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**ECONOMIC COMMISSION FOR EUROPE
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Meeting of the Signatories to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Working Group on Pollutant Release and Transfer Registers

**ANALYSIS OF THE LEGAL, ADMINISTRATIVE, INSTITUTIONAL, PRACTICAL
AND FINANCIAL IMPLICATIONS OF THE PROTOCOL ON PRTR BEING OPEN TO
STATES AND REGIONAL ECONOMIC INTEGRATION ORGANIZATIONS,
WHETHER OR NOT THEY ARE PARTIES TO THE AARHUS CONVENTION**

Introduction

1. At its second meeting in May 2002, the Working Group for the preparation of the first meeting of the Parties to the Aarhus Convention, decided to establish an informal ad hoc open-ended expert group to analyse the legal, administrative, institutional, practical and financial implications of the protocol on pollutant release and transfer registers (PRTR) being open to all States and regional economic integration organizations, whether or not they were Parties to the Aarhus Convention, and to suggest feasible solutions to such implications (CEP/WG.5/2002/2, para. 40).

2. The relevant provisions of the Convention for this study are article 3, paragraph 7, article 5, paragraph 9, article 10, paragraph 2 (e) and (i), article 17 and article 19.

I. GENERAL LEGAL BACKGROUND

A. Terminology: “open” and “closed” protocols

3. For easy reference, this analysis shall refer to a “closed” protocol if it is open *only* to Parties to the parent convention and to an “open” protocol if it is *not* restricted to Parties to the parent convention.

B. International (treaty) law: Considerations

4. First, it is necessary to consider whether, as a matter of international (treaty) law, a non-Party to a parent convention is able, or allowed, to become a Party to a protocol. To answer this question, the following considerations are relevant:

(a) Does the parent convention restrict who may become a Party to its protocols? An open protocol is allowed if it is not prohibited by the parent convention. The Aarhus Convention is silent on this point and does not prohibit its protocols from being open;

(b) Does the protocol *amend* or *supplement* the convention? Though a distinction between a protocol that *amends* or *supplements* is not always clear-cut, in general a supplementary protocol is linked to the parent convention but can stand alone and, to be effective, does not need the Parties to it to be Parties to the parent convention.

5. The PRTR protocol, as currently being negotiated, appears to supplement the Aarhus Convention, and can be effective with the Parties to it not being Parties to the Aarhus Convention. Article 10, paragraph 2 (i), of the Aarhus Convention provides for the possible elaboration by the Meeting of the Parties of an appropriate instrument on PRTRs, “which could be annexed to this Convention.” Annexes constitute an integral part of the Convention and can be adhered to only by Parties to the Convention. Note that the wording (“... *could* be annexed...”) is indicative - a decision to shape the instrument on PRTRs in the form of a protocol is therefore not in contradiction with that article.

C. International (treaty) law: Precedents

6. Treaty practice shows both open and closed protocols. Examples of *closed* protocols include:¹ (i) the Convention on Long-range Transboundary Air Pollution; (ii) the Convention on Biological Diversity; (iii) the United Nations Framework Convention on Climate Change. Examples of *open* protocols include:² (i) the Protocol on Water and Health (to the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes); (ii) the Protocol relating to the Status of Refugees (to the Convention relating to the Status of Refugees); (iii) the Optional protocols to the Convention on the Rights of the Child.

D. Conclusion

7. There appears to be no international legal impediments to *open* protocols. International (treaty) law does not prohibit open protocols; the Aarhus Convention does not prohibit its protocols to be open; the PRTR protocol does not amend but supplements the Convention and can be effective in the form of an open protocol; and precedent shows both open and closed protocols.

II. IMPLICATIONS

A. An open protocol - becoming a Party via different legal ‘routes’

¹ See annex I below for more information.

² See annex I below for more information.

8. A first and obvious implication is that the protocol should include provisions on who can become a Party and how. In the present context it suffices to list the two main “legal routes” to becoming a Party to the protocol: (i) through signature, followed by ratification, acceptance or approval; or (ii) through accession.³

9. It is relevant to note that the recommendation of the Working Group on PRTRs (CEP/WG.5/AC.2/2001/5, para. 16), and the subsequent decision by the Committee on Environmental Policy (ECE/CEP/80, para. 31 (e)):

- (a) Refer to the method of accession only;
- (b) Make no further differentiation within the category of non-Parties to the Aarhus Convention; and
- (c) Are silent as to possible pre-conditions for accession.

10. In order for the protocol to prescribe who can become a Party to it, and by which method, the following policy questions need to be addressed:

- (a) Can non-Parties to the Aarhus Convention become a Party to the protocol by way of accession only, or will they be allowed also to become a Party through signature, followed by ratification, acceptance or approval?
- (b) Should a distinction be made between non-Parties to the Aarhus Convention that have signed the Convention and non-Parties that have not signed it?
- (c) Should a distinction be made between non-Parties that are members of UNECE and those that are not, e.g. should accession of non-UNECE members be made conditional upon approval by the Meeting of the Parties to the protocol?

The different options for answering these policy questions are presented in the following table:

Becoming a Party to the protocol	Non-Parties to the Aarhus Convention		
	UNECE member/ Non-Signatory Aarhus Convention	Non-UNECE member/ Non-Signatory Aarhus Convention	UNECE member/ Signatory Aarhus Convention
Signature, followed by ratification/ Acceptance/ Approval			
Accession			
Accession upon approval Meeting of the Parties to the PRTR protocol			

B. Implications related to interim governance

³ See annex II for an explanation of the term accession.

11. This section identifies some of the implications related to the period before the protocol enters into force, i.e. the interim period during which the protocol is being negotiated, adopted and signed, and awaits entry into force.

12. When the Meeting of the Parties to the Aarhus Convention takes over authority of the Working Group on PRTRs, the protocol negotiations will be conducted under its guidance. This will have several implications:

(a) The decisions of the Meeting of the Parties pertaining to the protocol during the interim period are taken by the Parties to the Aarhus Convention. The negotiating States and regional economic integration organizations in the Working Group on PRTRs that are not Parties to the Convention have no decision-making authority in such decisions, unless the Meeting of the Parties decides otherwise;

(b) Since the Meeting of the Parties to the Aarhus Convention has authority during the interim period, non-Parties to the Convention, more in particular perhaps those that have not signed the Convention, may decide to accede to the Protocol only *after* its entry into force;

(c) The text of the protocol will be adopted by the Parties to the Aarhus Convention, most probably at an extraordinary meeting of the Parties. The Meeting of the Parties may want to indicate the extent to which it will include PRTR negotiating States and regional economic integration organizations that are non-Parties to the Aarhus Convention in the adoption of the text. One option could be for the Meeting to indicate that it shall seek consensus among all negotiating States;

(d) Upon adoption of the protocol, the Meeting of the Parties will probably establish a preparatory committee charged with the preparations needed for its entry into force. In doing so, the Meeting of the Parties may want to consider the criteria of membership of such a preparatory committee;

(e) A separate decision for adoption by the Meeting of the Parties concerning its extraordinary meeting may be opportune.

C. Implications related to the rules of procedure

13. The protocol can provide that:

(a) Its Parties shall (negotiate and) adopt their own rules of procedure, or that

(b) Its Parties shall apply the rules of procedure of the Aarhus Convention, *mutatis mutandis*, and unless the Parties decide otherwise.

14. Legally speaking, options (a) and (b) are possible in both an open and a closed protocol. Option (a) is more likely with an open protocol. Option (b) is more likely with a closed protocol.

15. Should option (b) be chosen, there are two approaches as to how amendments (changes) to the rules of procedure of the Aarhus Convention may become applicable to the protocol:

(a) Amendments to the Aarhus Convention's rules shall apply automatically to the

protocol, unless expressly rejected by the Parties to the protocol; or

(b) Amendments to the Aarhus Convention's rules shall apply to the protocol only after express acceptance by the Parties to the protocol.

16. Legally speaking, options (a) and (b) are possible in both an open and a closed protocol. Option (b) is more likely with an open protocol.

The bureau and its composition

17. The protocol (or its rules of procedure) may provide that:

(a) It shall have a bureau, separate from the bureau under the Aarhus Convention (see para. 13 (a)); or that

(b) The bureau of the Convention shall also be the bureau of the protocol, regardless of whether option (a) or (b) in paragraph 13 is chosen.

18. Option (b) is more likely with a closed protocol. It should be noted that, should one bureau service both instruments (option (b)), additional rules might be needed, regardless of whether the protocol is open or closed. These additional rules relate to replacing those bureau members that represent States not Party to the protocol when the bureau is dealing with protocol matters. This requires a system of alternates.

D. Implications related to the compliance procedure

19. The protocol can:

(a) Set up its own compliance procedure; or

(b) Provide that the compliance procedure under the Aarhus Convention shall apply to it.

20. Option (a) is most likely with an open protocol. Option (b) is likely with a closed protocol, although the Parties to the protocol may opt for a different composition of the compliance committee when it deals with protocol matters, in order to ensure the appropriate expertise required to address PRTR issues.

E. Implications related to Parties to the Aarhus Convention being subject to obligations arising from the Aarhus Convention

21. This section addresses the margins within which the Parties to the Aarhus Convention can negotiate and adhere to the PRTR protocol. This is also of importance to non-Parties to the Aarhus Convention that are negotiating the protocol, since such margins indicate the outer boundaries (or "bottom line") of their negotiating partners.

22. For the purpose of this analysis, and in the context of the PRTR protocol, the obligations under the Aarhus Convention may be divided into two groups:

- (a) Obligations arising from the Convention as such; and
- (b) Specific obligations, directly related to the issue of PRTRs.

Obligations arising from the Convention as such

23. The issue of negotiating and adhering to the PRTR protocol while being subject to the obligations of the Aarhus Convention is basically the same issue as adhering to a treaty while being a Party to an existing treaty dealing with the same, or a highly related, subject matter. It falls beyond the scope of this analysis to address in detail this issue of successive treaties. Here, it has to suffice to state that Parties to the Aarhus Convention cannot agree with any obligations under the PRTR protocol that would prevent them from fulfilling their obligations under the Aarhus Convention.

Specific Aarhus obligations related to PRTR

24. Article 5, paragraph 9, of the Convention relates to a national PRTR. Pursuant to the first sentence of that article, drafted in mandatory wording, Parties to the Convention are under an obligation to take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. The second sentence of article 5, paragraph 9, provides a certain degree of discretion to Parties and is of a recommendatory nature, stating the aspects that "may" be included in such a national system.

25. Article 10, paragraph (2) (i), of the Aarhus Convention refers to the Parties collectively, requiring the Meeting of the Parties to consider the steps necessary to develop further the system mentioned in article 5, paragraph 9. Any such further development pursued collectively should thus be consistent with the requirements of that article. Parties to the Aarhus Convention cannot agree with any obligations under the PRTR protocol that would prevent them from fulfilling their obligation under article 5, paragraph 9, first sentence, or that would undermine their discretion granted by article 5, paragraph 9, second sentence.

Decisions by the Meeting of the Parties to the Aarhus Convention

26. After entry into force of the Protocol, decisions taken by Meeting of the Parties to the Aarhus Convention could have implications for the protocol, e.g. interpretative decision as regards the protocol. Such decisions are not legally binding on the Parties to the Aarhus Convention, but represent moral and political commitments.⁴ Such decisions therefore have no *legal* impact on the protocol. To the extent that such decisions pertain to the protocol, their impact on it remains confined to the moral and political commitment that they carry.

F. Implications related to dispute settlement provisions

27. A closed protocol may provide for its own dispute settlement provisions, or may provide that the Aarhus Convention's provisions on dispute settlement shall apply. An open protocol will likely provide for its own provisions on the settlement of disputes.

⁴ Some types of decisions of the Meeting of the Parties can be considered as binding upon the Parties, but this issue is not pursued further in this analysis.

G. Implications related to (the use of) subsidiary bodies under the Aarhus Convention

28. Whether the protocol is open or closed, the Parties to it may wish to make use of subsidiary bodies established under the Aarhus Convention. This can be accommodated in two ways:

(a) An explicit provision in the protocol stating that (certain) subsidiary bodies under the Convention may serve the protocol. Should such a provision exist in the protocol, a corresponding action by the Meeting of the Parties to the Aarhus Convention is needed. This may be done *implicitly*, with the adoption of the protocol by this body being understood as acceptance of the Parties to the Aarhus Convention that such use is possible, or *explicitly* by way of a specific decision by the Meeting of the Parties;

(b) By way of a decision by the Meeting of the Parties to the PRTR protocol, requesting the Meeting of the Parties to the Aarhus Convention to allow the use of a subsidiary body.

29. Legally, use by the protocol of the Aarhus Convention's subsidiary bodies is possible in both an open and a closed protocol. It may be restricted to task forces established under the auspices of the Convention, since the emphasis within such bodies is not on decision-making or policy matters, but on generating expert advice and sharing knowledge or exchanging expert views.

30. Should the Aarhus Convention's subsidiary bodies be used by the protocol, additional rules may be needed on their composition or on participation in them when they deal with protocol matters.

H. Implications related to the budget, financial arrangements and administration

31. Pending a decision on the financial arrangements under the Convention, implications related to the protocol being open or closed are difficult to identify. At least during the interim period, the funds related to the PRTR process will form part of the Convention's budget. As not only Parties to the Aarhus Convention participate in the PRTR process (which currently pursues an open protocol), all negotiating States and regional economic integration organizations should be enabled (invited) to contribute financially to the PRTR process. In this regard, earmarking may be considered. The forthcoming decision of the Meeting of the Parties on the PRTR protocol may accommodate this.

32. The protocol can either follow the financial arrangements decided under the Convention or design its own system. The enabling provision in the protocol can be drafted in a way to provide the Meeting of the Parties to the protocol with the possibility of choosing either option.

I. Implications related specifically to a "MOP/MOP" construction

33. The Working Group on PRTR has not yet discussed the institutional structure under the protocol. The first draft of the protocol, as prepared by the secretariat, proposes as the institutional structure a "Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol" (MOP/MOP).

34. With a “MOP/MOP” construction a new legal entity is created, namely “the Meeting of the Parties to the Convention serving as the Meeting of the Parties of the Protocol.” This new legal entity is legally distinct from the Meeting of the Parties to the Aarhus Convention. Thus, decisions under the protocol are made not by the Meeting of the Parties to the Aarhus Convention, but by the MOP/MOP. Only Parties to the Protocol have decision-making authority (a vote) in the MOP/MOP. As mentioned, the MOP/MOP is legally distinct from the Meeting of the Aarhus Convention, but the construction aims for a *functional integration* with this body where possible.

35. Notable examples of a MOP/MOP construction are the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD). It should be noted that both protocols are closed protocols. Taking the Cartagena Protocol as an example, functional integration is realized through, inter alia: (i) meetings of the Parties being held in conjunction; (ii) application of the rules of procedure of the Convention, mutatis mutandis, unless the Parties to the Protocol decide otherwise; (iii) one bureau serving both instruments, with a system of substitutes to replace members who represent a non-Party to the Protocol when the bureau deals with Protocol matters; (iv) the possibility of subsidiary bodies to the Convention serving the Protocol.

Implications MOP/MOP

36. The main question is whether a MOP/MOP construction is possible with an open protocol. Although the two existing models are both closed protocols, a MOP/MOP can be construed in an open protocol. In a MOP/MOP construction under a *closed* protocol, those Parties to the convention that are not Parties to the protocol “step back”, and act as observers when the Meeting of the Parties to the convention serves as the Meeting of the Parties to the protocol. In a MOP/MOP construction under an *open* protocol, non-Parties to the protocol “step back” and non-Parties to the convention being Parties to the protocol “step in”.

37. One aspect of having a MOP/MOP structure is that the Meeting of the Parties to the Aarhus Convention can retain residual powers concerning the PRTR protocol, should the protocol so provide.⁵ This option is not likely in an open protocol, neither is the option described in paragraph 15 (a) above.

J. Implications related to (negotiating) the protocol

Direct references to the Aarhus Convention

38. Differences exist as regards direct references in the protocol to the Aarhus Convention. Such direct references are likely in a closed protocol and less feasible in an open protocol.

Inclusion of provisions from the Aarhus Convention

39. Legally speaking, the possibility of including or excluding certain provisions of the Aarhus Convention in the protocol exists, regardless of whether the protocol is closed or open. Should the PRTR protocol be open, Parties to the Protocol commit themselves to Aarhus-based notions in the specific context of the protocol.

⁵ For example, the Cartagena Protocol on Biosafety provides for residual powers to the Conference of the Parties to the Convention on Biological Diversity as regards guidance to the Global Environment Facility.

40. The feasibility of including provisions from the Aarhus Convention in the Protocol is not obvious, notably because:

(a) Each provision should be seen in the context of the whole instrument. Thus, including one or more specific provisions in another instrument could change its original context or scope. Moreover, a provision that is acceptable in one context may not always be acceptable in another context;

(b) The inclusion of certain provisions of the Convention in the protocol may give the impression that the provisions which are *not* included are less relevant or even not applicable to the Parties to the Aarhus Convention in the context of the protocol.

Annex I

PRECEDENTS OF OPEN AND CLOSED PROTOCOLS

I. EXAMPLES OF CLOSED PROTOCOLS

A. Kyoto Protocol to the United Nations Framework Convention on Climate Change

Preamble

The Parties to this Protocol,

Being Parties to the United Nations Framework Convention on Climate Change, hereinafter referred to as “the Convention”, (...).

Article 24

1. This Protocol shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations which are Parties to the Convention. It shall be open for signature at United Nations Headquarters in New York from 16 March 1998 to 15 March 1999. This Protocol shall be open for accession from the day after the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depository.

Article 25

1. This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.

B. Convention on Biological Diversity and Cartagena Protocol on Biosafety

Article 32 of the Convention on Biological Diversity

1. A State or a regional economic integration organization may not become a Party to a protocol unless it is, or becomes at the same time, a Contracting Party to this Convention.

Article 36 of the Cartagena Protocol

1. This Protocol shall be open for signature at the United Nations Office at Nairobi by States and regional economic integration organizations from 15 to 26 May 2000, and at United Nations Headquarters in New York from 5 June 2000 to 4 June 2001.

Article 37 of the Cartagena Protocol

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention.

C. Protocols to the Convention on Long-range Transboundary Air Pollutions (e.g. the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone)

Article 14

1. The present Protocol shall be open for signature at Gothenburg (Sweden) on 30 November and 1 December 1999, then at United Nations Headquarters in New York until 30 May 2000, by States members of the Commission as well as States having consultative status with the Commission, pursuant to paragraph 8 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations, constituted by sovereign States members of the Commission, which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by the Protocol, provided that the States and organizations concerned are Parties to the Convention and are listed in annex II.

Article 15

1. The present Protocol shall be subject to ratification, acceptance or approval by Signatories.
2. The present Protocol shall be open for accession as from 31 May 2000 by the States and organizations that meet the requirements of article 14, paragraph 1.

II. EXAMPLES OF OPEN PROTOCOLS

A. Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes

Article 16

1. The first meeting of the Parties shall be convened no later than eighteen months after the date of the entry into force of this Protocol. Thereafter, ordinary meetings shall be held at regular intervals to be determined by the Parties, but at least every three years, except in so far as other arrangements are necessary to achieve the aims of paragraph 2 of this article. The Parties shall hold an extraordinary meeting if they so decide in the course of an ordinary meeting or at the written request of any Party, provided that, within six months of it being communicated to all Parties, the said request is supported by at least one third of the Parties.
2. Where possible, ordinary meetings of the Parties shall be held in conjunction with the meetings of the Parties to the Convention.

Article 21

1. This Protocol shall be open for signature in London on 17 and 18 June 1999 on the occasion of the Third Ministerial Conference on Environment and Health, and thereafter at United Nations Headquarters in New York until 18 June 2000, by States members of the Economic Commission for Europe, by States members of the Regional Committee for Europe of the World Health Organization, by States having consultative status with the Economic Commission for Europe pursuant to paragraph 8 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe or members of the Regional Committee for Europe of the World Health Organization to which their member States have transferred competence over matters governed by this Protocol, including the competence to enter into treaties in respect of these matters.

Article 22

1. This Protocol shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

2. This Protocol shall be open for accession by the States and organizations referred to in article 21. (...)

B. Protocol relating to the Status of Refugees (to the 1951 Convention)

Article 5

1. The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations.

Article 8

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

C. Optional Protocol (on armed conflict) to the Convention on the Rights of the Child

Article 9

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.

2. The present Protocol is subject to ratification and is open to accession by any State. (...)

**E. Optional Protocol (on the sale of children, child prostitution and child pornography)
to the Convention on the Rights of the Child**

Article 13

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification and is open to accession by any State that is a party to the Convention or has signed it.

Annex II

THE TERM “ACCESSION”

1. If permitted by the provisions of the legal instrument, “accession” is one of the methods under international law by which a State can express its consent to be bound by the instrument. Put simply, “accession” is a method for a State to become a Party to an international agreement if it has been unable, for whatever reason, to *sign* the agreement. Generally, there are two reasons why a State may have been unable to sign.
2. First, the deadline for signature set in the agreement has passed. For instance, the Aarhus Convention was open for signature until 21 December 1998 (see art. 17). Those States that were entitled to sign but did not do so before or on 21 December are entitled to accede to the Convention from 22 December onwards (see art. 19, para. 2).
3. Another common reason why a State may not have been able to sign is because the agreement restricts signature to certain States. Those States that were not entitled to sign in the first place may be granted the right to accede to the agreement, depending on the conditions laid down in the agreement. For example, the Aarhus Convention sets two conditions. It provides, in article 19, paragraph 3, that any State that was not entitled to sign the Convention may nevertheless accede to it, if it is a Member of the United Nations and if the Meeting of the Parties approves the accession.