

ECONOMIC COMMISSION FOR EUROPE

**MEETING OF THE PARTIES TO THE
CONVENTION ON THE PROTECTION
AND USE OF TRANSBOUNDARY
WATERCOURSES AND
INTERNATIONAL LAKES**

**CONFERENCE OF THE PARTIES TO
THE CONVENTION ON THE
TRANSBOUNDARY EFFECTS OF
INDUSTRIAL ACCIDENTS**

**Intergovernmental Working Group
on Civil Liability**

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Working paper*
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**POSSIBLE DRAFT ELEMENTS FOR PROVISIONS ON “COMPLIANCE” AND
“REPORTING” FOR THE
DRAFT LEGALLY BINDING INSTRUMENT ON CIVIL LIABILITY FOR
TRANSBOUNDARY DAMAGE CAUSED BY HAZARDOUS ACTIVITIES, WITHIN THE
SCOPE OF BOTH CONVENTIONS (MP.WAT/2002/2 - CP.TEIA/2002/2)**

Prepared by the Regional Environmental Center for Central and Eastern Europe (REC)**

* Apart from some editorial changes, this working paper is reproduced in the form as received by the secretariat.

** This document should not be considered a proposal by the REC. It was prepared in response to a request from the Chair at the First Meeting, following an intervention by the REC that such provisions would appear necessary and useful to the instrument. As such, it is based upon other current UNECE initiatives, including the work of the UNECE Task Force on Environmental Compliance and Enforcement, recently adopted UNECE instruments, and other instruments and decisions under current negotiation. In particular, the changes to Article 18 are based in large part on the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, while Article 18 bis is based on that protocol, the Aarhus Convention and the results of its Working Group on Compliance and Rules of Procedure, and the Note by the Secretariat, “Overview of compliance mechanisms under ECE environmental conventions,” prepared for the meeting of the UNECE Task force on Environmental Compliance and Enforcement, Geneva, 8-9 November 2001. Further reference is made to that Note, and to the (informal) Compiled Version of the Work of the Working Group on Compliance and Rules of Procedure on the Draft Decision on the Compliance Mechanism at its Second Meeting, Geneva, 26-27 November 2001.

Article 18, paragraphs 4 and 5

4. The functions of the Meeting of the Parties shall be:

(a) To review the implementation of and the compliance with the Protocol *on the basis, inter alia, of regular reporting by the Parties*;

(b) To ~~provide for reporting and~~ establish guidelines and procedures for such reporting, ~~where necessary,~~ *including the provision that the Parties can use for this purpose reports covering the relevant information produced for other international forums*;

(c) To consider and adopt, where necessary, proposals for amendment of the Protocol or any annexes and for any new annexes;

(d) To consider and undertake any additional action that may be required for the purposes of the Protocol.

5. *The reporting referred to in the previous paragraph shall include the collection and evaluation of data on the progress of the respective Party towards the achievement of the goals of the Protocol, together with an assessment of such progress. Such information shall be published periodically, the frequency of which shall be established by the Meeting of the Parties.*

Article [18 bis]

Compliance

Option 1 – Framework provision

The Parties shall review the compliance of the Parties with the provisions of this Protocol on the basis, inter alia, of the reports referred to in article 18. Multilateral arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance shall be established by the Parties at their first meeting. These arrangements shall allow for appropriate public involvement and may include the option¹ of considering communications from members of the public on matters related to this Protocol.

Option 2 –Committee with Procedures

[Paragraph 1, alternative 1 (Committee of Parties)

1. At its first meeting, the Meeting of Parties shall establish a Compliance Committee consisting of eight Parties to the Protocol.²

(a) The Meeting of the Parties shall, as soon as practicable, elect four Parties to the Committee to serve until the end of the next ordinary meeting and four Parties to serve a full term

¹ With respect to optional communications from the public, see Option 2, paragraph 6(a) below.

² The Aarhus Convention makes explicit provision for the status of environmental NGOs and international organizations in the Meetings of the Parties. If such an example is followed, a provision for the participation of such organizations as members or observers in the Compliance Committee should be considered.

of office. At each ordinary meeting thereafter, the Meeting of the Parties shall elect four Parties for a full term of office. Outgoing Parties may be re-elected once for a further full term of office, unless in a given case the Meeting of the Parties decides otherwise. A full term of office commences at the end of an ordinary meeting of the Parties and runs until the second ordinary meeting of the Parties thereafter. The Committee shall elect its own Chairperson and Vice-Chairperson.

(b) The Meeting of the Parties shall elect the members of the Committee by consensus or, failing consensus, by secret ballot.

(c) In the election of the Committee, consideration should be given to geographical distribution of membership and diversity of experience.

(d) In carrying out its functions the Compliance Committee shall be guided by the objective of the Protocol as expressed in article 1 of the Protocol.]

[Paragraph 1, alternative 2 (independent committee)

1. (a) At its first meeting, the Meeting of Parties shall establish a Compliance Committee consisting of eight members.

(b) The members of the Committee shall serve in their personal capacity.

(c) The Committee shall be composed of nationals of the Parties to the Protocol who shall be persons of high moral character and recognized competence in the fields to which the Protocol relates, including persons having legal experience.

(d) The Committee may not include more than one national of the same State.

(e) Committee members meeting the requirements of subparagraph (c) shall be nominated by Parties [, and by non-governmental organizations promoting environmental protection,] for election pursuant to subparagraph (g).

(f) Committee members shall be elected on the basis of nominations in accordance with subparagraph (e). The Meeting of the Parties shall give due consideration to all nominations.

(g) The Meeting of the Parties shall elect the members of the Committee by consensus or, failing consensus, by secret ballot.

(h) In the election of the Committee, consideration should be given to geographical distribution of membership and diversity of experience.

(i) The Meeting of the Parties shall, as soon as practicable, elect four members to the Committee to serve until the end of the next ordinary meeting and four members to serve a full term of office. At each ordinary meeting thereafter, the Meeting of the Parties shall elect four members for a full term of office. Outgoing members may be re-elected once for a further full term of office, unless in a given case the Meeting of the Parties decides otherwise. A full term of office commences at the end of an ordinary meeting of the Parties and runs until the second ordinary meeting of the Parties thereafter. The Committee shall elect its own Chairperson and Vice-Chairperson.

(j) If a member of the Committee can no longer perform his or her duties as member of the Committee for any reason, the Bureau of the Meeting of the Parties shall appoint another member fulfilling the criteria in this paragraph to serve the remainder of the term, subject to the approval of the Committee.

(k) Every member serving on the Committee shall, before taking up his or her duties, make a solemn declaration in open Committee that he or she will perform his or her functions impartially and conscientiously.]

2. The Committee shall, unless it decides otherwise, meet at least once a year. The secretariat shall arrange for and service the meetings of the Committee.

3. (a) The Committee shall:

- (i) Consider any submission, referral or communication made in accordance with paragraphs 4, 5 and 6 below;
- (ii) Prepare, at the request of the Meeting of the Parties, a report on compliance with or implementation of the provisions in the Protocol; and
- (iii) Monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 18 of the Protocol; and act pursuant to paragraphs 10 and 11.

(b) The Committee may examine compliance issues and make recommendations if and as appropriate.

4. (a) A submission may be brought before the Committee by one or more Parties that have reservations about another Party's compliance with its obligations under the Protocol. Such a submission shall be addressed in writing to the secretariat and supported by corroborating information. The secretariat shall, within two weeks of receiving a submission, send a copy of it to the Party whose compliance is at issue. Any reply and supporting information shall be submitted to the secretariat and to the Parties involved within three months or such longer period as the circumstances of a particular case may require but in no case later than six months. The secretariat shall transmit the submission and the reply, as well as all corroborating and supporting information, to the Committee, which shall consider the matter as soon as practicable.

(b) A submission may be brought before the Committee by a Party that concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligations under the Protocol. Such a submission shall be addressed in writing to the secretariat and explain, in particular, the specific circumstances that the Party considers to be the cause of its non-compliance. The secretariat shall transmit the submission to the Committee, which shall consider the matter as soon as practicable.

5. Where the secretariat, in particular upon considering the reports submitted in accordance with the Protocol's reporting requirements, becomes aware of possible non-compliance by a Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response or the matter is not resolved within three months, or such longer period as the circumstances of the matter may require but in no case later than six months, the secretariat shall bring the matter to the attention of the Committee, which shall consider the matter as soon as practicable.

6. (a) Communications may be brought before the Committee by one or more members of the public concerning a Party's compliance with the Protocol.³

(b) The communications referred to in subparagraph (a), shall be addressed to the Committee through the secretariat in writing and may be in electronic form. The Communications shall be supported by corroborating information.

(c) The Committee shall consider any such communication unless it determines that the communication is:

- (i) Anonymous;
- (ii) An abuse of the right of submission of such communications;
- (iii) Manifestly unreasonable; or
- (iv) Incompatible with the provisions of the Protocol.

(d) The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

(e) Subject to the provisions of subparagraph (c), the Committee shall as soon as possible bring any communications submitted to it under subparagraph (a) to the attention of the Party alleged to be in non-compliance.

(f) A Party shall, as soon as possible but not later than five months after any communication is brought to its attention by the Committee, submit to the Committee written explanations or statements clarifying the matter and describing any response that may have been made by that Party.

(g) The Committee shall, as soon as practicable, further consider communications submitted to it pursuant to this paragraph and take into account all relevant written information made available to it, and may hold hearings.

7. To assist the performance of its functions, the Committee may:

(a) Request further information on matters under its consideration;

(b) Undertake, with the consent of any Party concerned, information gathering in the territory of that Party;

(c) Consider any relevant information submitted to it; and

(d) Seek the services of experts and advisers as appropriate.

8. (a) Save as otherwise provided for in this paragraph, no information held by the Committee shall be kept confidential.

³ This is a simplified version of the provisions of the draft decision on Compliance under the Aarhus Convention. The latter provides for Parties to opt out of the consideration of communications from the public. If such an optional arrangement is maintained here, detailed provisions such as those under the Aarhus Convention should be considered.

(b) The Committee and any person involved in its work shall ensure the confidentiality of information that has been provided to it in confidence by a Party when making a submission in respect of its own compliance in accordance with paragraph 4 (b) above.

(c) Information submitted to the Committee, including all information relating to the identity of the member of the public submitting the information, shall be kept confidential if submitted by a person who asks that it be kept confidential because of a concern that he or she may be penalized, persecuted or harassed.

(d) If necessary to ensure the confidentiality of information in any of the above cases, the Committee shall hold closed meetings.

(e) Committee reports shall not contain any information that the Committee must keep confidential under subparagraphs (b) and (c) above. Information that the Committee must keep confidential under subparagraph (c) shall not be made available to any Party. All other information that the Committee receives in confidence and that is related to any recommendations by the Committee to the Meeting of the Parties shall be made available to any Party upon its request; that Party shall ensure the confidentiality of the information it has received in confidence.

9. (a) A Party [, whether or not a member of the Committee,] in respect of which a submission, referral or communication is made or which makes a submission, as well as the member of the public making a communication, shall be entitled to participate in the discussions of the Committee with respect to that submission, referral or communication.⁴

(b) The Party [, whether or not a member of the Committee,] and the member of the public shall not take part in the preparation and adoption of any findings, any measures or any recommendations of the Committee.⁵

(c) The Committee shall send a copy of its draft findings, draft measures and any draft recommendations to the Parties concerned and the member of the public who submitted the communication if applicable, and shall take into account any comments made by them in the finalization of those findings, measures and recommendations.

10. The Committee shall report on its activities at each ordinary meeting of the Parties and make such recommendations as it considers appropriate. Each report shall be finalized by the Committee not later than twelve weeks in advance of the meeting of the Parties at which it is to be considered. Every effort shall be made to adopt the report by consensus. Where this is not possible, the report shall reflect the views of all the Committee members. Committee reports shall be available to the public.

[10 bis. If, as a result of the operation of paragraph 9, the size of the Committee is reduced to five members or less, the Committee shall forthwith refer the matter in question to the Meeting of the Parties.]⁶

⁴ The text in the square brackets in this subparagraph reflects alternative 1 on the structure of the Committee and should be deleted if it is decided to delete that alternative.

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11. Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Compliance Committee may

- in consultation with the Party concerned, take the measures listed in paragraph 12(a)
- subject to agreement with the Party concerned, take the measures listed in paragraph 12(b), (c) and (d).

12. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Protocol. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures:

(a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Protocol;

(b) Make recommendations to the Party concerned;

(c) Request the Parties concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Protocol and to report on the implementation of this strategy;

(d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;

(e) Issue declarations of non-compliance;

(f) Issue cautions;

(g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Protocol;

(h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

13. The present compliance procedure shall be without prejudice to article 22 of the Protocol on the settlement of disputes.

14. In order to enhance synergies between this compliance regime and compliance regimes under other agreements, the Meeting of the Parties may request the Compliance Committee to communicate as appropriate with the relevant bodies of those agreements and report back to it, including with recommendations as appropriate. The Compliance Committee may also submit a report to the Meeting of the Parties on relevant developments between the sessions of the Meeting of the Parties.