COMPLIANCE WITH AND ENFORCEMENT OF THE BASLE CONVENTION: LATEST DEVELOPMENTS AND THINGS TO COME DURING THE TENTH MEETING OF THE CONFERENCE OF THE PARTIES

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SUMMARY

This article provides an update on the latest developments that have taken place in the framework of the Basel Convention to promote compliance by Parties with their obligations under the Convention as well as to ensure a better enforcement of the Convention at the national level. Of particular interest is the fact that, nearly ten years after its was established, the Implementation and Compliance Committee has recently considered for the first time specific submissions dealing with individual Parties’ implementation and compliance difficulties. A second development to note is the proposal, from the same Committee, to establish a partnership on preventing and combating illegal traffic aimed at bringing together institutions undertaking capacity building activities.

1 INTRODUCTION

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is the most comprehensive global treaty dealing with the generation, transboundary movement and environmentally sound management of hazardous and other wastes. Its overall objective is to protect human health and the environment from the adverse effects which may result from such wastes. The Convention celebrated its twentieth anniversary in 2009 and has now 175 Parties.

As the tenth meeting of the Conference of the Parties of the Basel Convention gets closer, it seems opportune to present the latest developments that have taken place in the framework of the Basel Convention to promote compliance by Parties with their obligations under the Convention as well as to ensure a better enforcement of the Convention at the national level. Issues of compliance and enforcement, in particular in relation to the illegal traffic provisions of the Convention, are expected to feature on the agenda of the conference, to be held in Cartagena de Indias, Colombia, on 17-21 October 2011, and Parties will be invited to review and consider adopting decisions on these issues.

This article focuses on the outcome of the eighth session of the Basel Convention Implementation and Compliance Committee as well as work under the Convention to prevent and combat illegal traffic of hazardous and other wastes.
Because they aim primarily at achieving goals of interest to each and everyone, above and beyond individual national interests, Multilateral Environmental Agreements (MEAs) establish institutional mechanisms and processes with the ultimate objective of ensuring that the integrity of a given treaty is preserved and that its effectiveness is promoted. Preventing or deterring non compliance, facilitating a return to compliance or sanctioning non-compliance all constitute traditional objectives of MEA non-compliance mechanisms, and most MEAs have now in place such mechanisms. The Basel Convention is no exception to this growing trend.

Negotiated in the late eighties, the Convention text does not provide for the establishment of a mechanism or procedures aimed at preventing and restoring compliance by Parties with its requirements. At that time, the only MEA with an explicit legal basis providing for the elaboration and adoption of “procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance” was the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, under which framework a non-compliance procedure was established in 1992. In 1995, backed by the rising understanding that a built-in multilateral regime aimed at preventing and restoring compliance was key to ensure MEA efficiency and in line with the growing trend to establish such procedures and mechanisms within MEAs the Parties to the Basel Convention decided to initiate work related to the possible establishment of a mechanism for monitoring implementation of and compliance with the Basel Convention. Negotiations were completed in 2002 with the adoption, by the fourth Conference of the Parties, of the terms of reference of the Mechanism for Promoting Implementation and Compliance with the Basel Convention.

Although the adoption of non-compliance mechanisms plays a critical role in monitoring the implementation of an MEA and in preventing and addressing possible cases of non-compliance, other factors heavily weigh on Parties’ ability and willingness to fully implement a treaty. Political will at the national level, clear and meaningful objectives and associated obligations in the MEA, legitimate MEA institutions, provision of financial and technical assistance to developing countries and countries with economies in transition, and transparent information sharing systems all contribute to a culture of compliance and, ultimately, better environmental governance.

The Basel Convention Implementation and Compliance Mechanism is a model of a facilitative compliance mechanism: its objective is to “assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with the obligations under the Convention”. The mechanism is based on the assumption that a party is facing compliance “difficulties”. It is non-confrontational, transparent, preventive in nature
and oriented in the direction of “helping” Parties to implement the Convention. The procedures for the consideration of individual submissions as well as the possible outcomes further evidence the facilitative and cooperative nature of the mechanism. The Committee is indeed given the authority to provide a Party, “after coordination with that Party”, with advice, non-binding recommendations and information, for instance the elaboration of voluntary compliance action plans. Further measures may be decided by the Conference of the Party upon by recommendation by the Committee provided its efforts did not address the Party’s compliance difficulty. Such further measures include access to financial resources, for instance through the implementation fund, on one hand, and, on the other hand, the issuance of a cautionary statement. Even in this latter case, though, the issuance of this statement aims at helping Parties to implement the provision of the Convention and to promote cooperation between all Parties.

Unlike some other compliance mechanisms, the Basel Convention Implementation and Compliance Committee has a dual mandate: in addition to considering specific submissions, it may, as directed by the Conference of the Parties, review general issues of compliance and implementation under the Convention. This latter function provides the Committee with the opportunity to develop recommendations and conclusions on any issue of general interest to Parties and has the particular value of contributing to preventing non-compliance. For instance, the Committee has been able, under its general review mandate, to elaborate a directory of training institutions which offer courses that can help Parties to deal with cases of illegal traffic under the Convention, or to elaborate guidance manuals to assist Parties to better implement and comply with their reporting obligations. Another recent example of the outcomes of the Committee’s work in the context of its general review mandate is its recommendation that the Conference of the Parties decide to establish a partnership on preventing and combating illegal traffic. This recommendation, directed to the tenth meeting of the Conference of the Parties (COP-10, 17-21 October 2011), aims to bring together and improve coordination among relevant entities with a specific mandate to deliver capacity building activities on preventing and combating illegal traffic, such as WCO, Interpol, UNEP, individual Parties, the Basel Convention Regional Centres, informal networks (IMPEL-TFS, INECE or the Asian Network for Prevention of Illegal Transboundary Movements of Hazardous Wastes) and the Secretariat of the Basel Convention, with a focus on the development of tools and training materials, the hosting of workshops, as well as information exchange. We will come back to this matter in the second part of this article focusing on enforcement issues.

Consideration of specific submissions took place for the first time during the eighth session of the Committee in March 2011. Until then, neither a Party nor the Secretariat had made a submission to the Committee. This situation raised sufficient concern among the Parties for the Conference of the Parties, during its ninth meeting in June 2008, to mandate the Committee to address shortcomings and limitations in relation to the lack of specific submissions to the Committee. Central to the work to be undertaken by the Committee was the development of recommendations in relation to two issues: first the available trigger options - currently a Party self –
trigger, a Party to Party trigger and a Secretariat trigger limited to Parties’ reporting difficulties - and second the lack of resources to assist Parties that are determined to be facing difficulties in implementation and compliance. Both sets of issues were considered by the Committee during its eighth session. Concerning the trigger issue, the Committee agreed to recommend that Conference of Parties-10 adopt a decision amending the terms of reference by extending the scope of the Secretariat trigger. Should the recommendation be endorsed by the Conference of Parties, the Secretariat would no longer be restricted to make submissions only in relation to possible difficulties faced by a Party in complying with its reporting obligation under article 13 paragraph 3 of the Convention. Instead, the Secretariat could for instance, if aware of possible difficulties of Party in complying with the control procedure for transboundary movements of hazardous wastes, and provided consultations with the Party concerned were unsuccessful in resolving the matter, make a submission to the Committee. In addition, the Committee agreed to recommend that the Conference of Parties introduce a new paragraph to the Committee’s terms of reference that would confer a triggering role to the Committee, under specific circumstances and provided no individual Party or the Secretariat have made or are likely to make use of the possibility to make a submission. This proposed broadening of the trigger options aims to ensure that the Committee no longer faces paralysis in the event individual Parties or the Secretariat are unable to make specific submissions to the Committee.

Concerning the issue of lack of resources to assist Parties that are determined to be facing difficulties with implementation and compliance, the Committee discussed how to bring to life the implementation fund established at Conference of Parties-9. This fund constitutes an enlargement of the scope of the Trust Fund to Assist Developing Countries and other Countries in Need of Technical Assistance in the Implementation of the Basel Convention, with the objective of assisting any Party that is a developing country or country with an economy in transition and is the subject of a submission made in accordance with the terms of reference of the Committee. During its eighth session, the Committee agreed that this matter was of particular relevance, especially since its consideration of specific submissions had clearly evidenced that in order for implementation and compliance difficulties to be resolved, access to funding might be required. The Committee will therefore seek from Conference of Parties-10 the authorization to direct the use of contributions to the implementation fund to assist individual Parties concerned by a specific submission in the event facilitative measures such as advice, non-binding recommendations and information, appear to not be sufficient to resolve the compliance matter.

As previously mentioned, the Committee considered for the first time specific submissions during its eighth session. The Committee had received one self submission from Oman, and nine submissions from the Secretariat. All submissions related to difficulties in implementing and complying with the reporting obligation under the Convention enshrined in its article 13 paragraph 3. Under this provision, Parties are required to transmit, for each calendar year, a report on the previous calendar year containing information on various aspects of the implementation of the Convention’s obligations. The report takes the form of answers to a “revised
questionnaire on transmission of information”. Some elements of information, sought in part I of the questionnaire, relate to the institutional and legal framework in place at the national level, for instance the obligation to designate a Focal Point and a Competent Authority or the obligation to take appropriate legal measures to implement and enforce the Convention. Other elements of information to be provided in part II of the questionnaire relate to the implementation of the Convention’s substantive provisions on the generation of hazardous and other wastes, and the control of transboundary movements of such wastes. If the provision of substantive data on the former kind of information sought may be seen as relatively easy to be provided, substantive data on the latter kind of information sought can only be provided if a Party has taken a number of steps to implement the Convention, for instance the elaboration and regular updating of an inventory of wastes, the adoption of a waste management legislation and strategy, and procedures for collecting data on waste generation and for tracking the movement of wastes.

The level of implementation and compliance with the national reporting obligation under the Convention can thus be seen as an indicator of the effectiveness of the Convention. In practice, about one half of the Parties submit national reports on an annual basis, reflecting an apparently high level of compliance difficulties with article 13 paragraph 3 of the Convention. This situation, coupled with the limited capacity within the Convention’s infrastructure for the Committee to consider numerous submissions, led the Secretariat to initiate consultations with nearly a hundred Parties facing possible difficulties with their reporting obligation but to make submissions to the Committee concerning the limited number of Parties presumably facing the most difficulties in complying with this obligation: Parties that have never submitted a national report. As a result, the Committee, during its eighth session, considered nine submissions from the Secretariat with regards to the following Parties that had never submitted a report: Bhutan, Cape Verde, Eritrea, Guinea Bissau, Liberia, Libyan Arab Jamahiriya, Nicaragua, Swaziland and Togo.

In considering these submissions, the Committee aimed at identifying the facts and root causes of the matter and assisting in its resolution. Four Parties concerned by a submission attended, in person or via teleconference, discussions on the submission relevant to them. The cooperation of these four Parties, namely Bhutan, Eritrea, Guinea Bissau and Togo, greatly facilitated the work of the Committee in understanding the challenges faced by these Parties, their own efforts to address their difficulties, steps that they were in a position to take to submit at least part I of their national report, and how best the Committee could assist them in restoring compliance with the reporting obligation, for instance through the elaboration, in coordination with these Parties, of a voluntary compliance action plan. Concerning Nicaragua, the Committee concluded that the matter had been resolved following the Secretariat’s submission, prior to the eighth session of the Committee, of its national report for 2009. Concerning the four other Parties concerned by a Secretariat submission that did not participate in the meeting, namely Cape Verde, Liberia, Libyan Arab Jamahiriya and Swaziland, the Committee agreed to seek their cooperation in order to allow the Committee to assist them in resolving the compliance matter.
The recommendation, from the Committee, that it be authorized by Conference of Parties-10 to direct the use of contributions to the implementation fund to assist individual Parties concerned by a specific submission stems from the conclusion that resolving compliance difficulties may well require that, in addition to advice and recommendations, resources be made available to these Parties. As evidenced by the negotiations on a possible non-compliance mechanism under the Stockholm Convention, access to funding within the context of a compliance regime is seen by many governments as a critical feature of such a regime.

3 ENFORCEMENT AND ILLEGAL TRAFFIC: TOWARDS A PARTNERSHIP?

As indicated in the first part of this article, one of the key outcomes of the eighth session of the Committee is the recommendation that Conference of Parties-10 establish a partnership on preventing and combating illegal traffic. As evidenced by the directory of training institutions which offer courses that can help Parties to deal with cases of illegal traffic under the Convention, elaborated by the Implementation and Compliance Committee, a variety of institutions offer activities aimed at improving capacity for detection, prevention and prosecution of cases of illegal traffic. Some are governmental institutions, others are non-governmental, some are national, others are regional or global, some focus on specific clients, others will build the capacity of any entity involved in transboundary movements of hazardous and other wastes. All these institutions have different mandates, approaches, activities, legal nature, governance structure and scope.

Currently, the Secretariat of the Basel Convention cooperates with a number of institutions in an effort to build the capacity of developing countries and countries with economies in transition to prevent and combat illegal traffic. Some activities are undertaken at the request of individual States and in cooperation with the Basel Convention Regional and Coordinating Centres (BCRCs) in the framework of national projects. These include the Probo Koala Programme (BCRC-Senegal, BCRC South Africa), the West Africa E-waste programme (BCRC-Nigeria, BCRC-Senegal and BCRC Egypt) as well as the Project in Trinidad and Tobago and thirteen other Small Islands Developing States in the Caribbean (BCRC-Trinidad). Project activities focusing mainly on the environmentally sound management of specific waste streams also aim at building capacity to prevent and combat illegal traffic. Such project activities are undertaken, e.g. in cooperation with BCRC-Southeast Asia and BCRC-China on e-waste, and BCRC-Central America and Mexico on used lead-acid batteries.

Other activities are undertaken at the global level in cooperation with several organizations/networks: the World Customs Organization (WCO), the International Criminal Police Organization (Interpol), the Transfrontier Shipments cluster of the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL-TFS), the International Network for Environmental Compliance and Enforcement (INECE), the Asian Network for Prevention of Illegal Transboundary Movements of Wastes. Within UNEP, the Secretariat cooperates with several MEA Secretariats – mainly Rotterdam, Stockholm and CITES, UNEP’s
Green Customs Initiative, UNEP Division of Environmental Law and Conventions, and UNEP Regional Office for Asia and the Pacific’s Multilateral Enforcement Network. The Secretariat has signed Memorandum of Cooperation with the WCO, Interpol, IMPEL-TFS and INECE. Cooperation with the other organizations/networks relies on an informal basis and is based on decisions from the Conference of the Parties. Capacity building activities include the development of tools as well as participation in meetings, workshops and support to inspections exercises.

The Basel Convention has a tradition of relying on partnerships as an efficient way of bringing together the various private, public, national or international stakeholders whose joint involvement is key to achieving specific goals of the Convention. Since the fifth Conference of the Parties, partnerships have been established to deal with mobile phones (Mobile Phone Partnership Initiative - and computing equipment (Partnership for Action on Computing Equipment). During the ninth Conference of the Parties, a partnerships programme was adopted that extends to mercury and climate change issues. Precedents of partnerships initiated outside of the framework of the Basel Convention and that are more relevant to the issue of preventing and combating illegal traffic of environmentally sensitive goods include the UNEP Green Customs Initiative and the International Consortium on Combating Wildlife Crime. A Waste Shipments Compliance and Enforcement Platform was also launched on 29 November 2010 by the Inspectorate of the Netherlands Ministry of Housing, Spatial Planning and the Environment. This platform is a valuable part of a preparatory process towards the possible establishment of the proposed partnership on preventing and combating illegal traffic.

There is indeed scope to improve the current framework of cooperation between organizations/networks engaged in activities aimed at building the capacity of and improving the implementation by authorities in importing countries to prevent and combat illegal traffic. In addition, the way forward could also aim at bringing forward change within exporting countries as well (tackling the problem at the source), and within the various stakeholders involved in the transboundary movements of wastes chain (improved awareness of and cooperation with generators, disposers, exporters, transport industry).

A more comprehensive approach to preventing and combating illegal traffic would have the following benefits:

- A common understanding of the issues at stake, of the role of the various stakeholders, of their challenges and needs and of how to best address them.
- A shared vision or strategy for preventing and combating illegal traffic that is line with the objectives and requirements of the Basel Convention.
- Increased awareness and dialogue among the various stakeholders involved in transboundary movements of hazardous wastes.
- A coordinated approach in order to avoid duplication or gaps in the activities, to ensure a broader geographical distribution of activities, and to prevent competition over resources.
A more concerted approach to increase visibility and the importance of the issue of preventing and combating illegal traffic. Greater visibility would generate increased political support within States, could provide an increased leverage for resource mobilization, and would aim at increasing efficiency in the delivery of activities.

All these benefits will lead to better environmental governance.

4 CONCLUSION

Improving the implementation of a treaty, ensuring compliance with its provisions, preventing and combating illegal activities at the national level are all key to ensuring the effectiveness of an MEA and of its implementing legislation. The recent work of the Basel Convention Implementation and Compliance Committee, both to facilitate compliance with Parties’ reporting obligation and in relation to preventing and combating the illegal traffic of hazardous and other wastes, provides useful lessons on how MEA institutional mechanisms play an important role in achieving the overall objective of protecting human health and the environment from the adverse effects posed by hazardous and other wastes.