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**MEETING OF THE PARTIES TO THE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES**
**and**
**MEETING OF THE SIGNATORIES TO THE PROTOCOL ON WATER AND HEALTH TO THE CONVENTION**

**Working Group on Water and Health**
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## ESTABLISHING A COMPLIANCE REVIEW MECHANISM UNDER THE 1999 PROTOCOL ON WATER AND HEALTH

Prepared by a consultant and finalized by the secretariat

This document has been drawn up under consultancy agreement with the Regional Office for Europe of the World Health Organization. A preliminary version of this paper has been considered at the second meeting of the Signatories to the Protocol on Water and Health (Geneva, 2-4 July 2003); it was updated by the consultant taking into account the outcome of the discussion of the Signatories' meeting and written comments and suggestions submitted afterwards. Apart from editorial changes, the document is reproduced in the format in which it had been received by the secretariat.

# PART I

# BASIC CONCEPTS RELATING TO A COMPLIANCE REVIEW MECHANISM UNDER THE PROTOCOL

## I. Introduction

1. The present paper has been prepared by a consultant [1] with a view to assisting the Signatories to the 1999 London *Protocol on Water and Health* [hereinafter "The Protocol"] [2] to the *Convention on the Protection and Use of Transboundary Waters and International Lakes* [hereinafter the Convention] [3] in setting up a Compliance Review Mechanism [hereinafter CRM] under Article 15 of the Protocol.

2. The present paper has a twofold purpose: (a) to illustrate the basic concepts that mark the difference between non-confrontational, non-judicial and consultative compliance regimes, including arrangements for public involvement, on the one hand, and adjudication and arbitration, on the other; and (b) to provide assistance in drafting rules for the establishment and functioning of a mechanism in line with the relevant practice within the UNECE context.

## II. Background

The relevant provisions of the Protocol

3. Article 15 of the Protocol provides the main legal basis for the present exercise, as follows:

> "Parties shall review the compliance of the Parties with the provisions of this Protocol on the basis of the reviews and assessments referred to in article 7. 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".

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[1] Prof. Attila Tanzi, University of Verona (Italy). The author is grateful to Mr. Cesare Pitea for his precious help in the reseach and elaboration of the present paper.

[2] London, June 17, 1999, Doc. MP.WAT/2000/1 and EUR/ICP/EHCO 020205/8Fin, available at www.unece.org

[3] Helsinki, March 17, 1992, 31 I.L.M. (1992), at 17.

Article 7 reads as follows:

"1. The Parties shall each collect and evaluate data on:

(a) Their progress towards the achievement of the targets referred to in article 6, paragraph 2;

(b) Indicators that are designed to show how far that progress has contributed towards preventing, controlling or reducing water-related disease.

2. The Parties shall each publish periodically the results of this collection and evaluation of data. The frequency of such publication shall be established by the Meeting of the Parties.

3. The Parties shall each ensure that the results of water and effluent sampling carried out for the purpose of this collection of data are available to the public.

4. On the basis of this collection and evaluation of data, each Party shall review periodically the progress made in achieving the targets referred to in article 6, paragraph 2, and publish an assessment of that progress. The frequency of such reviews shall be established by the Meeting of the Parties. Without prejudice to the possibility of more frequent reviews under article 6, paragraph 2, reviews under this paragraph shall include a review of the targets referred to in article 6, paragraph 2, with a view to improving the targets in the light of scientific and technical knowledge.

5. Each Party shall provide to the secretariat referred to in article 17, for circulation to the other Parties, a summary report of the data collected and evaluated and the assessment of the progress achieved. Such reports shall be in accordance with guidelines established by the Meeting of the Parties. These guidelines shall provide that the Parties can use for this purpose reports covering the relevant information produced for other international forums.

6. The Meeting of the Parties shall evaluate progress in implementing this Protocol on the basis of such summary reports. "

4. The setting up of Compliance Review Mechanisms is fully in line with the most recent environmental treaty practice with special regard to UNECE practice. 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). [4]

5. A special link between Compliance Review as envisaged in the Protocol and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [hereinafter Aarhus Convention] concerning public

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[4] Within the ECE, CRMs have been set up for the following Conventions:

- 1979 *Long-Range Transboundary Air Pollution Treaty* (18 I.L.M. (1979) at 1442) [hereinafter LRTAPT], through Executive Body's Decision 1997/2 (*Report of the Fifteenth Session of the Executive Body* [hereinafter LRTAP CRM], doc. ECE/EB.AIR/53, annex II), which applies also to the 1991 *Geneva Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes* [hereinafter VOC Protocol] (31 I.L.M. (1992) at 568) and to the 1994 *Oslo Protocol on Further Reduction of Sulphur Emission* [hereinafter 2nd Sulphur Protocol] (33 I.L.M. (1994) at 1542);
- 1998 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* [hereinafter Aarhus Convention] (38 I.l.M. (1999) at 517), through Decision I/7 of the First MOP in 2002 [hereinafter Aarhus CRM];

Outside the ECE context, see:

- 1987 *Montreal Protocol* to the 1985 *Vienna Convention on the Protection of the Ozone Layer* [hereinafter Montreal Protocol] (26 I.L.M. (1987) at 1529 and 1550), through MOP's Decision IV/5 in 1992 (*Report of the Fourth Meeting of the Parties*, doc. UNEP/OzL.Pro.4/15, 25 November 1992) [hereinafter Montreal CRM] and
- 1989 *Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal* [hereinafter Basel Convention] (28 I.L.M. (1989), at 649), following the decision taken at the Sixth Conference of the Parties (see *Mechanism for promoting implementation and compliance - Revised text of the annex in document UNEP/CHW.6/9 proposed by the Working Group on a Compliance Mechanism*" [hereinafter Basel CRM], Doc. UNEP/CHW.6/CRP.12) .

Arrangements for CRMs under negotiation or not yet entered in force concern the following instruments:

- 1992 *Framework Convention on Climate Change* (31 I.L.M. (1992), at 1330) [hereinafter FCCC]; The fourth COP approved a text, prepared by an *ad hoc* Group, for a consultative process envisaged in Article 13, with some "square brackets", reserving final approval and the establishment of the Committee to a successive decision (Decision 10/CP4, 6 November 1998)
- 1997 *Kyoto Protocol to the 1992 Framework Convention on Climate Change* [hereinafter Kyoto Protocol] (37 I.L.M. (1998), at 22); The mechanism was established by the Second COP of the FCCC in 2001 (*Report of the Conference of the Parties at their Seventh Session*, doc. FCCC/CP/2001/13/ Add.3, Annex [hereinafter Kyoto CRM]), but is not operational pending the entry into force of the Kyoto Protocol
- 2000 *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* [hereinafter Cartagena Protocol] (39 I.L.M. (2000), at 1027); The Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP), on request by the Conference of the Parties to the Convention and in co-operation with an open-ended meeting of experts developed the text of the draft procedures and mechanisms on compliance (doc. UNEP/CBD/ICCP/2/13/ADD1[hereinafter Draft Cartagena CRM]), and also forwarded options regarding the bracketed text to the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol with a view to assisting that meeting in its consideration of this issue.
- 1994 *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* [hereinafter Desertification Convention], 333 i.l.m.(1994) at 1328; under this instrument an open-ended working group has been established to deal with implementation issues, which are included in the agenda for the 6th Conference of the Parties, to be held next summer. The secretariat has prepared a note, presented to the Parties at their previous meetings, on the issue (docs. ICCD/COP(4)/8 and ICCD/COP(5)/8).

participation is set out in most clear terms in article 15, last sentence, of the Protocol. Indeed, the drafting exercise concerning the setting up of a CRM under the Protocol falls well under article 3(3) of the Aarhus Convention, under which the Parties

"shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment". [5]

Follow up

6. The programme area IV on water and health of the 2000-2003 work plan , adopted by the Parties to the Water Convention, [6] as amended by the Signatories to the Protocol at their first meeting, [7] entrusts the Working Group on Water and Health – with the assistance of the Working Group of Legal and Administrative Aspects – to draw up compliance review arrangements envisaged in article 15, taking into consideration the work of an expert group that drafted in 1999 the *Geneva Strategy and Framework for Monitoring Compliance with Agreements on Transboundary Waters* [hereinafter *Geneva Strategy*], [8] which sets out principles and guidelines meant to provide guidance for the establishment of compliance review procedures for any legal instrument negotiated under, or in connection with, the Convention.

7. The Geneva Strategy outlines three basic elements of a compliance arrangement: (a) a baseline (e.g., the assessment of the technical parameters required for compliance); (b) a procedure governing the compliance review; and (c) an institutional body in charge of compliance review. The Working Group on Water and Health, at its second meeting, has generally endorsed this document and called for the development of the above three basic elements.[9]

8. The first element envisaged in the Geneva Strategy falls outside the scope of the present paper. However, it should be underlined that reporting obligations under article 7(5) of the Protocol shall be strengthened by the establishment, by the Meeting of the Parties (MOP), of reporting guidelines. As pointed out in the Geneva Strategy, agreed guidelines for reporting, monitoring, review and evaluation are essential for an effective action to promote compliance.

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5 Article 3(3) Åarhus Convention, *supra* note 4.

6 doc. n. ECE/MP.WAT/5 (Annex II).

7 doc. n. MP.WAT/AC.2/2000/4 (Annex).

8 Docs. MP.WAT/2000/4, 5, and add. 1.

9 See para. 2.7.3 of the *Report on the Second Meeting of the Working Group on Water and Health*, held in Budapest, Hungary, 28-29 October 2002.

Other relevant international guidance

9. Most recently, international guidelines to address compliance issues have been drafted within the UNEP [10] and the UNECE [11] contexts. They both envisage the establishment of formal bodies and procedures to examine compliance by a Party/Parties to an MEA and provide guidance thereto.

Summary remarks

10. In sum, the present paper and the drafting options suggested in its Part II build on: (a) established conventional practice, with special regard to UNECE context; (b) the 1999 Geneva Strategy document; and (c) the UNECE and the UNEP guidelines on the topic.

## III. Basic concepts relating to compliance with MEAs

The concept of compliance and reasons for non-compliance

11. The term "compliance with international obligations" can be defined as the behaviour adopted by relevant actors that conforms to relevant rules [12], that is the fulfilment by the Contracting Parties to a treaty of their obligations. More broadly, in treaty practice the term compliance also indicates the measures taken by the Parties to a treaty (individually and as a whole) in order to implement effectively within their domestic legal systems the obligations thereof.

12. The expression "non-compliance" indicates the non-performance of treaty obligations (generally, under MEAs) as a subtle terminological alternative to the term "breach" used in the Vienna Convention on the Law of Treaties or to the terms "violation" and "infringement". The expression "non-compliance" is meant to recognize that lack of performance of treaty obligations may not be due to the unwillingness to comply with a given environmental rule by the State concerned, but rather to its inability to do so. One reason for such inability may lie in the indeterminate nature of the obligation, which is not complied with, or in its highly technical

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10 *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements* [hereinafter UNEP Guidelines] Doc. UNEP(DEPI)/MEAs/WG.1/3, Annex II.

11 *Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements MAEs] in the ECE Region* [hereinafter ECE Guidelines], doc. ECE/CEP/107, 20 March 2003 . The guidelines drafted by the Task Force on Environmental Compliance and Enforcement established by the ECE Committee on Environmental Policy, have been put forward to the Committee for approval and have been endorsed by the Fifth Ministerial Conference "Environment for Europe" in Kiev on 23 May 2003.

12 Ronald B. Mitchell, *Compliance Theory: An Overview*, in Cameron/Werksman/Roderick (eds.), IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW [hereinafter IMPROVING COMPLIANCE], London, 1996, at 5.

content. Accordingly, States may face special difficulties in identifying the precise normative content of the obligation in point or lack the necessary technical capacity to implement it effectively.

13. Another reason for the inability to implement and abide by international environmental obligations may lie in the fact that the obligation in point may prove to place an especially onerous financial burden on States Parties. At times, States may also have the perception that the benefits deriving from employment of resources for compliance do not outfit the costs thereof, especially where there is no guarantee that other Contracting Parties will abide by the same obligations.[13] In a short-term perspective, a Party may obtain through non-compliance competitive advantages vis-à-vis complying Parties (for example, through the adoption of lighter standards in the treatment of industrial waste water).

14. In light of the above consideration, it becomes apparent that an effective action to enhance compliance: (a) should be based on **collective and multilateral**, rather then unilateral, **measures**; (b) should be conducted in a **constructive and cooperative,** rather than confrontational, **manner**; and (c) should be **flexible** enough to take all reasons for non-compliance duly into account.

Confrontational means of dispute settlement or enforcement and their limited appropriateness for our purposes

15. The establishment of these means of dispute settlement is based on the assumption that traditional means of dispute settlement and treaty law enforcement – such as the termination or suspension of the treaty, withdrawal of some privileges under the treaty, invocation of responsibility or liability - are frequently inappropriate and may also be ineffective with regard to MEAs. This traditional approach is largely based on bilateral confrontation between the so-called "injured State" and the so-called "wrongdoer" and, when a jurisdictional ground allows it, it leads to an "all or nothing" kind judicial settlement of the dispute. Collective management of situations of non-compliance, as opposed to a traditional bilateral adversarial approach, better reflects the collective nature of the interests protected by MEAs, in general, and by the Protocol, in particular.

16. Confrontational means of dispute settlement, such as those provided for under the Law of Treaties may also prove ineffective for our purposes. The suspension or termination of the treaty

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13 The ECE Guidelines identify the following sources of non-compliance: (a) A lack of sufficient political attention to implementation; (b) A lack of awareness of the obligations arising under the MEA by the implementing authorities; (c) A lack of technical, administrative and financial capacity; (d) A lack of coordination among relevant national authorities; (e) A lack of understanding of implementation issues; (f) Insufficient preparation (as regards, for example, laws, regulations, training); (g) Uncertain or inaccurate data; (h) A lack or total absence of monitoring and/or review of implementation; (i) Unclear implementing rules/tools/regulations (for example, related to the translation and interpretation of legal terms and provisions); (j) A failure to mobilize public support; (k) Insufficient budget allocations, changes in economic circumstances or unforeseen costs of implementation. (*supra* note 11, para. 5).

with respect to the wrongdoing Party would not benefit other Parties, since most MEAs obligations - particularly those under the Protocol - are not of a bilateral nature.

17. As to judicial settlement, it would normally prove difficult to identify an "injured State" who could establish a sufficient legal interest to invoke State responsibility for breaches of the obligations under consideration. Accordingly, it would be highly unlikely for a State to obtain standing before a competent international Court or Tribunal with regard to a breach of the obligations of the kind contained in our Protocol. [14]

18. Furthermore, adjudication does not appear to be a suitable remedy with regard to a large number of provisions of the Protocol, since the "goal oriented" nature of a large number such provisions would prevent their *justiciability.* [15] Whenever legally admissible, a judicial procedure in connection with a breach of such an obligation would most likely lead to the mere assessment of a State's failure to comply (declaratory judgement) and, possibly, to the imposition of guarantees of non repetition. It would be difficult for an adjudicatory body to take fully into account the difficulties in complying with the Protocol, outside the strict category of the "state of necessity", and to provide assistance to remove them.

19. Repeated and serious failure to comply with the Protocol could result in a violation of internationally protected human rights, such as the right to health. Even there, judicial relief for such violations would face important limitations. Judicial and quasi-judicial protection of human rights at the international level is normally attached to the protection of civil and political rights, while invocation of breaches of obligations protecting social and economic rights has proved not so effective. However, this point might require further study of a comparative nature among existing remedies under various human rights treaties with a view to finding a suitable complement to compliance review mechanisms that may afford direct protection to the actual victims of non-compliance. This would particularly be appropriate when the victims are nationals of the non-complying State, which would be likely the case with regard to non-compliance with the majority of the obligations set out in the Protocol.

20. Even in the hypothetical extreme case – such as the outbreak of a water-related disease with significant impact both domestic and transboundary – in which the difficulties for invoking State responsibility would be overcome and a jurisdictional ground be available, the judicial settlement of the dispute cannot be seen as a fully satisfactory remedy, in consideration of the

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14 See A. Kiss, *Present Limits to the Enforcement of State Responsibility for Environmental Damage*, in F. Francioni and T. Scovazzi (eds.), INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, Dordrecht [etc.] (1991) at 3, Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 YB INT'L ENV. L., (1992) at 123 and L. Boisson de Chazournes, *La mise an œuvre du droit international dans le domaine de la protection de l'environnement : enjeux et défis*, in RGDIP (1995) at 37, especially at 50 *et seq* ; R. Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 *RdC* (1999) at 96-100.

15 *Infra*, paras. 30-36.

preventive purpose of the Protocol and the impossibility to re-establish the situation existing prior to the failure linked to the harmful event. [16, 17]

## IV. The fundamental concepts of a CRM

Institutional arrangements

21. Articles 15 and 16 of the Protocol clearly vest the MOP with the principal responsibility to monitor and assess compliance with the Protocol. To that end the Parties are to set up a Compliance Review Arrangement including a Compliance Review Committee [hereinafter the Committee]. However, existing treaty practice and international guidelines [18], show that the power to make the final assessment concerning a case of non-compliance and the consequences thereof, may remain with the Parties as a whole, which will discuss the matter in a constructive and cooperative manner in order to secure amicable solutions. The MOP may accordingly decide to vest the Committee with such power.

Public Participation

22. A formal connection between a CRM under the Protocol and public participation has already been stressed above in para. 5 in relation to article 3 of the Aarhus Convention. Indeed, participation by the public to a CRM – particularly through non-governmental organizations [hereinafter NGOs] - appears as a factor enhancing the effectiveness of its functioning. This is especially so in consideration of the normative specificity of the Protocol, which largely bears on the position of individuals within the domestic sphere of the States Parties. Furthermore, NGOs may enhance the CRM by providing the Committee with independent sources of information, as well as with technical expertise where needed.

23. While the language of article 15 clearly endorses the principle of public participation, the precise scope and extent of such a participation remains to be defined. Some existing CRMs accept NGOs participation to the Committee's meetings with the status of observers, i.e. without the right to vote. More controversial is whether - as is the case under the Aarhus Convention - NGOs should be afforded rights or entitlements in relation to the trigger mechanism and to the process of election of the members of the Committee.

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16 This would equally apply in cases where individuals could claim a violation of their human rights, as it could be possible under the Optional Protocol on individual communications under the Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter CEDAW] (see the text of the Convention and of the Protocol, respectively in 19 ILM (1980) at 33 and 38 ILM (1999) at 763) . Article 14 para. 2 CEDAW stipulates that parties shall ensure to women the right to enjoy adequate living conditions, particularly in relation to […] water supply".

17 *Infra*, para. 29.

18 See UNEP Guidelines, *supra* note 10, para. 14(b)(iv).

The relation of CRMs to dispute settlement and enforcement

24. The case has been made above (paras. 15 – 20) that traditional bilateral means of dispute settlement – as well as the general rules on State responsibility and those of treaty law on the legal consequences on the material breach of a conventional obligation – may not be suitable to cases of non-compliance with rules set out in MEAs. That being said, the existence of a CRM would not necessarily set aside completely the option to resort to traditional dispute settlement within the conventional framework in which the CRM in point operates. It is no accident that, next to article 15 on compliance review arrangements, the Protocol contains a dispute settlement provision in article 20. Furthermore, the existence of compliance review mechanisms would preclude the possibility for the MOP – were attempts of cooperation with the non-complying Party to no avail - to take necessary enforcement measures within its competence and in accordance with general international law. [19] Arrangements for the harmonization between CRM and dispute settlement procedures could also be considered.

## V. The nature of the characteristic obligations of the Protocol

25. As stressed in the UNEP Guidelines, one should not lose sight of the importance that compliance review bodies and procedures must reflect the particular normative features of the instrument to which they apply [20]. Accordingly, before addressing the operational aspects of the present report in its Part II, it seems appropriate to focus briefly on the specific nature of the characteristic obligations of the Protocol and, consequently, of the legal relationship, rights and duties arising therefrom.

The normative features of the Protocol

26. MEAs, generally, do not produce the typical bilateral legal relationships arising out of traditional international treaties. The former are not geared primarily towards the legal protection of the individual interests of the Parties on the basis of reciprocity, they rather tend to protect collective interests and pursue collective goals. Accordingly, the Parties thereto share a common interest in their effective implementation.

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19 See *Geneva Strategy*, *supra* note 8, para. 29. Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 YB INT'L ENV. L., (1992) at 123, especially at 155 *et seq*, M. Fitzmaurice and Redgwell, *Environmental Non-Compliance Procedures and International Law*, 31 NETH. YB INT'L L. (2000) at 35, especially at 43 *et seq.*

20 UNEP Guidelines, *supra* note 10, paras. 5 and 14(d).

27. On that score, one should single out the fact that the Protocol links issues of sustainable management of water resources - by their very nature of a global concern - with the promotion and protection of human health, thus bearing on fundamental human rights [21] (see art. 1).

28. To that end, the Protocol, next to obligations of international cooperation and joint action with regard to *transboundary* waters (articles 11 to 12), provides for obligations addressing *purely domestic* water management (articles 6 to 10). Consequently, there may well be breaches of the Protocol that do not cause damage in the territory of another Party or to its nationals. That is to say that non-performance of treaty obligations may not affect any particular Party.

29. It is to be noted that, unlike other MEAs – such as the Framework Convention on Climate Change (FCCC) and its Kyoto Protocol - the long-term adverse impact of non-compliance with the Protocol would not be produced at the global level, producing a direct adverse effect on the territory and on the populations of the non-complying Party and, possibly, of the other Party (or Parties) sharing the transboundary waters concerned. This explains the reason why effective measures to enhance compliance with the Protocol can hardly be imagined to be the end-product of a unilaterally triggered Dispute Settlement Procedure, but should be based on a **collectively decided action**. Likewise it corroborates the appropriateness for non-State actors (either domestic or international) to be involved in such action.

30. The overall purpose of the Protocol is to prevent harm being caused to individuals and public health through a sound management of water resources. The preventive nature of the Protocol is reflected in the principles and approaches laid down in article 4, as well as in the obligations providing for target setting, public participation and institutional and procedural safeguards at the domestic level. The concept underlying those provisions is that continued public action to keep under review and to improve water management is essential to preserve public health and that repressive measures - once damage has occurred - may be ineffective. Accordingly, **dispute avoidance and prevention** appears to be the essential element of an effective compliance review arrangement.

<u>The characteristic obligations of the Protocol</u>

31. Most of the obligations set out in the Protocol are obligations of prevention of a "due diligence" nature. In strict legal terms they are called "obligations of conduct" as opposed to "obligations of result". That is to say that a watercourse State will not automatically incur international responsibility for the sheer occurrence of significant harm as if the obligation of

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[21] See Committee on Economic, Social and Cultural Rights, *General Comment n. 15 (2002). The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, doc. E/C.12/2002/1, 26th November 2002. See also the background paper for the WHO, prepared by D. Shelton, *Human Rights, Health and Environmental Protection: Linkages in Law and Practice*, available on line at www.who.int/entity/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf

prevention was one of result, but only if the causing of the harm can be proved to have been caused by lack of due diligence concerning prevention[22].

32. Different standards of conduct – hence of due diligence - are required by the Protocol under its various provisions. In general, article 4, para. 1, requires the Parties to "take all appropriate measures to prevent, control and reduce water-related disease". Article 9 requires the Parties to "take steps" to enhance public awareness (para. 1), to "promote" understanding of public health aspects among those responsible for water policies and of principles of water management for those responsible for public health (para. 2), and to "encourage" research and information within the scope of application of the Protocol.

33. Further "obligations of conduct" are established under articles 6 and 7 requiring the Parties to establish, publish, review and assess targets and target dates on a list of items, in connection with the aim to provide access to drinking water and sanitation for everyone. At the same time, the Protocol does not establish any specific target to be reached in relation to the rather general objectives set out in the provisions in point (for example on water quality). Such targets are either to be determined by each Party individually, where possible, in accordance with international guidelines or "recognized good practices" (article 6, para. 2 lett. (a)(k)(m)), or to be developed through further international cooperation (article 12, para. 1 lett. (a)).

34. Eventually, the case can well be made that the proper functioning of a CRM would contribute to clarifying and specifying the contents of an important number of obligations under the Protocol with regard to the degree of the due diligence required.

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[22] As it was stressed by Professor Pisillo Mazzeschi "[…] many agreements contain a special clause, in which the States pledge themselves to take 'all appropriate measures' or to make 'appropriate efforts to control and reduce sources of pollution in the area or in the space concerned. This is to be done both by establishing technical and administrative procedures for informing other States in the event of pollution. It is clear that such agreements do not establish the the strict obligation not to pollute (obligation of result), but only the obligation to 'endeavour' under the due diligence rule to prevent, control and reduce pollution. For this reason the breach of such obligation involves responsibility for fault (*rectius*: for lack of due diligence)" (*Forms of International Responsibility for Environmental Harm, in* F. Francioni and T. Scovazzi (eds.), *supra* note 14, at 19. In Article 2 of the Draft-Resolution on the Pollution of Rivers and Lakes in International Law of the Institut de Droit International submitted in 1979 by the Special Rapporteur, Jean Salmon, it was stated that "[…] l'exercise d'un diligence raisonnable comporte l'obbligation de prendre toutes les mesures de vigilance requises […]" (58 AIDI-I (1979) at 358).

## PART II

## OPERATIONAL ASPECTS: DRAFTING A CRM UNDER THE PROTOCOL

### VI. Introduction

35. According to the UNECE guidelines, the rules establishing a CRM should address the following points: (a) objective(s); (b) size and composition of any committees established under such rules and other organizational issues; (c) their functions and mandate; (d) actors entitled to raise compliance issues in the procedure; (e) sources of information; (f) potential measures; and (g) procedural safeguards. [23]

36. In drafting a CRM under the Protocol, special attention should be paid to the language to be used with a view to reflecting the objective and the nature of the mechanism. For example, there will be no "complainant" or "complaining Party" but a "submitting Party", and the Party whose compliance with the Protocol is under consideration, will be defined as the "Party concerned".

### VII. Objectives

37. Provisions setting out the objectives and scope of the mechanism are usually included in the rules setting up CRMs, even if this has not been the case so far precisely within the UNECE context. However, it may be noted that the UNECE Guidelines on the topic suggest the inclusion of provisions of this kind in line with the prevalent conventional practice. It appears advisable for the Parties to consider adopting similar provisions, as they would provide guidance in the interpretation and application of the set of rules in point. [24]

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[23] Such points will be dealt with separately in the following paragraphs underling how the "non confrontational, non judicial and cooperative" nature of the CRM is reflected in each of them. Those points will integrated, where appropriate, with the element of public participation, as mandated by article 15.

[24] DRAFTING EXAMPLES:

KYOTO PROTOCOL CRM: I. OBJECTIVE - The objective of these procedures and mechanisms is to facilitate, promote and enforce compliance with the commitments under the Protocol.

CLIMATE CHANGE CRM: Objective - 2. The objective of the process is to resolve questions regarding the implementation of the Convention, by: (a) Providing advice on assistance to Parties to overcome difficulties encountered in their implementation of the Convention; (b) Promoting understanding of the Convention; (c) Preventing disputes from arising.

CATAGENA PROTOCOL CRM: *I. Objective, nature and underlying principles* 1. The objective of the compliance procedures and mechanisms shall be to promote compliance with the provisions of the Protocol, to address cases of non-compliance by Parties, and to provide advice or assistance, where appropriate. 2. The compliance procedures and mechanisms shall be simple, facilitative, non-adversarial and cooperative in nature. 3. The operation of the compliance procedures and mechanisms shall be guided by the principles of transparency, fairness, expedition, predictability, [and common but differentiated responsibilities] [and taken into account principle 7 of the Rio Declaration on Environment and Development, that States have common but differentiated responsibilities].

Proposed draft provisions:

**I. OBJECTIVE, NATURE AND PRINCIPLES**

1. The objective of these procedures and mechanisms is to facilitate and promote [and aim to secure] implementation of and compliance with the obligations under the Protocol [, with a view to preventing disputes from arising,] by:

(a) addressing cases of non-compliance by Parties, and

(b) providing advice or assistance to Parties, where appropriate.

2. The mechanism shall be simple, facilitative, non-adversarial and cooperative in nature and its operation shall be guided by the principles of transparency, fairness, expedition, and predictability.

3. The mechanism shall be conducted bearing in mind the interests of the Party facing difficulties, of the Parties as a whole and of populations potentially or actually affected by the adverse effect of non-compliance.

## VIII. Size and composition of the Compliance Review Committee and other organizational issues

38. As to the composition and organizational issues of Compliance Review bodies, against the background of the existing practice, the following aspects deserve special attention.

Number of members

39. The Committee should be composed of a reasonably limited number of members, to be elected by the MOP. The number of members of existing CRMs ranges from eight (Aarhus Convention and the UNECE Convention on Long-range Transboundary Air Pollution (LRTP)) to twenty (Kyoto Protocol to the Framework Convention on Climate Change) with intermediate solutions (ten (Montreal Protocol on Substances that Deplete the Ozone Layer), fifteen (Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Cartagena Protocol on Biosafety)). Having regard to the proportion between the number of the negotiating delegations, on the one hand, and of the components of the would be Compliance Review body, on the other, a number of **eight members** is proposed, in line with the composition of the existing ECE Compliance Review Committees of the LRTAP and the Aarhus Convention.

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BASEL CRM: *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.

Representatives of States Parties vs. independent members

40. A more delicate issue is whether the Committee should be composed of States representatives or members sitting in their personal capacity. This issue should not be confused with that concerning public participation, let alone the fact that even if it was decided that the Committee should be composed of members serving in their personal capacity, the latter would be designated and elected by the Governments. Existing practice in areas no less delicate than ours, such as human rights, shows that Committees composed of independent members selected at the governmental level on the basis of their expertise offer a high degree of reliability and impartiality. This matter has been left open in both the UNECE and UNEP Guidelines, [25] and it appears unsolved under the FCCC CRM and in the draft Cartagena CRM. The Geneva Strategy opts for representatives of the Parties to the parent Conventions (in our case it would be the Parties to the Protocol), [26] following the practice of early CRMs, such as the Montreal CRM and the LRTAP CRM. Under the Basel CRM, the text was left ambiguous on this point, in the absence of agreement on more defined formulas, simply providing that members "shall serve objectively and in the best interest of the Convention". Finally, the Kyoto CRM and the Aarhus CRM provide for members of the Committee serving in their personal capacity. [27] A mixed formula could also be considered.

41. Independent experts put forward by Governments seem to offer the basic requirements of a CRM under the Protocol, i.e. technical expertise and impartiality vis-à-vis the country whose compliance is under review. However, were the option of representatives of States Parties to prevail, the text should at least provide for the necessary arrangements to ensure continuity, motivation, impartiality and technical expertise in the composition of the Committee. Either way, it is submitted that public participation – somehow reflected in the composition of the

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25 See UNEP Guidelines para. 14(d) (i).

26 See Geneva Strategy, para. 19.

27 DRAFTING EXAMPLES

MONTREAL PROTOCOL CRM: 5. An Implementation Committee is hereby established. It shall consist of 10 Parties elected by the [M]eeting of the Parties […]

LRTAP CRM: *Structure* - 1. The Committee shall consist of eight Parties to the Convention […];

ÅARHUS CRM *I. STRUCTURE* – 1. The Committee shall consist of eight members, who shall serve in their personal capacity.

KYOTO PROTOCOL CRM: *II. COMPLIANCE COMMITTEE* – 3. The Committee shall consist of twenty members elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol […] 6. Members of the Committee and their alternates shall serve in their individual capacities. They shall have recognized competence relating to climate change and in relevant fields such as the scientific, technical, socio-economic or legal fields.

BASEL CRM: *Composition and tenure*: 5. Members of the Committee will serve objectively and in the best interest of the Convention […].

Committee, as discussed in the following section - would contribute to enhance the level of impartiality and technical expertise of the CR Committee. [28]

Public Participation

42. Public participation in the Committee could be ensured under two basic possible formulas:

One option would be that of granting observer status to NGOs. That is, without the right to vote. Considering the limited membership of the Committee, such a status should be recognized to a limited number of NGOs, possibly two. The NGOs having observer status in the Committee would be selected by the MOP among those enjoying observer status at the said meeting, taking into account the indications made by the latter.

A second option would be the one adopted under the Aarhus CRM (for 2 members out of 8). It affords NGOs the power to officially submit candidatures for the Committee's membership. Both such options are provided for, alternatively or cumulatively, in the present draft, in brackets.

Other issues

43. Other issues concerning the composition and organization of the Compliance Review Committee relate to: *qualifications and expertise of members*[29]*; nationality requirements* and *balance in composition*[30]**;** *term of office*; *re-election and substitution*; *election of officers and rules of procedure;* and *meetings.*

[28] In the negotiation of the Aarhus CRM, after having considered different alternatives and options, including the participation of two NGOs as full members of a Committee composed of Parties, an agreement was reached on the possibility for NGOs of presenting candidatures (see doc. CEP/WG.5/AC.1/2001/2 annex II. Pat 19-20)

[29] This issue is linked to the choice sub b. In any case, as in most CRMs, a provision providing for professional expertise shall be included. In the case of independent members, Parties can consider to include a provision on personal qualities (see Aarhus Convention).

[30] Some CRMs include provisions on balance based on specificities of the relevant instrument, for example Annex I Parties / Non-annex 1 Parties to the Kyoto CRM and exporting/importing Parties under the Basel CRM. No such issue arises under the Protocol.

Proposed draft provisions:

| **II. Structure** | |
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| **[Option 1: independent members]** | **[Option 2: Parties]** |
| 4. (a) The Committee shall consist of eight Members who shall serve in their personal capacity. | 4. (a) The Committee shall consist of eight Parties. |
| (b) The Committee shall be composed of nationals of the Parties to the Protocol, no two Members having the same nationality. | (b) Parties members of the Committee shall be elected by the Meeting of the Parties (MOP). |
| (c) The Members shall be persons of high moral character and have recognized expertise in the fields to which the Protocol relates, in areas including scientific, technical, socio-economic and/or legal experience. | (c) Member Parties shall ensure continuity and adequate qualification and skills in the workings of the Committee |
| (d) The members of the Committee shall be elected by the Meeting of the Parties (MOP), on candidatures proposed by the Parties [and NGOs]. | (d) In the election of the Committee, consideration should be given to the geographical distribution of membership, the principle of rotation and ability to fulfill requirements under lett. (c) |
| (e) In the election of the Committee, consideration should be given to the geographical distribution of membership and diversity of experience. | (e) At their first meeting, the Parties will elect four Members for a full term of office and four members for a half-term of office. Subsequently, the Meeting of the |

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|---|---|
| (f) At their first meeting, the Parties will elect four Members for a full term of office and four members for a half-term of office. Subsequently, the Meeting of the Parties shall elect for a full term new members to replace those whose term has expired. 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 to the Protocol […] shall appoint another member fulfilling the criteria in this chapter to serve for the remainder of the term, subject to the approval of the Committee. 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. Members shall not serve for more than two consecutive terms. | Parties shall elect for a full term new members to replace those whose term has expired. 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.<br><br>(f) At their first meeting, the Parties will elect four Members for a full term of office and four members for a half-term of office. Subsequently, the Meeting of the Parties shall elect for a full term new members to replace those whose term has expired. 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 to the Protocol […] shall appoint another member fulfilling the criteria in this chapter to serve for the remainder of the term, subject to the approval of the Committee. 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. Members shall not serve for more than two consecutive terms. |
| (g) [Candidates meeting the requirements of paragraph 4(c) shall be nominated by Parties, Signatories and non-governmental organizations enjoying observer status before the Meeting of the Parties]. | |

5. (This is an alternative for the provision in 4 (g) applicable to both option 1 and 2). [Two non-governmental organizations promoting the objectives of the Protocol and enjoying observer status before the MOP shall be entitled to participate in the meetings of the Committee as observers, with full rights except the right to vote. The MOP shall designate these two organizations at each ordinary meeting following the indications of NGOs enjoying observer status before it.]

6. The Committee shall elect its own Chairperson and Vice-Chairperson and approve its rules of procedure.

7. 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.

## IX. Mandate

44. When it comes to the functions of the Compliance Review Committee, existing and consistent practice shows that Compliance Review Committees are usually vested with a two-fold task. On the one hand, they exercise a general monitoring function on the basis of periodical reports submitted by States, further reporting to the Parties as a whole. On the other, Compliance Review Committees are given the power to consider submissions, referrals or communications, arising out of specific cases of non-compliance.

45. Some sets of rules establishing CRMs (outside the UNECE context) set out the mandate of Compliance Review bodies using language restating the non-confrontational nature of their functions. [31] Considering the above proposed draft provision on the objectives and nature of the CRM, such language would be redundant. It is therefore suggested to pass on directly to a provision setting out the functions of the Compliance Review Committee.

Proposed draft provisions:

**III. Functions of the Committee**

8. The Committee shall:

(a) Consider any submission, referral [or communication] relating to specific issues of compliance made in accordance with paragraphs xx to xx below;

(b) Prepare, at the request of the Meeting of the Parties, a report on compliance with or implementation of specific provisions of the Convention; and

(c) Monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article […] , paragraph […], of the Convention;

[and act pursuant to paragraphs 36 and 37.]

9. The Committee may examine compliance issues and make recommendations if and as appropriate.

[31] EXAMPLES:
CLIMATE CHANGE CRM : Mandate of the Committee - 6. The Committee shall, upon a request received in accordance with paragraph 5, consider questions regarding the implementation of the Convention in consultation with the Party or Parties concerned and, in light of the nature of the question, provide the appropriate assistance in relation to difficulties encountered in the course of implementation, by: (a) Clarifying and resolving questions; (b) Providing advice and recommendations on the procurement of technical and financial resources for the resolution of these difficulties; (c) Providing advice on the compilation and communication of information.

## X. Actors Entitled to have access to the Compliance Review Procedure

46. The determination of the subjects who have access to the Compliance Review procedure is an issue of special importance. It is generally taken that problems concerning the compliance of a Party can be signalled by that very Party with a view to seeking advice and assistance, as well as by other Parties, irrespective of whether they may be considered as "injured States" under the law of State responsibility.

It is also generally accepted that the secretariat of a given Convention may refer to the Committee issues of non-compliance of which it has become aware, particularly as to whether the reporting requirements have been met. Practice in this matter is consistent and the language proposed below is taken *mutatis mutandis* from other CRMs established within the UNECE context.

Proposed draft provisions:

### IV. SUBMISSIONS BY PARTIES

10. 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

11. 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.

**V. REFERRALS BY THE SECRETARIAT**

12. 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.

47. Less consistent is the existing practice on whether to include non-State actors among the subjects entitled to approach the Compliance Review Committee. Such an option was proposed and rejected under the Basel CRM, and is still in square brackets in the Draft Cartagena CRM.

To date, the only CRM granting non-State actors the possibility to raise compliance issues can be found in article 15 of the Aarhus Convention on compliance review, which explicitly envisages "the option of considering communications from the public". This provision has been implemented in the Aarhus CRM through a system of "communications from the public" from which Parties have a time-limited right to opt-out.

It may be noted that the possibility for the public to make submissions to the would be Compliance Review procedure under the Protocol has been considered by the "Geneva Strategy" which invites Parties to focus on "whether it is appropriate for the Compliance Review Committee to consider communications from the public". [32] The power to make submissions to a Compliance Review Committee should be distinguished from the right to trigger a confrontational procedure, i.e. the *locus standi* in an arbitration or judicial procedure. At the most, the corresponding obligation to the right of submission would be for the Compliance Review Committee to give consideration to the information submitted.

48. In light of the rationale of the Protocol and of its bearing on the rights of individuals within the domestic sphere of its Parties - no less than on inter-State relations – it appears that providing non-State actors with the power to set in motion the Compliance Review procedure would be of special importance in order to ensure the effectiveness of the overall Compliance Review system. Concerns about possible abuses of such procedural rights could be met by appropriate provisions – such as that proposed below in draft article VI, point 15 - concerning the admissibility of communications by non-State actors. Such provisions can be drawn from those well developed in the field of human rights, which is an area that touches upon the core of State sovereignty no less acutely than water management.

49. Another option would be to afford non-State actors the formal entitlement to submit information to the secretariat, complemented with the right to a written explanation of the

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[32] *Ibidem*, para. 23(a).

secretariat's reasons not to refer the issue to the Committee, were this to be the case. This formula, which might impinge significantly on the resources of the secretariat, could be considered by the Parties even though it has not been included at this stage among the proposed drafting options. These options are largely based on the negotiating experience under the Aarhus CRM. [33]

**VI. COMMUNICATIONS FROM THE PUBLIC**

13. On the expiry of twelve months from either the date of adoption of this decision or from the date of the entry into force of the Protocol with respect to a Party, whichever is the later, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Protocol ,

**[Option A: opt-out for an indefinite period – communications from the public]**

unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received and make it available to the public.

**[Option B: opt-out for a two or four years period - communications from the public]**

unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years[two years], the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received and make it available to the public. During the four-year [two years] period mentioned above, the Party may revoke its notification thereby accepting that, from that date, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Protocol.

**[Option C: opt-in irrevocable – communications from the public]**

provided that the Party concerned, when ratifying, accepting, approving or acceding to the Protocol, or at any time thereafter, has declared in writing to the Depositary that it accepts the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received and make it available to the public. A Party that has declared its acceptance of the consideration of communications from the public by the Committee [, and has not withdrawn its acceptance within two [four] years thereafter,] may not subsequently withdraw its acceptance without withdrawing from the Protocol.

[33] See *Report of the Working Group on Compliance and Rules of Procedure* (First meeting, Geneva, 12-16 February 2001) doc. CEP/WG.5/AC.1/2001/2, Annex II.

**[Option D: opt-in revocable – communications from the public]**

provided that the Party concerned, when ratifying, accepting, approving or acceding to the Protocol, or at any time thereafter, has declared in writing to the Depositary that it accepts the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received and make it available to the public. A Party that has declared its acceptance of the consideration of communications from the public by the Committee may subsequently modify or withdraw its declaration at anytime thereafter.

14. The communications referred to in paragraph 13 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.

15. The Committee shall consider any such communication unless it determines that the communication is:

(a) Anonymous;

(b) An abuse of the right to make such communications;

(c) Manifestly unreasonable;

(d) Incompatible with the provisions of this decision or with the Protocol.

16. 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.

17. Subject to the provisions of paragraph 15, the Committee shall as soon as possible bring any communications submitted to it under paragraph 1 to the attention of the Party alleged to be in non-compliance.

18. 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 it may have made.

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

## XI. information gathering

50. Closely linked to the last point, i.e. communications from the public, the ability of the Committee to gather full information on factual, scientific, administrative and legal issues concerning problems of compliance is a precondition for the effectiveness of its action. Therefore, it seems that the Committee should be entitled to request information from the

broadest range of subjects, including Parties, the secretariat, intergovernmental and non-governmental bodies and experts.

51. Two drafting approaches have emerged from the existing practice. One consists of a very general provision vesting the Committee with broad powers and wide discretion in the matter. A second approach consists of spelling out exhaustively the specific sources of information that may be resorted to by the Committee.

In some cases the information gathering from the Parties directly concerned has not been left to the complete discretion of the Committee. With specific regard to the possibility for the Committee to conduct a fact-finding mission on the territory of Parties, it has often been made subject to the consent of the Party concerned. [34]

52. The suggested provision below amounts to a merger of the two approaches described above. On the one hand, it leaves the Committee with a broad discretion in the determination as to the possible sources of information and as to whether information submitted should be considered. On the other, an indicative list of possible sources is attached to the provision. This list includes the submitting Party/Parties and the author of a communication. In the present text, the right to have the information considered is not envisaged. However, this point will be addressed in connection with the provisions on "guarantees" for the Parties.

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**34** DRAFTING EXAMPLES

LRTAP CRM: Information gathering 6.To assist the performance of its functions under paragraph 3 above, the Committee may: (a) Request further information on matters under its consideration, through the secretariat; (b) Undertake, at the invitation of the Party concerned, information gathering in the territory of that Party; (c) Consider any information forwarded by the Secretariat concerning compliance with the protocol.

ÅARHUS CRM VII. INFORMATION GATHERING 12.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.

KYOTO PROTOCOL CRM: VIII. GENERAL PROCEDURES 3. Each branch shall base its deliberations on any relevant information provided by: (a) Reports of the expert review teams under Article 8 of the Protocol; (b) The Party concerned; (c) The Party that has submitted a question of implementation with respect to another Party; (d) Reports of the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Protocol, and the subsidiary bodies under the Convention and the Protocol; and (e) The other branch.4. Competent intergovernmental and non-governmental organizations may submit relevant factual and technical information to the relevant branch.5. Each branch may seek expert advice.

DRAFT CARTAGENA CRM: *V. Information and consultation* 1. The Committee shall consider relevant information from: (a) The Party concerned; (b) [The Party that has made a submission with respect to another Party.]2. The Committee may seek or receive and consider relevant information, including from: (a) The Biosafety Clearing-House [and other bodies of the Convention on Biological Diversity and the Protocol]; (b) [Non-governmental organizations, the private sector and other civil-society organizations and relevant intergovernmental organizations;] (c) [The Secretariat.] 3. The Committee may seek expert advice from the biosafety roster of experts.

BASEL CRM: *Composition and tenure*: 5. Members of the Committee will serve objectively and in the best interest of the Convention […].

Proposed draft provisions:

**VII. INFORMATION GATHERING**

20. In order to perform its functions, the Committee may:

(a) Request further information on matters under its consideration including to Parties involved, the secretariat, Intergovernmental bodies, non-governmental organizations, the private sector and other civil society organizations;

(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, including from Parties involved, the secretariat, intergovernmental bodies, non-governmental organization, the private sector and other civil society organizations; and

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

21. Information referred to in letters (a), (b) and (c) of the precedent paragraph may come from any relevant source, including Parties involved, the secretariat, intergovernmental bodies, non-governmental organization, the private sector and other civil society organizations

## XII. Procedural safeguards

53. In the present section, two separate issues are addressed: (a) transparency and confidentiality in the proceedings; and (b) the rights of the actors involved in the procedure (Parties or members of the public).

As to the first issue, according to the principle of public participation the working of the Committee should follow the principle of transparency, however, a safeguard provision for confidential information is provided for. Since the provisions of the Protocol on public participation/confidentiality reproduce *verbatim* the Aarhus Convention, the draft provision suggested below on confidentiality takes the Aarhus CRM as a model on this point.

Proposed draft provisions:

**VIII. CONFIDENTIALITY**

22. Save as otherwise provided for in this chapter, no information held by the Committee shall be kept confidential.

23. The Committee and any person involved in its work shall ensure the confidentiality of any information that falls within the scope of the exceptions provided for in article 10 paragraphs 3 (c) and 4, of the Protocol and that has been provided in confidence.

24. 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 10 above.

25. 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.

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

27. Committee reports shall not contain any information that the Committee must keep confidential under paragraphs 23 to 25 above. Information that the Committee must keep confidential under paragraph 23 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 that it has received in confidence.

54. As to the second issue, i.e. the rights of the actors involved in the procedure (Parties or members of the public), given the cooperative and non-confrontational nature of CRMs, it is widely accepted that the State Party concerned has the right to full participation in the Committee's proceedings, with the exclusion from the actual adoption and drafting of the findings of the Committee. On the other hand, the submitting Party or the member of the public filing a communication are usually barred from participating in the meetings of the Committee. This preclusion is aimed at avoiding any confrontational and adversarial slant in the procedure. An exception to this approach is found in the Aarhus CRM, which entitles the submitting Party or the author of a communication to participate in the procedure on an equal footing as the Party concerned. This formula has attracted some criticisms precisely because of its potential negative impact on the non-confrontational nature of the mechanism.

55. The present draft suggests that the submitting Parties and the authors of communications are provided with minimum guarantees that their submissions are given consideration and their interests protected through written proceedings. It is also suggested that the Committee would be vested with the power to request or consider unsolicited information, when it deems it appropriate. At the same time, the right for the submitting Party or the author of a communication to participate in the proceedings may deserve special consideration, were the Committee to be composed exclusively of State representatives.

56. In line with the Aarhus CRM, an interim review phase is suggested, in which a draft report is transmitted for comments to the Party concerned, as well as to the submitting Party or to the author of a communication.

Proposed draft provisions:

**IX. ENTITLEMENT TO PARTICIPATE**

28. A Party in respect of which a submission, referral or communication is made or which makes a submission [and which is not a member of the Committee], [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.

29. The Party concerned [, the submitting Party][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.

30. The Committee shall send a copy of its draft findings, draft measures and any draft recommendations to the Party concerned, the submitting Party 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.

## XIII. Outcome of the Compliance Review Procedure

57. The outcome of the Compliance Review procedure carried out by the Compliance Review Committee usually consists of a report. It contains recommendations – which are non-binding by definition - concerning general or specific issues of non-compliance. Such recommendations are addressed to the Parties as a whole that have the power to take the final decision on the adoption of the report and on the appropriate take measures in order to tackle the problems of compliance indicated therein.

Proposed draft provisions:

**XI. Committee reports to the Meeting of the Parties**

31. 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. If all efforts to reach consensus have been exhausted and no agreement has been reached, any decision shall be taken by a two-third majority of the members present and voting or by five members, whichever is the greater. [Committee reports shall be available to the public].

58. As to the adoption of the measures addressing the problems of compliance singled out in the report, two points – closely intertwined - may prove controversial. The first point is whether the Committee should be allowed to directly take measures vis-à-vis the Party concerned, at least of a non-binding and non-confrontational nature with a view to enhancing compliance through cooperation. A provision in the affirmative could be envisaged, exclusively while pending decision to be taken by the MOP. The second point is whether the Meeting of the Parties should be entitled to take, facilitative and or mandatory measures, some kind of enforcement action.

59. As to the first point, it may be recalled that in the early CRMs Compliance Review Committees were entitled to address only the Parties as a whole, while recent CRMs also vest the Compliance Review Committees with the power to enter into consultation with the Party concerned, providing it with recommendations and advice on implementation. In particular, Compliance Review Committees have been vested with the power to set out action plans for compliance, as well as specific systems for review.[35] On that score, the Basel CRM and the Draft Cartagena CRM, on the one hand, and the Aarhus CRM, on the other, provide two different models. Under the Aarhus Convention, the Compliance Review Committee has the *interim* power to take non-confrontational measures within the competence of the Meeting of the Parties pending consideration of the same issue by the latter, with the consent of the Party concerned. Under the Basel and Draft Cartagena CRMs, the Compliance Review Committees have the power to conduct a "facilitation procedure" on their own, while only in exceptional cases further action is recommended to, and adopted by, the Parties as a whole.

60. As to the second point - i.e. the kind of measures to be taken - recent CRMs, building on the Montreal precedent, provide for a list of possible measures that may be taken by the respective Compliance Review Committees or Meeting of the Parties. Such list includes, besides provisions on assistance, stronger forms of action, such as the issuance of cautions and the suspension of rights and privileges.

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[35] See BASEL CRM, para. 19, Aarhus CRM, para. 36, Draft Cartagena CRM, chapter VI.

61. As to the Protocol on Water and Health it seems consistent with its objective and purpose to afford the Committee with the power to address its recommendations and advice directly to the Party concerned. This appears all the more appropriate and practical since ordinary MOPs are scheduled to take place once every three years. Two options are drafted along the lines of the two models indicated above. It is submitted that, in view of the specific features of our Protocol, the Aarhus CRM provision requiring the consent of the Party to certain measures risks to undermine the effectiveness of the mechanism.

62. As to the kind of measures envisaged, the list ranges from the finding of non-compliance to forms of pressure inducing full compliance. Such measures may be necessary in extreme situations, such as in cases of lack of cooperation by the Party concerned. However, such a formula has been left in square brackets.

Proposed draft provisions:

| **Alternative one – measures** | **Alternative two - measures** |
|---|---|
| **XI. MEASURES TO PROMOTE COMPLIANCE AND ADDRESS CASES OF NON-COMPLIANCE** | **XI. CONSIDERATION BY THE COMPLIANCE COMMITTEE** |
| 31.The Committee may take one or more of the following measures with a view to promoting compliance and addressing cases of non-compliance: | **Option one**<br>31. Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Compliance Committee may: |
| (a) Provide advice and facilitate assistance to individual Parties regarding the compliance with and implementation of the Protocol, as appropriate; | (a) In consultation with the Party concerned, take the measures listed in paragraph 32 (a);<br>(b) Subject to agreement with the Party concerned, take the measures listed in paragraph 32 (b), (c) and (d). |
| (b) Make recommendations to the Meeting of the Parties regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures; | |

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| (c) Request or assist, as appropriate, the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a timeframe to be agreed upon between the Committee and the Party concerned, [taking into account its existing capacity to comply]; | **Option two**<br>31. 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 32 (a); (b), (c) and (d). |
| (d) Invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Protocol; and | |
| (e) [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.] | **XII. CONSIDERATION BY THE MEETING OF THE PARTIES** |
| 32. 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 Convention. 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: | 32.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 Convention. 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) Recommend financial and technical assistance, technology transfer, training and other capacity-building measures; | (a) Provide advice and facilitate assistance to individual Parties regarding the compliance with and implementation of the Protocol, as appropriate [and particularly through financial and technical assistance, technology transfer, training and other capacity-building measures]; |
| (b) [Issue cautions] | |
| (f) [Issue declarations of non-compliance] | |
| (d) [Give special publicity to cases of non-compliance; or] | |

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| (e) [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 Convention;].] | (b) Request or assist, as appropriate, the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a timeframe to be agreed upon between the Committee and the Party concerned, [taking into account its existing capacity to comply]; and |
| (f) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate. | (c) Invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Protocol. |
| | (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 cautions] |
| | (f) [Issue declarations of non-compliance] |
| | (g) [Give special publicity to cases of non-compliance; or] |
| | (h) [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 Convention;].] |
| | (i) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate. |

## XIV. Issues of Coordination

63. The establishment of a CRM under a conventional system has been considered to pose problems of coordination with the dispute settlement provision in the legal instrument concerned, i.e. under article 20 of the Protocol. The issue has generated quite a debate in legal literature, [36] while it appears to have been settled with consistency in CRMs' practice. The proposed draft provision reflects such practice.

Proposed draft provisions:

> **XIV. RELATIONSHIP BETWEEN SETTLEMENT OF DISPUTES AND THE COMPLIANCE PROCEDURE**
>
> 35. The present compliance procedure shall be without prejudice to article 20 of the Protocol on the settlement of disputes.

64. In the first place, the above provision avoids the interpretation that the existence of a CRM would require its exhaustion as a precondition for the admissibility of an international claim invoking the international responsibility for breach of the Protocol by the non-complying State. Furthermore, problems of coordination have arisen on different counts since the multiplication of CRMs under MEAs, within and outside the UNECE framework, which have led to overlaps between obligations arising from different treaty systems bearing directly or indirectly on related subject-matters[37]. That is to say that the same conduct or omission may entail at one and the same time a case of non-compliance with different treaties, hence falling within the scope of different MEAs. So called *compatibility provisions* are therefore needed.

65. The only CRM containing a compatibility provision addressing the problem described above is to be found in the Aarhus CRM. According to the latter, the Parties as a whole may request the Committee to establish contact with other relevant bodies outside the system of the Convention. A similar provision could be complemented with the permanent involvement of a permanent body, or of the secretariat of the Protocol, which would serve also under different but related instruments. Accordingly, such a permanent body, or the secretariat, when notified by the Committee of issues of non-compliance under another MEA, could be placed in the position of initiating Compliance Review procedures under a different mechanism (the one which provides for more effective assistance measures) or submit such problems to the secretariat of the relevant MEA.

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[36] See references, *supra* note 19.

[37] An egregious example is the overlap between the Public Participation provisions of the Protocol and obligations under the Aarhus Convention.

66. In consideration of the non-judicial nature of the Compliance Review mechanism, *lis pendens* provisions do not seem required. It seems more advisable to leave to the Committee's evaluation – on a case-by-case basis - whether it is appropriate in any given case to take compatibility action - such as termination or suspension of proceedings - when the same compliance issue is under review by another international CRM.

Proposed draft provisions:

**XV. ENHANCEMENT OF SYNERGIES**

36. In order to enhance synergies between this compliance procedure and compliance procedures 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.

[37. If during its activity the Committee becomes aware of possible compliance issues under another international environmental agreement [concluded in the UNECE framework] applicable to the Party concerned and falling within the competence of an international mechanism of compliance review, it may transmit the relevant information to the secretariat of the Protocol.]

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