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Working Group on Pollutant Release and Transfer Registers
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Item 5 (b) of the provisional agenda

AN ANALYSIS OF OPTIONS FOR A COMPLIANCE MECHANISM TO THE UNECE PROTOCOL ON POLLUTANT RELEASE AND TRANSFER REGISTERS (PRTRs)[*/]

Introduction

1. There has been a growing trend in recent years for international treaty bodies to develop mechanisms to identify and address problems with treaty compliance at an early stage, as a means of ensuring that the objectives of the treaty are met as fully as possible. Compliance problems may be caused by a number of factors, e.g. institutional, political, economic or cultural.

2. A compliance committee typically serves as the main body for the review of compliance and sets out the structure and functions of its internal operations as well as the procedures for reviewing compliance with a binding international legal instrument. The primary role of the committee is to report and make recommendations to the treaty's governing body for it to decide upon and take appropriate action. In certain circumstances, the committee itself may take certain actions on an interim basis, in consultation or in agreement with the Party concerned.

[*/] Prepared by a consultant. This document was submitted late due to the need to hold consultations with a number of leading experts on the topic of compliance mechanisms.

3. The setting-up of compliance review mechanisms (CRMs) is fully in line with the most recent environmental treaty practice, including that followed by UNECE. Indeed, institutional and procedural arrangements for monitoring, reviewing, facilitating and promoting compliance on a multilateral and cooperative basis are increasingly being provided under multilateral environmental agreements (MEAs).[1]

4. The present paper has been prepared with a view to assisting the Working Group on PRTRs in its task to prepare a draft compliance review mechanism for consideration and possible adoption by the Meeting of the Parties to the Protocol on PRTRs at its first session.

I. BACKGROUND

A. The relevant provisions of the Protocol

5. The Protocol on Pollutant Release and Transfer Registers to the Convention was adopted at an extraordinary meeting of the Parties to the Aarhus Convention on 21 May 2003.

6. Article 22 of the Protocol sets the legal basis for the preparation and adoption of a compliance mechanism:

> At its first session, the Meeting of the Parties shall by consensus establish cooperative procedures and institutional arrangements of a non-judicial, non-adversarial and consultative nature to assess and promote compliance with the provisions of this Protocol and to address cases of non-compliance. In establishing these procedures and arrangements, the Meeting of the Parties shall consider, inter alia, whether to allow for information to be received from members of the public on matters related to this Protocol.

7. The four basic elements of a compliance arrangement are: (a) a baseline (e.g. the assessment of the technical parameters required for compliance); (b) a procedure governing the compliance review; (c) an institutional body in charge of compliance review; and (d) measures to facilitate and promote compliance.

8. Compared to other mechanisms however - for example, rules of procedure - for which a standard formula can be applicable more or less to various agreements, a compliance mechanism, which is intended to review the status of compliance by the Parties with the obligations deriving from a specific agreement, may be fashioned differently depending on the substance of the obligations, which vary from one agreement to another.

9. Most recently, guidelines to address compliance issues have been adopted within the UNECE context.[2] These envisage the establishment of formal bodies and procedures to examine compliance by a Party/Parties to an MEA and provide guidance thereto.

10. The compliance mechanisms most recently developed and under consideration by UNECE conventions' governing bodies are fully consistent with the guidelines adopted at the fifth "Environment for Europe" Conference, in Kiev in 2003. They incorporate many innovations and represent good practice. In particular, consideration is being given to incorporating some of the innovations of the Aarhus Convention's CRM into other CRMs in the UNECE context. Notably

relevant is the current process of preparing a CRM under the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention).

B. Mandate of the Working Group on PRTRs

11. The Working Group is charged with identifying and carrying out activities that need to be undertaken pending the entry into force of the Protocol. The Working Group noted that the adoption of a compliance mechanism would be addressed by the Parties at their first session. The Working Group has requested the secretariat to prepare the present paper, setting out various options for a compliance mechanism, which could be used as a basis for further discussion at its second meeting (MP.PP/AC.1/2004/2, para. 44).

II. SCOPE OF THE PAPER

12. This paper summarizes the main options that could be relevant for a CRM under the Protocol and presents the possible implications, including the advantages and disadvantages, of each option. The options include directly applying the Convention's compliance mechanism to the Protocol; using the Convention's compliance mechanism as a model for developing a similar compliance mechanism for the Protocol (implying a separate compliance body); or developing a separate compliance mechanism for the Protocol without any particular reference to that developed under the Convention. The paper also analyses the suitability of these options, taking into account the specificity of a compliance mechanism itself and also the specificity of the Protocol as compared to the Convention.

13. The options draw from examples of CRMs under both UNECE and global instruments. The paper also takes note of the progress made by the Legal Board of the Meeting of the Parties to the Water Convention in the preparation of legal documents for the Meeting of the Parties to the Protocol on Water and Health, including the CRM.

14. The options take into account the legal basis for the mechanism, which is article 22 of the Protocol. According to this article, the mechanism shall be "of a non-judicial, non-adversarial and consultative nature." Its objectives are "to assess and promote compliance with the provisions of this Protocol and to address cases of non-compliance."

III. OPTIONS FOR A COMPLIANCE MECHANISM UNDER THE PROTOCOL ON PRTRs

A. Option A: Direct application of the mechanism for review of compliance under the Aarhus Convention

15. The Convention's CRM was established through decision I/7 on review of compliance at the first meeting of the Parties to the Convention held in Lucca, Italy, October 2002. At the same meeting, a compliance committee was elected. The Committee will present its first report,

including findings and recommendations with respect to specific countries, at the second meeting of the Parties (25-27 May 2005).

16. The option of directly applying the Convention's CRM to the Protocol offers the advantage of simplicity and would require only the adoption of a decision applying the mechanism mutatis mutandis to the Protocol. This option presents multiple advantages. It is cost-effective, it draws upon the experience of Parties and NGOs with the functioning of the Convention, and could be easily accepted by those Parties which are also Parties to the Aarhus Convention.

17. With regard to its cost-effectiveness, this option could lead to the adoption of the CRM without prior lengthy negotiations on the text. Direct application of the Convention's CRM would facilitate the possibility of benefiting fully from the experience of operation of the Convention's CRM since its first meeting in March 2003.

18. Unlike article 17, paragraph 2, of the Protocol, which requires that its rules of procedure should take into account the rules of procedure developed under the Convention, article 22 of the Protocol does not make a direct reference to the CRM established under the Convention. In fact, while there is substantial agreement between the respective provisions of article 22 of the Protocol and article 15 of the Convention, they are not identical. That said, there does not appear to be anything in the nature of the Convention's compliance mechanism that would be incompatible with article 22 of the Protocol.

19. As regards possible disadvantages of option A, a decision on direct application would preclude negotiations that might lead to improvements in or more specific adaptation of the CRM of the Protocol, based on the lessons learned from the application of the CRM under the Convention, or in other relevant forums. For example, since article 22 of the Protocol, unlike article 15 of the Convention, contains no requirement that the compliance mechanism should be optional and since no Party to the Convention has so far taken advantage of the opportunity to "opt out" of the provisions relating to communications from the public, the Protocol's Parties might choose to dispense with an opt-out provision if developing a new mechanism. On the other hand, this might be a rather theoretical consideration, given that the Convention's CRM stands out as being particularly innovative among CRMs.

20. The fact that the States and regional economic integration organizations that are not Parties to the Convention may become Parties to the Protocol is a significant consideration. Given that certain States that are Parties to the Protocol may not be Parties to the Convention, they may be less willing to accept the adoption of a compliance mechanism developed in another context. Furthermore, certain States that are not Parties to the Convention, but may intend to ratify the Protocol, could be reluctant to embrace some of the provisions of the Convention's compliance mechanism. This may be particularly true of States that are not UNECE members but which are still eligible to become Parties under articles 24 and 26 of the Protocol. On the other hand, acceptance of the kind of mechanism developed under the Aarhus Convention could be seen as an entrance requirement for ratifying the Protocol.

21. Under option A, the Parties to the Protocol would have to decide how to handle amendments to the CRM of the Convention. The two options are:

(a) Automatic application of the amendments to the Convention's CRM to the CRM of the Protocol, either:

(i) With the possibility for the Parties to the Protocol to expressly reject the amendments; or

(ii) Without the possibility for the Parties to the Protocol to expressly reject the amendments; or

(b) Express acceptance of the amendments by the Meeting of the Parties to the Protocol required.

22. Direct application would not necessarily mean that the existing Compliance Committee would serve as the compliance review body for the Protocol. Establishing a separate committee might have certain advantages. First, individuals having recognized competence in the fields to which the Convention relates would not necessarily be qualified in the matters related to the Protocol. Although the Protocol incorporates the "core values" of the Convention, by its nature it aims to promote improved management of chemicals and this aim may require its committee's members to have different types of expertise than are required with respect to the Convention. Second, it would allow for the possibility of associating the compliance review process for the Protocol more closely with the Parties and Signatories to the Protocol, insofar as the references to Parties and Signatories in paragraphs 2 and 4 of the annex to decision I/7 would be construed as referring to Parties and Signatories to the Protocol, rather than those of the Convention, and the reference to the Bureau in the context of the substitution procedure set out in paragraph 10 of the annex to decision I/7 would be understood to refer to the Bureau of the Meeting of the Parties to the Protocol if it were decided to establish a separate bureau. Third, the Convention's Compliance Committee already has a substantial workload which is likely to increase even if its remit is not expanded to cover the Protocol. These factors could point to having a separate compliance review body for the Protocol, albeit governed by the same rules as the Compliance Committee established through decision I/7.

23. Nevertheless, the Parties to the Protocol may consider that it would be preferable for the existing Compliance Committee to serve as the compliance review body for the Protocol, taking into account the general UNECE policy of avoiding proliferation of bodies and the additional costs associated with having a separate committee. In that case, the Parties to the Protocol would need to take a decision to reflect this and the Meeting of the Parties to the Convention would need to expand the remit of the Committee accordingly.

B. Option B: Mechanism for review of compliance based on the Aarhus Convention's model

24. This option involves using the CRM developed under the Convention as a basis for developing a compliance mechanism under the Protocol. A possible advantage of this option is that, by allowing more in-depth negotiations among the Parties, clarifications could be made with respect to the scope and extent of the application of the Convention's CRM to the Protocol. Thus, this option can be said to spell out the technical meaning of the term *mutatis mutandis*, as

used in a potential decision under option A, and could avoid future uncertainty or disagreement as to adaptation.

25. It would also allow for the opportunity to add new elements or make amendments to decision I/7, based on the lessons learnt during the application of the Convention's CRM. In effect, it could mean the adoption of a state-of-the-art mechanism as the Meeting of the Parties to the Convention would adopt it if it were considering the issue today.

26. This option, in order to be based upon the Convention's CRM, would need to maintain as far as possible the innovative elements of the compliance mechanism under the Aarhus Convention, including:

(a) The possibility for members of the public to submit communications;

(b) Having members of the committee who are independent and serve in their personal capacity; and

(c) The right of not only Parties but also Signatories and NGOs to nominate members of the committee.

27. As the Convention's CRM is the most recent one adopted in the UNECE context, this option would also ensure that the Parties to the Protocol could take advantage of the latest developments in such mechanisms, subject to any adjustments that should be made to take into account the subsequent practice.

28. When conducting negotiations based on this option, the following modifications to the Convention's CRM could be considered:

(a) Omission of the "opt-out" provision;

(b) Addition of provisions for coordination and cooperation between the two compliance committees;

(c) The status of the nationality provisions found in the Convention's CRM;

(d) Taking account of the capacity of the Party concerned, especially Parties with economies in transition when addressing cases of non-compliance;

(e) More intersessional powers for the compliance committee.

29. Some of the potential disadvantages of option A could more easily be avoided through the application of option B, for example, the lack of certainty in the application of one body's mechanism to another's and the problems related to subsidiary bodies with potentially different membership. One disadvantage which clearly remains, however, is that found in paragraph 20 above related to the possible lack of acceptance of some provisions of the Convention's CRM by certain potential Parties to the Protocol. Also, a mechanism based firmly on the Convention's CRM might still run the risk of discouraging certain States from becoming Parties.

30. A disadvantage as compared to option A is that the separate CRMs under the Convention and the Protocol could gradually drift apart through amendment, decisions or practice, whereas under option A the clear cross reference would help to ensure consistency in both contexts, especially if the same committee served both instruments. This could be mitigated by developing additional provisions for coordination and cooperation between the two compliance review mechanisms.

31. A further disadvantage of option B, as compared with option A, is the additional amount of time and resources that would be required for intergovernmental negotiation, both for the initial establishment of the mechanism and any subsequent amendments to it. Such negotiations would require funds for meetings or, even if the meetings are held in conjunction with other meetings, at a minimum for the preparation, including time and background materials.

32. As compared with option C, option B has the advantage of a clear starting point with respect to the preparation of a draft decision. While, in practical terms, once engaged in negotiations, it would be difficult to limit the scope of amendments, a clear first draft would facilitate discussion and consensus.

C. Option C: Rules of procedure developed taking into account other similar models

33. This option involves the development of a CRM using various models within the UNECE and global contexts, considering the Aarhus Convention on an equal footing with other instruments. The Convention's CRM is the one most recent in the UNECE context and represents the state of the art in many respects, not only in the field of public rights. Thus, the Convention's CRM should be taken into account in any case.

34. Under option C, a comprehensive survey of global and regional CRMs would need to be undertaken to determine elements that could be considered as part of an appropriate CRM for the Protocol. A preliminary analysis including the CRMs under the Cartagena Protocol on Biosafety, the Basel Convention, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, among others, shows that CRMs vary in several key respects. These include the nature of the compliance review body (i.e. whether made up of Parties or individuals serving in a personal capacity), the ways in which the review process can be triggered (e.g. referrals by the secretariat, communications from members of the public), the procedures for nominating candidates for membership in the compliance review body and issues related to the transparency of its proceedings. It appears, therefore, that one main inquiry under option C would be to determine the usefulness of retaining or extending the Aarhus Convention's innovations.

35. The main advantage of option C would be that, as with option B, it would allow the possibility of developing a state-of-the-art CRM, taking account of and introducing improvements on previous models, including the Convention's CRM (see para. 28 above). Theoretically, it would allow more divergence from the Convention's CRM than option B, though it is not clear why Parties to the Protocol would want to do this.

36. By remaining open-ended, option C has a disadvantage as compared to options A and B in that substantial additional negotiations would need to take place in order to agree on the overall scope and structure of the CRM.

37. Option C additionally implies that innovations and developments under instruments other than the Aarhus Convention might be given substantial weight, which would be more likely to result in differences between the two CRMs. This divergence in rules and procedures between

the Convention and the Protocol could create confusion and reduce efficiency, although many refinements could eventually be taken into account in the Convention's CRM as well.

IV. CONCLUSIONS

38. The option of applying the Convention's CRM mutatis mutandis to the Protocol might offer a simple, practical and cost-effective solution avoiding lengthy negotiations. It could be done either by extending the remit of the Convention's Compliance Committee to cover review of compliance with the Protocol (involving a decision of the Meeting of the Parties to the Convention) or by establishing a separate committee for the Protocol. The latter option would entail higher costs but might be justified on grounds that it would allow for the inclusion of expertise of most relevance to the Protocol in the compliance review body and because it would avoid problems arising with respect to the application of certain provisions (notably paras. 2, 4 and 10 of the annex to decision I/7) as a result of the differences in the memberships of the Meetings of the Parties to the Convention and the Protocol. Under either variant of option A, the CRM would be governed by decision I/7 of the Meeting of the Parties to the Convention and whatever subsequent amendments might be made to it, though the possibility of the Meeting of the Parties to the Protocol reserving the right to approve future amendments (either actively or passively) could be provided for.

39. Option A differs markedly from the other two options in that it would foreclose negotiation on most aspects of the Protocol's CRM. Both options B and C would involve the opening of negotiations on a text, which would inevitably involve an investment of time and resources and would probably entail some divergence from the Convention's model depending on the course and outcome of the negotiations. Both would involve a separate compliance review body, with its associated costs. The main differences between options B and C occur with respect to the starting point of drafting and the weight to be given to the Convention's mechanism as compared to other possible examples. As such, the distinction between the two options is more one of emphasis.

40. Option B could be an appropriate choice if it were felt that there is a need to make certain improvements in the Convention's CRM, without departing from its distinctive 'Aarhus' features. With any international agreement or mechanism, there are always theoretical possibilities for making improvements, and some issues that could be considered in this context have been provided in this paper. Whether such hypothetical improvements are sufficiently important to justify the additional commitment of time and resources that would be entailed as compared with option A and whether they would in practice emerge from a negotiating process is a moot point. Insofar as any such improvements would be equally valid in the contexts of both the Convention and the Protocol, it should be borne in mind that any future development of the Convention's CRM would apply mutatis mutandis to the Protocol under option A.

41. Options B or C might be appropriate if the differences in the subject matters of the Protocol and the Convention were considered to be such as to justify either some modifications to the Convention's CRM (option B) or an entirely different type of CRM (option C). It is true that the obligations under the Protocol tend to be more concrete, quantitative and technical than those under the Convention. While this might lend weight to the argument for having a separate

committee, it does not obviously provide an argument for adapting the Convention's CRM or for having a different type of mechanism.

42. Options B or C might also be appropriate if it were considered necessary to accommodate possible concerns of future Parties to the Protocol that are not Parties to the Convention and that may have reservations about the form of compliance mechanism developed under the Convention. At this point, no State that is neither a Party nor a Signatory to the Convention has indicated that it intends to become a Party to the Protocol but that it would have reservations about a mechanism based on the Convention's CRM.

43. Finally, option C might be appropriate if there were significant doubts among Parties to the Protocol about some of the core elements in the Convention's CRM. At this stage, there is no evidence that Parties to the Convention have such misgivings, and at the fourth meeting of the Working Group of the Parties, many delegations expressed their strong support for the Compliance Committee's work (ECE/MP.PP/WG.1/2005/2, para. 38). However, given that Parties will only have their first opportunity to formally review how the compliance mechanism under the Convention is functioning in May 2005 at their second meeting, it might be premature to conclude either that the mechanism is considered to be functioning adequately or that it is considered to require revision.

Notes

[1] See, for example, MP.WAT/WG.4/2004/2, 19 February 2004.

[2] Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements (MEAs) in the ECE Region, ECE/CEP/107, 20 March 2003. The Guidelines, drafted by the Task Force on Environmental Compliance and Enforcement established by the UNECE Committee on Environmental Policy, were put forward to the Committee for approval and were endorsed at the fifth Ministerial Conference "Environment for Europe" in Kiev on 23 May 2003.