review programme? The mandate of such bodies would need to be extremely clear in order not to add the already existing complexities, and rules of procedure would need to be developed.
32. It would also be of paramount importance to secure appropriate funding for compliance bodies under CITES. Funds would be needed e.g. in order to cover travel costs and DSAs of all members, at least if members were not representatives of parties⁷. It is probably generally recognized that many non-compliance problems, depending on the presence of political will, could be resolved if appropriate funds to assist Parties with non-compliance problems were available. Thus, ironically, the creation and funding of compliance bodies under CITES might decrease funding that would otherwise have been at the disposal of CITES to assist Parties with non-compliance problems.
33. The EC Proposal⁸ indicates that a CC under CITES could meet in conjunction with meetings of the Standing Committee. This seems to be a rather problematic proposal if the Standing Committee was still to play a central role, due to the fact that there would be very little time to prepare the recommendations of the Compliance Committee for consideration by the Standing Committee. In addition the Standing Committee would have very little time to prepare for its consideration of the recommendations and the Members of the Standing Committee would have virtually no time at all to consult with their regions. Meetings of a CITES CC back-to-back with meetings of the Standing Committee, but after these meetings, would make no sense at all.
34. There is no doubt that the creation of compliance bodies under CITES would entail a series of amendments to a number of existing resolutions and decisions. This would be a heavy burden for

¹ See, para. 15 above.

² The EC Proposal, *supra*, note 2, is suggesting a separate and regionally balanced independent committee comprising 10-15 members, nominated by governments, serving in their personal capacity and seeking election based on their personal experience, while Rosalind Reeve 2000, *supra*, note 29, at p. 269 is recommending a compliance committee of independent experts nominated by parties.

³ *Supra*, note 20, and report of the first session of the committee on 19 October 2003, para. 16 on how to interpret that Members (nominated by Parties) "will serve objectively in the best interest of the Convention".

⁴ *Supra*, note 10.

⁵ *Supra*, note 18.

⁶ All individuals having been elected as Members of the Aarhus Convention Compliance Committee are independent, i.e. they are not governmental civil servants. This is, irrespective of the application of almost the same criterion, not the case regarding all Members of the Biosafety Protocol Compliance Committee. See, *supra* notes 17 and 19.

⁷ Funding is not available for Members of the Basel Compliance Committee. This implies that meetings of that committee must take place back to back with other meetings of the Convention where funds are available for representatives of developing countries or of countries with economies in transition, and that Members of the Compliance Committee from these countries are included in the national delegations to these meetings. Other Members of the Basel Convention Compliance Committee are financed by their governments. This system could put an objective consideration of non-compliance issues (as foreseen in the procedures) at risk.

⁸ *Supra*, notes 2 and 3.

any CITES COP, coming on the top of its workload related to discussions and negotiations on the draft resolutions and decisions needed to create such bodies.

VII. Would the creation of compliance bodies under CITES be an appropriate response to various points of criticism against the present compliance system?

- 35 It has been argued that in order to improve compliance greater "use of carrots" is needed, but that a prerequisite for "carrots" is access to a stable and adequate funding mechanism¹. As mentioned in para. 32 above compliance bodies under CITES will not respond to this criticism, rather the opposite.
36. It has also been observed that the Standing Committee lacks transparency and accountability² as well as sufficient time for considering non-compliance issues.

The question of transparency has to some extent been resolved by the admittance of NGO observers at Standing Committee meetings permitting NGOs to attend discussions on general compliance issues. Specific cases of non-compliance are dealt with in closed sessions. However, compliance committees under other MEAs normally are not open for observers.

It might be worthwhile considering the provision of more time to Standing Committee meetings. This would indeed be a more simple solution and demand less funds than creating special compliance bodies under CITES. With regard to the question of accountability the (draft) Guidelines on Compliance with the Convention should provide a solution to that problem³.

37. Furthermore, it has been maintained that far-reaching recommendations regarding non-compliance have been made on a tenuous legal basis, and the ability to withstand criticism of controversial decisions would improve, if they had the backing of independent experts⁴.

The creation of a Legislation and Compliance Unit within the Secretariat could be a response to the first criticism and partly also to the second one. The second criticism, leaving aside that it contains a somewhat dubious statement, might be remedied by means of the above (draft) Guidelines on Compliance with the Convention, including the procedural safeguards they contain. Furthermore, a Party not satisfied with a decision by the Standing Committee probably always has the right to raise the issue at the COP itself⁵.

38. The question of impartiality (conflicts of interests) of the Members of the Standing Committee has also been raised. However, this criticism will probably be remedied by the (draft) Guidelines of Compliance with the Convention⁶.
39. Finally, it has been argued that the Standing Committee as a political body is not suitable to assume a reviewing and recommendatory role that requires specific expertise.

Specific expertise is available within the Secretariat and its network, as well as within the Animals and Plants Committees, and the (draft) Guidelines on Compliance with the Convention⁷ will provide a more clear and precise basis for the reviewing and recommendatory role of the Standing Committee. Furthermore, other compliance committees also to a certain degree have a reviewing and recommendatory role to the CoPs/MoPs.

¹ Rosalind Reeve 2000, *supra*, note 29, at pp. 1 and Rosalind Reeve 2002, *supra*, note 3, at p. 269. Most of the following points of criticism originate from Rosalind Reeve 2000 and Rosalind Reeve 2002, especially at p. 269.

² Rosalind Reeve 2000, *supra*, note 29, at p. 2

³ *Supra*, note 8.

⁴ Rosalind Reeve 2000, *supra*, note 29, at p. 2 and Rosalind Reeve 2002, *supra*, note 3, at p. 269.

⁵ See, also (draft) Guidelines on Compliance with the Convention, *supra*, note 8, Annex 3, para. 10.

⁶ See, (draft) Guidelines on Compliance with the Convention, *supra*, note 8, e.g. at para. 32.

⁷ *Supra*, note 8.

VII. Conclusions

40. The conclusions of the present paper may be summarized in the following three main points:

- The characteristics of the present CITES compliance system as compared to compliance mechanisms under other MEAs do not entail convincing arguments for the creation of special compliance bodies under CITES, rather the opposite, as demonstrated in section IV.
- The creation of special compliance bodies under CITES would raise a number of difficult issues related to the structure and functions of such bodies, including those in respect to their relationship with the Secretariat and existing bodies. The creation of special compliance bodies would also have financial implications and cause a series of amendments etc. to existing resolutions and decisions (section V).
- Appropriate responses to various criticisms of the existing compliance system of CITES are available without having to create special compliance bodies (section VI).

To put it simply: The characteristics of the present CITES compliance system generally constitute its strength. Suitable guidelines, and not the creation of special compliance bodies under CITES, would be an appropriate and adequate response to possible weaknesses in the present system.