



Distr.: General  
4 February 2013

Original: English

**Contact Group to Negotiate the Terms of Reference of  
the Basel Compliance Mechanism**  
Kobe, Japan, 21 January – 2 February 2013

**REPORT OF THE CONTACT GROUP  
TO NEGOTIATE THE TERMS OF REFERENCE OF THE  
BASEL COMPLIANCE MECHANISM**

**SUBMITTED BY THE CHAIR OF THE GROUP (JAMAICA)  
AND BY THE PROFESSOR**

1. The Contact Group to Negotiate the Terms of Reference of the Basel Compliance Mechanism (TOR-BCM) met for three sessions on 21 January, 28 January and 2 February and, at the concluding session on 2 February at 18:40, adopted by consensus the amendments to the TOR-BCM, which is attached to this report as Annex I. During the sessions, working papers, information papers and nonpapers were distributed (see INF.3 for the List of Documents).
2. The Professor has the following comments from an educational point of view:
  - a) The Importance of procedure: seemingly harmless procedural decisions at the beginning of the negotiation, induced by the Chair, had tremendous effects later on the substantive negotiation. The first was a decision to base our negotiation on Document 2. The Chair was considering, if Mozambique pushed even harder for the negotiation on a draft decision on funding, to ignore such request based on this decision to “base our negotiation on Document 2”. The second was a decision to confirm the application of Rule 26 (6) of the Rules of Procedure. India must have intervened on this point. Canada, in his opening statement, did refer to his preference for consensus decisions during the negotiation, but the Chair was quick to remind the members that the decision-making of the Group is based on Rule 26 (6).
  - b) Opening Statement: Good opening statements were made by Nigeria (good introduction referring to Koko case, clear message as to three points of importance); Canada (emphasizing the substantive issues important for the delegation); and EU (referring to committee trigger as “most important”). Japan was the only delegation that could say: “Thank you for giving this delegation the floor.” At the same time, there are pros and cons in revealing the core contents of your INSTRUCTIONS. It was regretted that all students just read their written statements. When you have given two chances to express your views, one by written statement and one by oral statement, you should utilize these two chances more effectively. For example, the written statement is kept on record so that you use this means to keep an “evidence” for your Capital, whereas oral statement can be used to provide “hints” to others how to interpret the written statement.

- c) The overall review and the importance of preparation: The students should have done by themselves an overall review of the negotiating texts in light of their INSTRUCTION before coming to the first session, because this was the only and last occasion to submit “new elements” to the texts. Although some INSTRUCTIONS did not explicitly demand an insertion of new texts, in order to have “as many cards as possible to deal with afterwards”, it was conceivable that those delegations also request some texts to be inserted. In this context, the professor commends very highly the efforts by Mozambique to produce two (2) working papers on 19bis (obligatory financial support from Trust Fund) and on draft decision on implementation fund, and Japan to produce one (1) working paper on 19bis (priority to self-trigger), submitted for this first session. The Chair considered these proposals very seriously (without saying or suggesting so) because they came in at the very beginning of the negotiation. And in reality, these three proposals later became a pivotal point whether the negotiation succeeds or not. The professor also commends the efforts by Nigeria for its preparation for the first session to orally propose many texts to the TOR (later in working papers). Again, some of these proposals came to be important elements of final package. The professor notes the textual proposals made by Brazil, Paraguay, EU, India, and other delegations, but because they came in later when the substantive negotiations were already underway, their impacts were limited.
- d) The importance of substantive justifications: Once the substantive negotiations start during the latter part of the second session, with so many proposals, those interventions and proposals with substantive justifications and “real” interests behind them would be distinguished. Here, the professor notes the different positions of delegations in relation to the original Jamaican proposal. If the delegation was supporting the original Jamaican proposal, it was relatively easier because, generally speaking, the Chair was on your side. However, if the delegations’ positions were to oppose or change the original proposal, they had to double or triple the efforts to achieve that. In this context, the Chair commends very highly the efforts made by Mozambique in succeeding to insert 19bis (joint efforts with Japan, but this provision is probably not acceptable for Japan from its INSTRUCTION) and by Brazil in succeeding to insert 17bis in the text. The professor highly commends Mozambique and Japan for its preparation of “intervention memos” on many of the issues: this is very important in the real negotiation not only for those who have language disadvantage but also for others, as this kind of preparation requires the delegation to suppose the expected direction of the negotiation and sets a clearer, longer-term perspective of the negotiation.
- e) The importance of “principle”: precedential value (CBDR): The Nigerian success as to the insertion of CBDR in Para.1 was a result more of the delegation’s stubbornness (and the possible majority support in the Group) than a reasoned justification. Paraguay is correct in saying that this provision does not change the substance of BCM operation (although the Chair intentionally said the contrary to strongly induce the withdrawal of “selection of provisions” issue). On this point, the professor was looking for “principled and legal arguments” from Canada, EU, and Japan that such an insertion is inappropriate. Their INSTRUCTIONS were firm not to accept such insertion, and the outcome of the negotiation was probably a big loss for those three delegations with huge precedential adverse effects on other MEAs. Since Nigeria could not compromise on this issue, Canada, EU and Japan must have convinced other developing countries to gain a majority with reasoned justifications: Did they do this during the informal consultation?
- f) The core issue of negotiation: Committee trigger: The Chair’s negotiation tactic: when were you succumbed? At the beginning of negotiation, Canada and Japan were basically against the committee trigger, whereas Brazil and Paraguay were also hesitant conditioning their acceptance only with the “exemption provision”. Noting a stalemate, the Chair tried to

“package it” with other elements: first with other triggers (Para. 9 (b), (c) and (d)), and later with the final grand package (Para.1 on CBDR and Para.25 on decision-making). The Chair sensed the possible compromise from Canada and Japan if Para.9 (b) and (c) were changed to their favour (return to the original texts), and he decided to include the committee trigger in the grand package. The Chair deliberately detached the “exemption” proposal of Paraguay from 9bis, and attached it to the CBDR package. The Chair also detached Para. 29, the most important issue for India, from the BAN issue and attached it to the CBDR package (see the Chair’s performance using the whiteboard to superficially demonstrates his eagerness to accommodate Indian proposal). As to the CBDR package, the Chair, in his bilateral consultation in the morning, already obtained the agreement from Nigeria that Nigeria would be satisfied with having CBDR in Para.1 only and delete all “selection provisions”. Thus, in the Chair’s mind, once an issue is attached to the CBDR as a package, they were doomed to be deleted when the Group agrees to Para.1 with some reference of CBDR. By the way, the Chair, in his bilateral consultation with EU in the morning, also obtained the EU’s willingness to accept the reference to CBDR in Para.1. On the other hand, in the Chair’s mind, there was no possibility of agreeing to the consensus only rule in Para.25, as long as there were some delegations favouring majority voting: this comes from common sense and from the fact that the majority voting was already agreed to in 2002. So for Japan, it was too late to condition its agreement to 9bis on the consensus ruling: it should have withheld its consent to 9bis until it could get a clear majority of the Group on the consensus ruling in Para. 25, if it was so important for Japan. For India, except from Mozambique and Nigeria (maybe also EU), India could have gained support on her issue of BAN amendment (thus a majority) if she acted earlier and were able to convince the participants of its substantive concerns.

- g) The professor commends the efforts made by Mozambique (on funding issue) and Brazil (CBDR issue and trigger issue) to lead informal consultations during the intersession and the final session on Saturday.
  - h) The professor was hoping, in para.5 on the nature of the Committee members, that, with a little bit of creative thinking, the compromise text, that was ultimately provided by the Chair, could have been proposed by one of the participants. This kind of “agreement promotion by drafting skill” is the expertise needed from international lawyers.
3. Finally, the professor commends all the participants for their excellent job done in the mock negotiation. The professor sincerely hopes that the students learned something out of it and, most importantly, enjoyed it!
  4. The professor appreciates very much if you can cooperate in filling out the questionnaire, as your feedback is very important in designing this class Multilateral Treaty Negotiation in the future years.

## Annex

### MECHANISM FOR PROMOTING IMPLEMENTATION AND COMPLIANCE (FINAL TEXT)

#### Terms of reference

##### Objectives

1. The objective of the mechanism 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, **noting the concept of the common but differentiated responsibilities of the Parties provided that the concept shall not be interpreted to exempt or weaken the obligations under the Convention.**

##### Nature of the mechanism

2. The mechanism shall be non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention. It will pay particular attention to the special needs of developing countries and countries with economies in transition, and is intended to promote cooperation between all Parties. The mechanism should complement work performed by other Convention bodies and by the Basel Convention Regional Centres.

##### Composition and tenure

3. A Committee for administrating this mechanism (“the Committee”) is hereby established. It shall consist of 15 Members nominated by the Parties, serving in accordance with paragraph 5, and based on equitable geographical representation of the five regional groups of the United Nations, elected by the Conference of the Parties.

4. If a Member of the Committee resigns or is otherwise unable to complete his or her term of office or to perform his or her functions, the Party who nominated that member shall nominate an alternate to serve for the remainder of the mandate.

5. Members of the Committee **shall be representatives of the Parties and shall serve objectively and in the best interest of the Convention.** They shall have expertise relating to the subject matter of the Convention in areas including scientific, technical, socio-economic and/or legal fields.

6. At the meeting at which the decision establishing the mechanism is adopted, the Conference of the Parties shall elect five members, one from each region, for one term, and ten members, two from each region, for two terms. The Conference of the Parties shall, at each ordinary meeting thereafter, elect for two full terms new members to replace those members whose period of office has expired, or is about to expire. Members shall not serve for more than two consecutive terms. For the purposes of the present terms of reference “term” means the period that begins at the end of one ordinary meeting of the Conference of the Parties and ends at the end of the next ordinary meeting of the Parties.

7. The Committee shall elect its officers – a Chair, three Vice-chairs and a Rapporteur – based on equitable geographical representation of the five regional groups of the United Nations.

8. The Committee shall meet at least once between each regular meeting of the Conference of the Parties, and in conjunction with meetings of other Convention bodies. The secretariat shall arrange for and service the meetings of the Committee.

#### Procedures for specific submissions

9. Submissions may be made to the Committee by:

(a) A Party that concludes that, despite its best efforts, it is or will be unable to fully implement or comply with its obligations under the Convention;

(b) A Party that has concerns or is affected by a failure to comply with and/or implement the Convention's obligations by another Party **with whom it is directly involved under the Convention. A Party intending to make a submission under this subparagraph shall inform the Party whose compliance is in question, and both Parties should then try to resolve the matter through consultations;**

(c) The Secretariat, if, while acting pursuant to its functions under articles 13 and 16, it becomes aware of possible difficulties of any party in complying with its obligations under **paragraph 3 of Article 13 of the Convention**, provided that the matter has not been resolved within three months by consultation with the Party concerned.

**(9bis) When a submission is not likely to be made under paragraph 9(a) (b) and (c), and where the Committee becomes aware of possible non-compliance by a Party with its obligations under the Convention, the Committee may request the party concerned to furnish the necessary information about the matter. Any reply and information in support shall be provided to the Committee within three months or such longer period as the circumstances of a particular case may require. The Committee shall consider the matter as soon as possible after the expiry of the three months or any longer period as determined by the Committee, taking into consideration, if available, any reply that the Party may provide, and in accordance with the provisions relating to the consideration of submissions in paragraphs 12–21, as applicable.**

10. Any submission, except one made under paragraph 9 (c) **and 9bis**, shall be addressed in writing to the secretariat, and shall set out:

(a) The matter of concern;

(b) The relevant provisions of the Convention; and

(c) Where paragraph 9 (b) applies, information substantiating the submission.

11. Where a submission is made under paragraph 9 (a), the secretariat shall forward the submission, within two weeks of its receiving the submission, to the Committee for consideration at its next meeting.

12. The Party whose compliance is in question may present responses and/or comments at every step of the proceedings described in this decision.

13. In cases of a submission other than by a Party with respect to its own compliance, the secretariat shall send, within two weeks of its receiving the submission, a copy to the Party whose

compliance with the Convention is in question and to the Committee for consideration at its next meeting.

14. Without prejudice to paragraph 12, additional information provided in response by the Party whose compliance is in question should be forwarded to the secretariat within three months of the date of the receipt of the submission by the Party in question, unless the circumstances of a particular case require an extended period of time. Such information will be immediately transmitted to the members of the Committee for consideration at its next meeting. Where a submission has been made pursuant to paragraph 9 (b), the information shall also be forwarded by the secretariat to the Party that made the submission.

15. Where a Party is identified in a submission or itself makes a submission, it shall be invited to participate in the consideration of the submission by the Committee. Such a Party, however, shall not take part in the elaboration and adoption of the conclusions or recommendations by the Committee. Conclusions and recommendations shall be shared with the Party concerned for consideration and an opportunity to comment. Any such comments shall be forwarded with the report of the Committee to the Conference of the Parties.

16. Meetings dealing with specific submissions relating to the compliance of an individual Party shall not be open to other Parties or the public, unless the Committee and the Party whose compliance is in question agree otherwise.

17. Under the compliance mechanism, a Party may also consider and use relevant and appropriate information provided by civil society on compliance difficulties.

17bis. Under the compliance mechanism, the Committee within its mandate provided in paragraph 9bis above may also consider and use relevant and appropriate information provided by governmental organizations on compliance difficulties.

18. The Committee may decide not to proceed with a submission which it considers is:

- (a) *de minimis*; or
- (b) manifestly ill-founded.

#### Facilitation procedure

19. The Committee shall consider any submission made to it in accordance with paragraph 9 with a view to determining the facts and root causes of the matter of concern and, assist in its resolution. As part of this process, the Committee may provide a Party, after coordination with that Party, with advice, non-binding recommendations and information relating to, inter alia;

- (a) Establishing and/or strengthening its domestic/regional regulatory regimes;
- (b) Facilitation of assistance in particular to developing countries and countries with economies in transition, including on how to access financial and technical support, including technology transfer and capacity-building;
- (c) Elaborating, as appropriate, and with the cooperation of the Party or Parties faced with the compliance problems, voluntary compliance action plans, and review their implementation. A voluntary compliance action plan may include benchmarks, objectives and indicators of the plan, as well as an indicative timeline for its implementation;

(d) Any follow-up arrangements for progress reporting to the Committee, including through the national reporting procedure under article 13.

Advice, non-binding recommendations and information other than those listed in subparagraphs (a) to (d) above should be provided in agreement with that Party.

### Special Consideration for further support

19bis. Where a Party that is a developing country or country with an economy in transition is the subject of a submission made pursuant to paragraph 9, despite its best efforts, the Committee shall provide financial and technical support. The Committee shall provide further support as a priority to a Party that by itself makes submission pursuant to paragraph 9 (a).

### Recommendation to the Conference of the Parties on additional measures

20. If, after undertaking the facilitation procedure in paragraph 19 above and taking into account the cause, type, degree and frequency of compliance difficulties, as well as the capacity of the Party whose compliance is in question, the Committee considers it necessary in the light of paragraphs 1 and 2 to pursue further measures to address a Party's compliance difficulties, it may recommend to the Conference of the Parties that it consider:

(a) Further support under the Convention for the Party concerned, including prioritization of technical assistance and capacity-building and access to financial and human resources. ; or

(b) **Notifying** a cautionary statement and providing advice regarding future compliance in order to help Parties to implement the provisions of the Basel Convention and to promote cooperation between all Parties.

Any such action shall be consistent with article 15 of the Convention.

### General review

21. The Committee shall, as directed by the Conference of Parties, review general issues of compliance and implementation under the Convention relating to, inter alia:

(a) Ensuring the environmentally sound management and disposal of hazardous and other wastes;

(b) Training customs and other personnel;

(c) Accessing technical and financial support, particularly for developing countries, including technology transfer and capacity-building;

(d) Establishing and developing means of detecting and eradicating illegal traffic, including investigating, sampling and testing;

(e) Monitoring, assessing and facilitating reporting under article 13 of the Convention;  
and

(f) The implementation of, and compliance with, specified obligations under the Convention.

#### Consultation and information

22. In carrying out its functions, the Committee may, inter alia:

(a) Request further information from all Parties, through the secretariat, on general issues of compliance and implementation under its consideration;

(b) Consult with other bodies of the Convention;

(c) Request further information from any sources and draw upon outside expertise, as it considers necessary and appropriate, either with the consent of the Party concerned or as directed by the Conference of the Parties;

(d) Undertake, with the agreement of a Party(ies), information gathering in its or their territory for the purpose of fulfilling the functions of the Committee;

(e) Consult with the secretariat and draw upon its experience and knowledge base compiled under article 16 of the Convention and request through the secretariat information, where appropriate in the form of a report, on matters under the Committee's consideration; and

(f) Review the national reports of Parties provided under article 13 of the Convention.

#### Reporting

23. The Committee shall report to each ordinary meeting of the Conference of the Parties on the work it has carried out to fulfil its functions under paragraphs 19 and 20 for the information and/or the consideration of the Conference of the Parties.

24. The Committee shall also report to each ordinary meeting of the Conference of the Parties on any conclusions and/or recommendations it has developed under paragraph 21 and on its suggestions for any future work that may be required on general issues of compliance and implementation, for the consideration and approval of the Conference of the Parties.

#### Decision-making

25. The Committee shall make every effort to reach agreement on all matters of substance by consensus. Where this is not possible, the report and recommendations shall reflect the views of all the Committee members. If all efforts to reach consensus have been exhausted and no agreement has been reached, any decision shall, as a last resort, be taken by a two-third majority of the members present and voting or by eight members, whichever is the greater. Ten members of the Committee shall constitute a quorum.



Confidentiality

26. The Committee, any Party or others involved in its deliberations shall protect the confidentiality of information received in confidence.

Relationship with provisions of the Convention

27. The present mechanism shall be without prejudice to the provisions of article 20 on settlement of disputes.

28. In performing its functions under paragraphs 19, 20 and 21, the Committee shall take into account any specific procedures provided for under the Convention concerning failures to meet Convention obligations.

~~Relationship with provisions of the Ban amendment~~

~~29. Relationship between provisions of the Ban amendment and terms of reference is prescribed as follows;~~

~~(b) The Compliance Committee shall not take up the matter related to a Party not ratifying the Ban amendment.~~

-----

PHOTOS

(Please have your permission to use a few of them on GSICS International Law Programme Homepage as well as Akiho SHIBATA's Homepage)

Second Session, 28 January 2013



#1



#2



#3



#4



#5

Third Session, 2 February 2013



#6



#7



#8



#9



#10



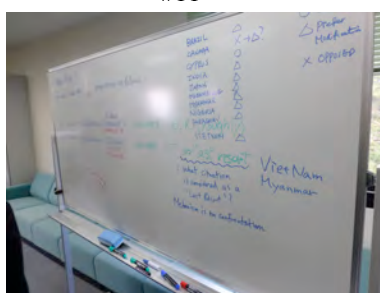
#11



#12



#13



#14





#15



#16



#17



#18



#19



#20



#21



#22

Reception organized by Japan and Brazil



#23



#24



#25



#26



#27