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Agenda item 4

SUBSIDIARY BODY FOR IMPLEMENTATION

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**PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER
THE KYOTO PROTOCOL**

Submissions from Parties

Note by the secretariat

Addendum

1. In addition to the submissions already received (see FCCC/SB/1999/MISC.12 and Add. 1), a further submission* has been received from South Africa.
2. In accordance with the procedure for miscellaneous documents, this submission is attached and is reproduced in the language in which it was received and without formal editing.

* In order to make this submission available on electronic systems, including the World Wide Web, this contribution has been reformatted. The secretariat has made every effort to ensure the correct reproduction of the texts as submitted.

FCCC/SB/1999/MISC.12/Add.2

BNJ.99-524

Preliminary views of South Africa on elements of a compliance system

Based on the Note by the co-Chairs of the Joint Working Group on Compliance on elements of a compliance system as well as the Annex to that document as contained in document FCCC/SB/1999/7, South Africa submits the following preliminary views on elements of a compliance system. The questions posed in Annex I to document FCCC/SB/1999/CRP.3/Rev.1 have also been taken into account in compiling this submission.

I Objectives, nature and principles

1. The **objectives** of the compliance system are to encourage, promote and ensure compliance with the commitments of the Kyoto Protocol as well as to deter non-compliance and also be in line with the ultimate objectives of the said Protocol.
2. The system should be comprehensive, fair and credible in nature and should operate in a predictable, transparent and timely manner.
3. The following **principles** should be taken into account:
 - The principle of common but differentiated responsibilities between Annex I and non-Annex I Parties in that the procedures and mechanisms should take into account the cause, type, degree and frequency of non-compliance as well as the common but differentiated characteristics of Parties' commitments and their capabilities;
 - The principles of efficiency and due process, that allow Parties and in particular the Party concerned, an opportunity for a fair and timely resolution of compliance-related matters;
 - Consequences of non-compliance should be proportional to the types and nature of the obligations in question and responsive to a particular case.

II Coverage

1. The compliance system should address all issues related to the non-compliance or the potential non-compliance of a Party with its commitments under the Protocol. The system should be tailor made to deal with especially non-compliance by Annex B Parties with their specific emission reduction obligations.
2. The question of the timing and character of the various commitments under the Protocol and how the compliance system will relate thereto, is a question that warrants our attention. In this regard, the principle of proportionality could be used as a guideline to determine how and when to take up issues related to compliance with specific commitments.

3. It is realised that “guidelines, modalities, rules, principles and procedures” as provided for in the various relevant provisions of the Kyoto Protocol will play an important role in the implementation of the compliance system. What the status of these “guidelines, modalities, rules, principles and procedures” will be, is still to be determined. “Guidelines, modalities, rules, principles and procedures” seldom have mandatory characteristics and non-compliance with them will not constitute a breach of obligations. The COP/MOP who will be responsible for devising the said guidelines, modalities, etc, will also have to address how non-compliance with these will be dealt with.

III Functions of a compliance procedure

The compliance system should be a two edged sword having both facilitative and enforcing functions. On the one hand it should encourage, promote and facilitate compliance, while on the other be able to apply appropriate consequences where cases of non-compliance occur, thus also having an enforcement function.

IV Eligibility to raise issues

1. **Parties** have the individual ability to raise issues regarding the non-compliance of another Party.
2. The **expert review teams** should not have the authority to make a determination that a Party is in non-compliance, as such a determination may involve legal as well as policy issues and which might jeopardise the objectivity of the team.
3. As the governing body of the Protocol, the **COP/MOP** will have an important role to play in the compliance system. Where and when the COP/MOP will get involved in the compliance procedure will have to be determine, taking into account the unacceptability of having the COP/MOP involved as both the trigger of the compliance procedures as well as in the determination/approval of the consequences. The role of the COP/MOP should be confined to one of these functions. The principles of due process will also have to be taken into account, especially if the process would take on a quasi judicial character. It might also be possible that in some circumstances it may be appropriate for the COP/MOP to initiate the procedures while in others it might approve the outcome of the compliance process.
4. The roles of the **other institutions/bodies** such as the CDM, will depend on the further elaboration of these institutions and will have to be determine at a later stage.
5. The **secretariat** should not be involved in a “double” role. It should not be raising matters of compliance as well as providing information and support during the decision-making process. This could compromise the secretariat’s objectivity and neutrality. The secretariat’s role should be confined to provide information to a Party on request or to a body involved in the compliance process, who will then decided whether to trigger compliance procedures on the basis thereof. The secretariat also

needs to render the necessary logistical assistance to the relevant compliance body/bodies.

V Structure of a compliance body or bodies

Given the complexity and special character of the commitments that Parties have, it may become necessary to develop specialised sub-procedures to deal with specific types of compliance. Also, the functions of the compliance system may warrant two different approaches. All of these procedures and institutional arrangements will however form part of a single integrated procedure that ensures their coherent and consistent application. In this regard we note that we do not see the necessity for two bodies to be created to deal with the functions of facilitation and enforcement but believe that sub-procedures taking into account the distinct nature of these two functions would be sufficient. It would be possible if necessary to draw on the specific expertise of a panel constituted for this purpose and that will enable the body to perform its tasks whether it be facilitation or enforcement.

Standing/Ad Hoc body

A standing body on compliance will be needed. This will enhance the establishment of a system that can be trusted and that will be consistent in its dealings with compliance related issues.

Size, composition and expertise

Cost-effectiveness requires that the size of the institutional arrangement should not be too large. The composition of the body should be based on equitable geographical representation. It should be composed of individuals with scientific, technical or legal expertise in issues covered by the Protocol. These individuals should be appointed by governments and should act in their personal capacities. The establishment of a panel of experts with specific skills related to the functions of the body, could be a helpful tool to enable the body to perform its tasks effectively.

Frequency of meetings

The frequency of the meetings will depend on the amount of work such a body would be charged with. It should meet in conjunction with the regular meetings of the subsidiary bodies and the Conference of the Parties serving as the meeting of the Parties.

VI Rules of Procedure

Rules of procedure for the operation of the compliance body will be essential. The Rules of procedure should ensure transparency, the full participation of all Parties concerned, access to all relevant information and due process. In defining the Rules of procedure due regard should also be given to the two distinct features of the compliance system. Where the process would have a quasi-judicial nature, the

necessity of an appeal procedure should be considered. In order to ensure the credibility and reliability of information, due regard should be given in the rules of procedure to information gathering, the use of such information as well as the weight to be given to different types of information.

VII Relationship to other bodies under the Protocol (e.g. Role of the COP/MOP, any mechanism bodies)

1. The COP/MOP will have an important role to play in the implementation of the compliance system, a role that still needs to be fully defined. In this regard Article 18 already stipulates that any procedures and mechanisms under this article entailing binding consequences shall be adopted by means of an amendment to the Protocol and the COP/MOP will thus have a decisive role in this regard.
2. The application of the Multilateral Consultative Process under Article 13 of the Convention with the necessary amendments to make it applicable to the Protocol might, given the complexity of the issue at hand, play a role to avoid the triggering of compliance procedure, through its facilitative role to assist Parties to comply with their obligations under the Protocol. We also see a role for the MCP where parties have questions about their own compliance.

VIII Consequences of potential non-compliance and non-compliance

1. The elaboration of both positive and negative measures/consequences will have to be devised in order to give effect to the two edged functions of the compliance system. Positive measures of assistance to help Parties overcome problems and difficulties in the implementation of their commitments will be essential in order to give effect to the facilitative function of the compliance system. Negative consequences such as penalties that form part of the enforcement function of the compliance system will have to be defined.
2. The principle of reasonable certainty requires that Parties should be aware in advance of possible consequences of non-compliance. In this regard the creation of an open-ended indicative list of consequences would be appropriate. Such a list of consequences should include the following aspects:
 - (a) Appropriate assistance, including technical and financial expertise and capacity building;
 - (b) Issuing cautions;
 - (c) Suspension of rights, including ability to participate in the Protocol Mechanisms under Articles 6, 12, and 17; and
 - (d) Penalties, including financial penalties.

3. Financial penalties could be used if an Annex I Party is found to be in non-compliance with the Protocol provided that such penalties be of a high enough monetary value to ensure that a Party cannot “buy” itself out of non-compliance. Financial penalties, if backed by a mechanism that can administer it effectively, could serve the dual purpose of deterring non-compliance and of making resources available to developing countries. These resources may be use for capacity building needs of developing countries.

IX Linkages to Article 19 of the Kyoto Protocol

The resolution of disputes between Parties pursuant Article 19 of the Protocol is without prejudice to the full use of the compliance/non-compliance procedures under the Protocol.

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