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Conference of the Parties to the Convention on the Transboundary Effects of Industrial Accidents

Working Group on the Development of the Convention

Fourth meeting
Geneva, 28 and 29 April 2014
Item 3 of the provisional agenda

Amendment of the Convention

Background paper on possible amendments to the Convention

Note by the secretariat

Summary

At its seventh meeting (Stockholm, 14–16 November 2012), the Conference of the Parties to the Convention on the Transboundary Effects of Industrial Accidents requested the Working Group on the Development of the Convention to evaluate the possible amendment of the Convention to address a number of other provisions and issues (ECE/CP.TEIA/24, para. 66). It was anticipated that the Conference of the Parties would then prioritize issues at its eighth meeting, in autumn 2014, with a view to adopting the amendment at its ninth meeting in autumn 2016.

The present background paper provides the Working Group with the necessary information as requested by the Conference of the Parties (ibid, para. 67 (a)) and the third meeting of the Working Group on Development (Geneva, 3–4 September 2013).

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I. Introduction

1. Following the decision of the Conference of the Parties to the Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) at its seventh session (ECE/CP.TEIA/24, para. 67 (a)), the Convention secretariat prepared a background paper for submission to the third meeting of the Working Group on the Development of the Convention (WGD).

2. At its third meeting, the WGD agreed to submit to its next meeting a revised version of the background paper on possible amendments to the Convention as an informal document for further discussion.

3. The present paper contains the text on possible amendments which was already included in the last version of this paper at the last meeting of the WGD, as well as the summary of key messages emerging from the discussion for each of the possible amendments, compiled by the secretariat with inputs from the small group, tasked with the evaluation of the possible amendments. At the request of the third meeting, the annex of the current document contains additional information on possible amendments, compiled by a consultant to the secretariat.

II. Evaluation of possible amendments to the Convention

5. The following items describe possible amendments to the Convention, their purpose and implications in terms of implementation.

A. Revised and additional definitions (art. 1)

6. In the light of the practical application of the Convention, and in view of the definitions included in other United Nations Economic Commission for Europe (ECE) multilateral environmental agreements (MEAs) and EU legislation, a number of definitions could be amended or added. These changes may require amendments to national legislation, but not in all cases (e.g., the definition of the public could be aligned with a more widely used definition). These changes should not entail any costs besides those of enacting an amendment to the Convention to address these amended or added provisions, and such amendments should lead to greater legal certainty for authorities, operators and the public.

7. The definition of “the public” in article 1 (j) could be revised to align it with the definitions used, following the definition used in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in other MEAs (e.g., the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) also envisages introducing the same definition in its text) and in all relevant EU law, as follows: at the end of article 1 (j), after “persons” insert “and, in accordance with national legislation or practice, their associations, organizations or groups”.

Key points emerging from the WGD-3 discussion:

- Definitions should only be added if additional clarity is needed. Therefore, a change in terminology could be considered regarding "notification of hazardous activities" and "notification of industrial accidents", as in the past this had led to some confusion among countries.
- It would be good if a definition of 'public' could be developed in order to make it consistent with the definitions in other UNECE MEAs. Also the current definition of 'public' refers only to natural or legal persons but not to the associations and groups (NGOs) which should be added.

B. Revised scope (art. 2)

8. In the context of the work of the Joint Ad Hoc Expert Group on Water and Industrial Accidents under the Industrial Accidents and Water Conventions, Parties to the Convention have expressed their desire to apply the principles of the Industrial Accidents Convention to tailings management facilities and/or to pipelines. There is recognition by some States that legal instruments are needed in these areas, with substantial safety benefits. Members of the Working Group differ, however, on whether to include pipelines within the scope of the Convention; therefore two options are proposed (para. 11 below).

9. It is the understanding of many Parties that the Convention already applies to tailings management facilities. The revision of the scope to make this explicit should not entail any costs besides those of enacting a wider-ranging amendment, and should lead to greater legal certainty for authorities, operators and the public.

10. With respect to pipelines, examples of costs entailed might include, depending on the legal regime decided upon:

(a) For authorities:

(i) Drawing up and implementing external emergency plans with measures to be taken in the vicinity of pipelines;

(ii) Setting up of a system of inspections or other control measures to ensure that pipeline operators meet requirements;

(iii) Ensuring that external and internal emergency plans are reviewed, tested and, where necessary, revised and updated at suitable intervals;

(iv) Providing the appropriate regulatory framework needed to control activities carried out by third parties in the vicinity of pipelines, including ensuring awareness of their responsibilities;

(v) Keeping an up-to-date record of the geographic position of pipelines;

(vi) Establishing a system for identifying the pipelines in the scope of the Convention (art. 4) and defining the framework for the demonstration of their safe performance (art. 6, para. 2, and annex V);

(b) For operators:

(i) Designing, constructing and operating pipelines that meet, at a minimum, the recognized national and international codes, standards and

guidelines and, where appropriate, internationally accepted company specifications;

(ii) Giving consideration to various aspects that could affect the safety of a pipeline, such as design and stress factors, quality of materials, wall thickness, depth of burial, external impact protection, corrosion, markings, route selection and monitoring;

(iii) Undertaking hazard/risk assessments for the purpose of article 4, as well as article 6, paragraph 2, and annex V, in order to choose among different options and to assess unusual circumstances;

(iv) Drawing up and properly implementing a document establishing a pipeline management system;

(v) Drawing up and implementing internal emergency plans and reviewing, testing, revising and updating them at suitable intervals.

11. The scope in article 2 might be revised to include tailings management facilities and/or pipelines, as follows:

(a) *Option A*: In article 2, paragraph 2 (c), after "with the exception of" insert "tailings management facilities that are classified as hazardous activities and" and, at the end of paragraph 2 (d), insert "(iii) pipelines;";

(b) *Option B*: In article 2, paragraph 2 (c), after "with the exception of" insert "tailings management facilities that are classified as hazardous activities and".

Key points emerging from the WGD-3 discussion:

- Regarding the question on whether to include TMFs into the scope of the Convention, one country was of the opinion that they were already covered through the Convention (according to the substances). It was therefore suggested that TMFs should be explicitly included under article 2.
- There was no agreement regarding the inclusion of pipelines within the scope of the Convention as in some cases, existing national legislation covers the issue;
- Possibly rewrite Art. 2, para 2 (a) into "This Convention shall not apply to: (a) the prevention of, preparedness for and response to nuclear accidents or radiological emergencies".
- Possibly remove the reference to transboundary aspects from the scope of the Convention, however, there was uncertainty about whether this would be in line with the COP-7 mandate.

C. Provisions on land-use planning (art. 7)

12. The November 2010 joint seminar on land-use planning around hazardous industrial sites, held under the Convention and the ECE Committee on Housing and Land Management, highlighted the need to address industrial safety in land-use planning. This need has been addressed in the Seveso III Directive (art. 13 and, to a lesser degree, art. 14). Parties might consider taking a similar approach under the Convention, noting that EU member States evaluated such changes as worthwhile.

13. It is recommended that a legal expert on land-use planning be contracted to ensure consistency between the Industrial Accidents Convention and related international instruments — for example, the ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (Protocol on SEA). An approach that might be employed would be to insert new paragraphs to article 7 of the Convention, along the following lines:

> 2. Parties shall ensure that their land-use or other relevant policies and the procedures for implementing those policies take account of the need, in the long term:
>
> (a) To maintain appropriate safety distances between hazardous activities and residential areas, buildings and areas of public use, recreational areas and, as far as possible, major transport routes;
>
> (b) To protect areas of particular natural sensitivity or interest in the vicinity of hazardous activities, where appropriate through adequate safety distances or other relevant measures;
>
> (c) In the case of existing hazardous activities, to take additional technical measures in accordance with article 3, paragraph 3, so as not to increase the risks to human health and the environment.
>
> 3. Parties shall ensure that all competent authorities and planning authorities responsible for decisions in this area set up appropriate consultation procedures to facilitate implementation of the policies established under paragraph 1 of this article. The procedures shall be designed to ensure that operators provide sufficient information on the risks arising from the hazardous activity and that technical advice on those risks is available, either on a case-by-case or on a generic basis, when decisions are taken.

Key points emerging from the WGD-3 discussion:

- The consultant to the secretariat delivered a presentation, in which he analysed the current text of the Convention with regard to land-use planning issues. Some points emerging from the discussion were the following:
  - The current Convention text on public participation is limited to specific projects (siting of specific activities) referring in this context to "policies" which is rather vague notion. The Aarhus Convention and the Espoo Convention and its SEA Protocol, as well as the Seveso III Directive differentiate between individual activities and general land use plans and programmes. This approach could also be applied to the Convention, by establishing separate provisions to address these two issues in a way that would provide clear links between art. 7 (LUP) and other provisions of the Convention, in particular provisions on public participation in art. 9
  - The background paper proposes adding 2 paras on general policies, which are modelled after some of the provisions of the Seveso 3 directive. The consultant suggested some further changes with the aim to capture general land-use plans and programs to assure consistency with Espoo Convention and its SEA Protocol and Aarhus Convention. To achieve this some further changes could be introduced based on the wording

from respective provisions of the Seveso III directive.

- The meeting, wanting to limit the number of amendments, asked whether it would be possible to just refer to the Aarhus Convention instead of including those provisions into the text of the Convention. This, although theoretically it would work for countries that are Parties to both Conventions, would not be the legal technique used in international law, as both are separate treaties and there is no legal requirement to be Party to both treaties. Bearing this in mind the consultant offered to prepare a more detailed proposal for amending article 7 of the Convention including alternatives involving less and more elaborated amendments.

D. Strengthened public participation (art. 9)

14. Most Parties to the Industrial Accidents Convention are also Party to the ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The latter treaty's obligations to supply information to the public and to allow public participation in decision-making relating to the transboundary effects of industrial accidents might also be reflected in the Industrial Accidents Convention. A similar approach has been taken with the Seveso III Directive (arts. 13 and 14).

15. Strengthened rights for the public, in terms of information, public participation in decision-making and access to justice, in line with Aarhus Convention, require policy decisions and more complex development of legal texts. The EU member States evaluated such changes as worthwhile when amending the Seveso Directive. The following amendment to annex VIII, on information to the public pursuant to article 9, paragraph 1, could be employed:

(a) At the end of paragraph 3, insert "in simple terms";

(b) At the end of paragraph 5, insert ", and control measures to address the industrial accident";

(c) At the end of paragraph 9, insert ". This should include advice to cooperate with any instructions or requests from the emergency services at the time of an accident".

16. In addition, to provide for more comprehensive public participation in relevant decision-making, further amendments would be necessary. It is recommended that a legal expert on public participation be contracted to ensure the consistency of the Industrial Accidents Convention with the Aarhus and Espoo Conventions, the Protocol on SEA and other relevant legislation, if applicable.

Key points emerging from the WGD-3 discussion:

- The consultant to the secretariat, made a presentation, in which he analysed the current text of the Industrial Accidents Convention in respect of Access to Information, Public Participation in Decision Making as well as Access to Justice. Based on the analysis he suggested the following:
- Art 9, para 1 – Access to information:
    - Currently the focus of the Convention is on the substance of the information, but there are no details on how to inform the public (e.g. in electronic form) or when to inform the public

(deadlines). Therefore, this could be added, as well as a statement that information in Annex 8 is not confidential but publicly available.

- Art 9, para 2 – Public Participation
  - The current text is rather unclear from legal point of view (e.g. use of "shall" which is binding together with "whenever possible and appropriate" which is much softer). Those issues could be addressed.
  - Following the requirements of the Aarhus Convention and the approach taken by the Seveso III directive, e contingency plans could also be subject to public participation.
  - Details of procedures could be included: whom to inform, how to inform, what should be the content of the notification, requirement to allow for reasonable timeframes, possibility to inspect all relevant information as well as to submit views and concerns, requirement to inform the public of the decision and possibility to look at the content and statement of reasons (all of this already is included in Seveso III Directive).
- Art 9, para 3 – Access to Justice
  - Currently the issue of access to justice is addressed in the Convention in rather limited way by invoking the principle of non-discrimination only "on a reciprocal basis". However, under the Aarhus Convention the public should be treated exactly the same way regardless of citizenship, domicile, nationality, etc. (non-discrimination instead of reciprocity should be applied).
  - Currently the Convention refers to rights only, it could however refer to rights and interests (like in Aarhus Convention). In addition, the way it is drafted at the moment, it suggests that it would not only cover administrative decisions but also legal actions related to compensation. It might be better to make no reference to civil liability issues.
- It could be useful to split the above paragraphs into three separate articles (currently there is only 1 article) or to introduce an additional annex with the details.
- Other issues through which public participation could be strengthened in the Convention: The preamble refers currently only to the Espoo Convention, not to the Aarhus Convention or SEA Protocol (as they did not exist at that time). It would be a nice gesture for the MEAs to refer to each other. The same applies to Art 4, para 4, which could also be linked to the SEA Protocol.
  - The meeting also discussed the fact that public participation is currently only open to specific projects rather than plans and programmes. The implications of this opening-up should therefore be evaluated before taking possible further steps.
  - The meeting was also questioned the benefit of the inclusion of stronger provisions on public participation as the majority of countries are also parties to both the Aarhus and Industrial Accidents Conventions. The consultant to the secretariat

explained that some of the provisions would not replicate those that are in the Aarhus Convention (e.g. the statement that certain information should never be confidential). Also under the Aarhus Convention, there is a legal provision that the authorities on the other side of the border have to cooperate with a country (which means that there is no legal competence to cross the border to inform other countries). This provision however could be useful and included in the Convention.

E. Revised scope of mutual assistance (art. 12)

17. The provisions on mutual assistance set out in article 12 and annex X might be considered of value for the provision of assistance even when no transboundary effect is possible; delays in deploying assistance sometimes occur pending resolution of issues such as conditions for entry, transit and liability, as covered by annex X. The provisions might even be considered of value in the event of other environmental or humanitarian emergencies, besides industrial accidents, where rapid agreement is also needed for the deployment of assistance.

Key points emerging from the WGD-3 discussion:

- There were no comments on this issue during the meeting, however, some members of the small group supporting the WGD, were of the opinion that the proposed changes would weaken the implementation of the legal text, since in the current wording of the Convention of the definition of industrial accident in Art. 1, does not imply a transboundary effect (the transboundary aspect is built into the definition of 'hazardous activity'). It was therefore suggested that no changes would be required.

F. Clarified frequency of meetings (art. 18, para. 1)

18. The Conference of the Parties has met every two years, whereas the Convention requires annual meetings, which Parties have considered unnecessary and onerous. The relevant provision could be amended in line with the Convention's Protocol, which allows the governing body to decide when to meet, or to reflect the current practice. The current practice of meeting every two years might, however, be revised by the Conference of the Parties, so the current practice might not form a suitable basis for the amendment. This change should not entail any costs besides those of enacting a wider-ranging amendment. The following amendments could be employed:

(a) Article 18, paragraph 1, replace "at least once a year" by "at dates to be determined by the Conference of the Parties";

(b) Article 26, paragraph 2, delete "annual".

Key points emerging from the WGD-3 discussion:

- There is general agreement on this proposed amendment.

G. Clarified or strengthened reporting obligations (art. 23)

19. Most Parties respect their obligations under article 23, but the obligation to report could be made clearer. Most Parties have obligations under the Aarhus Convention or related EU legislation to provide access to environmental information; these obligations, in the field of the transboundary effects of industrial accidents, might in part be satisfied by an explicit requirement in the Industrial Accidents Convention.

20. These changes should not entail any costs besides those of enacting a wider-ranging amendment and should lead to greater legal certainty and better governance. The following amendment could be employed:

(a) *Option A*: In article 23, after "Convention" insert ", at intervals and in a format determined by the Conference of the Parties" and, at the end of the article, insert a sentence reading "Reports on implementation shall be made available to the public, subject to the requirements of article 22";

(b) *Option B*: In article 23, at the end of the article, insert a sentence reading "Reports on implementation shall be made available to the public, subject to the requirements of article 22."

21. The Conference of the Parties also requested the Working Group on Development to consider possible remedies for non-compliance with the reporting requirements. It is clear that there is an obligation to report and that a failure to report in the specified interval would constitute non-compliance. As to the remedies for non-compliance, these would best be addressed within an overall compliance mechanism (see next section), rather than linking them to one particular provision. This has been the approach taken under many other MEAs.

22. The Conference of the Parties at its first meeting decided that reporting past industrial accidents with transboundary effects would be mandatory for all Parties to the Convention. At the same time, a structure for the report profile was agreed (ECE/CP.TEIA/2, annex V, appendix III). This requirement might be integrated into the text of the Convention, with or without a detailed specification of the reporting. This could be done by inserting a new article after article 12, as follows:

Article 12 *bis*

Reporting industrial accidents

The Party of origin shall report on industrial accidents with transboundary effects within a reasonable time frame, subject to the requirements of article 22. The Conference of the Parties shall establish the necessary arrangements for reporting and for the sharing of lessons learned.

Key points emerging from the WGD-3 discussion:

- What information could be made public, e.g. the national implementation reports.
- This item may not require an amendment of the Convention

H. Provisions on the review of compliance (art. 23)

23. Unlike some other ECE MEAs, the Convention lacks a compliance procedure to review and bring about compliance with its provisions. The introduction of a compliance

mechanism should not entail any costs domestically besides those of enacting a wider-ranging amendment. However, there are some costs associated with the operation of a compliance procedure at the international level, though such changes have been evaluated as worthwhile under the other ECE agreements, most recently for the Water Convention (November 2012). Article 23 could be amended to this purpose, by inserting new paragraphs at the end reading:

> 2. Parties shall review their compliance with the provisions of this Convention on the basis of, but not limited to, the reports referred to in paragraph 1 of this article. The Conference of the Parties [at their … meeting] shall establish multilateral arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance. These arrangements shall allow for appropriate public involvement.
>
> 3. The compliance procedure shall be available for application to any protocol adopted under this Convention.

Key points emerging from the WGD-3 discussion:

- A representative from the UNECE Water Convention Secretariat delivered a brief presentation on how compliance mechanism is intended to function within the Water Convention.
- National implementation reports provide a general indication of a country's compliance status vis a vis the provisions of the Convention, of some of the problems they face as well as possible corrective actions which could be taken to support the country to revert back to compliance.
- Perhaps the mandate of the WGI could be reviewed to include compliance, without the need to amend the text of the Convention. This could be achieved by receiving guidance from the COP regarding the revision of the TORs for the WGI.
- There is no expression from the COP regarding the need to establish a compliance mechanism
- Article 23 and/ or Article 18 of the Convention could be revised to address implementation and compliance.
- Involvement from the public in compliance could be explored.
- There is a need to determine what actions should be taken if a country is repeatedly found to be in a non-compliance situation.
- It would be good to highlight compliance-related elements within the text of the Convention. It would be beneficial to have compliance-related discussions with other MEAs, for harmonization purposes.

I. Derogation (art. 26)

24. The Bureau, at its January 2013 meeting, suggested that the Working Group also consider the possible need for a derogation provision in the Convention. This suggestion was made in the light of an EU ad hoc expert meeting, held on 1 February 2013, in view of developing methodology to allow a timely and consistent implementation of article 4 of the Seveso III Directive, with regard to the assessment of potential requests to exclude a particular dangerous substance from the scope of the Directive (derogation).

25. A similar derogation mechanism to that set out in article 4 of the Seveso III Directive might be achieved through additions to article 26 of the Convention, possibly supported by a new annex providing the details. An alternative might be for the Conference of the Parties to adopt guidance on derogation and then to rely on the existing wording of annex I. The European Commission could be invited to advise on the costs and benefits of the EU approach. However, the members of the Working Group think that at this stage of the implementation of both the Convention and the Seveso III Directive it is too early to propose such an amendment.

Key points emerging from the WGD-3 discussion:

- This provision, if included, should be used very restrictively. It might also be quite likely that it will not be
- The EU only recently introduced such a clause but there is currently no agreed mechanism on how the decision on the exclusion of a substance will be implemented in practice.
- Information on chemicals, such as results of studies could be made available to non-EU countries.
- If there is a general practice which is not in line with the law, the law should be adjusted to align with the practice.
- It was agreed that it was too early to discuss this issue.

J. Accession by other Member States of the United Nations (art. 29)

26. In the preamble to the Convention, Parties take into account the fact that the effects of industrial accidents may make themselves felt across borders, and require cooperation among States. To date, the Convention has only allowed this principle to be applied between ECE member States, whereas the effects of industrial accidents may also be felt in States neighbouring the region and beyond.

27. Opening the Convention to all Member States of the United Nations should lead to other countries benefitting from the Convention's provisions and to mutual benefits for those countries on the periphery of the ECE region. The change should not entail any substantial costs domestically besides those involving adjustments to the national legislation. If, however, the Conference of the Parties decides to invite other such States to benefit from the Assistance Programme, or to provide financial support to participants, this would likely entail costs for ECE member States. There might also be costs associated with, for example, the need for larger meeting rooms and the translation of documents, the processing of national implementation reports and the provision of interpretation in the official languages of the United Nations not currently included: Arabic, Chinese and Spanish. However, it is likely that new donor countries would also be interested in joining the Convention, perhaps offsetting some of these additional costs.

28. In 2003, Switzerland proposed an amendment to the Water Convention to allow all United Nations Member States to join that treaty. In doing so, Switzerland was guided by both legal considerations and the effects on the environment and promotion of peace (see box 1). The amendment was adopted in 2003 and entered into force on 6 February 2013.

29. The amendment to the Water Convention used wording also employed in an amendment to the Espoo Convention and in the original text of several other treaties, including the Protocol on Civil Liability and Compensation for Damage Caused by the

Transboundary Effects of Industrial Accidents on Transboundary Waters (Protocol on Civil Liability) — a protocol to the Industrial Accidents and Water Conventions — which provides for approval by the governing body of accession by a State not a member of ECE. In a further refinement, the Meeting of the Parties to the Water Convention agreed in November 2012 to waive case-by-case approval by the governing body, deciding that any future request for accession by a Member of the United Nations not a member of ECE would be welcome and considered as approved. The Water Convention Bureau saw the need for approval as unfair, as no equivalent requirement exists for ECE member States, and unjustified (see box 2).

Box 1

Rationale for the opening up of the Water Convention

Switzerland was guided by two general considerations in proposing an amendment in order to enable States not members of ECE to accede to the Water Convention:

(a) Legal aspects: Switzerland wishes to harmonize the provisions regarding accession to ECE MEAs in order to promote consistency; the more so because the Water Convention is the parent Convention of the Protocol on Civil Liability, which already contains such a provision. Even if countries bordering the region are members of other United Nations regional commissions, only ECE has such legally binding environmental instruments;

(b) *Effects on the environment and promotion of peace*: The majority of ECE legally binding environmental instruments are of a transboundary nature. However, ECE countries share their environment with countries outside the region. Promoting peace through transboundary cooperation in the case of shared natural resources is also crucial. Within the framework of environmental protection, this would also make it possible to implement one of the objectives of the plan of implementation of the Johannesburg World Summit on Sustainable Development (elaboration by 2005 of plans for integrated water management on the basis of river basins). An extension of the countries able to accede to the Convention would make it possible to build capacities in other States with a view to harmonizing environmental law.

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Source: adapted from MP.WAT/2003/4, annex, para. 3.

Box 2

Rationale for considering any future requests for accession to the Water Convention as approved

Deciding to consider any future requests for accession as approved is consistent with the fundamental cooperative character of the Convention, which speaks against a differentiation of the accession procedure for ECE and non-ECE member States. It also takes into account the due-diligence nature of its substantive obligations. The latter normative feature of the Convention, in combination with the widespread practice by Parties, militates in favour of such an approach in a twofold manner. On the one hand, the flexibly progressive nature of the substantive obligations of the Convention, together with its institutional mechanisms of support and assistance, have proven to act as an incentive and to be an effective catalyst for rapid increases in the compliance capacity of States which, at the time of their ratification, or accession, would seem to leave [room for improvement]. On the other hand, practice has also shown that the same normative flexibility inherent in the due-diligence nature of the substantive obligations of the Convention renders it extremely difficult to set absolute and, especially, objective parameters against which the Meeting of the Parties could undertake a procedure of approval of requests for accession in each specific case.

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Source: ECE/MP.WAT/2012/L.6, para. 17.

30. The amendments to the Water and Espoo Conventions included a further condition that the governing body would not consider or approve any request for accession by a State not member of ECE until the amendment had entered into force for all the States and organizations that were Parties to that particular Convention on the date of adoption of the amendment. This condition has proven problematic under the Water and Espoo Conventions because of the need for all Parties at the time of adoption of the amendment, without exception, to ratify the amendment before the governing body can consider approval of requests for accession.

31. Given these considerations, and to avoid such complexities, article 29 of the Convention could be simply modified by inserting a new paragraph following paragraph 2, reading:

> 3. Any other State, not referred to in paragraph 2, that is a Member of the United Nations may accede to the Convention.

Key points emerging from the WGD-3 discussion:

- A representative from the UNECE Water Convention secretariat delivered a presentation on the experience from the Water Convention on opening up the treaty to non-ECE countries, highlighting in particular the benefits, possible barriers and lessons learnt for Parties and non-Parties.
- Possible benefits that were discussed:
  - With new member states comes also new experience: Strong

impetus on the work of the Convention;

- Exchange of information with other regions;
- Parties' Ministries of Foreign Affairs might see the global opening of the Convention beneficial to their efforts of providing development aid;
- Increase of the political relevance and visibility of the Convention;
- Reaching out to non-ECE countries which could be particularly attracted by concrete activities and projects, the institutional framework for cooperation and soft-law (guidelines, etc.).
- Increase of partnerships and prospects of receiving additional funding (GEF).

- Possible barriers that were discussed:
  - Confusion with possible other global instruments on industrial accidents;
  - Problems with reaching out to non-ECE countries as the Convention might be perceived as an European instrument;
  - Less support to EECCA and SEE countries possible as the focus shifts to the global level;
  - Global opening needs resources and commitment by Parties and it requires a good preparation (strategy with phases, clear communication messages and products, etc.).
- The meeting raised concerns regarding the additional financial and personnel efforts that opening-up the Industrial Accidents Convention would require, bearing in mind that raising enough financial resources for implementing existing commitments in the Convention's workplan has been difficult in the past.
- The meeting was also informed that a global Convention on the prevention of industrial accidents and civil liability of international/transboundary accidents is currently being negotiated in one of the legal working groups of the General Assembly. As there was little information available on this Convention, the meeting requested the consultant to investigate at which state the proposal of the General Assembly is, which scope and aims this Convention would have, which possible overlaps with the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters there might be, etc. and to include the results into his paper to facilitate a more informed discussion at the next meeting of the Working Group on Development. The meeting at the same time expressed that opening-up the Industrial Accidents Convention to the global level might lead to a duplication of efforts which should be avoided in any case.

K. Application of amendments to new Parties (art. 29)

32. To promote its even-handed application, States acceding to the Convention once an amendment has entered into force should also automatically accede to the amendment. This

change should not entail any costs besides those of enacting a wider-ranging amendment, and would lead to greater legal certainty. To effect this amendment, at the end of article 29 a new paragraph could be inserted reading:

> Any State or organization that ratifies, accepts or approves this Convention shall be deemed simultaneously to ratify, accept or approve the amendment to the Convention adopted prior to its ratification, acceptance, or approval at the (…) meeting of the Conference of the Parties.

Key points emerging from the WGD-3 discussion:

- Additional clarity is needed on this point and the discussion should be postponed until the next meeting.

L. Governance structure under the Convention

33. The Working Group was also mandated to review the structure of subsidiary bodies to the Conference of the Parties, their mandates and rules of procedure, and to make proposals to the Conference of the Parties at its eighth meeting (ECE/CP.TEIA/24, para. 66 (k)). The Industrial Accidents Convention is unusual in not having a standing subsidiary body that is open-ended (i.e., where all Parties are represented). The Working Group on Development is open-ended, but is only convened when the Conference of the Parties wishes an amendment to be drafted. The Working Group on Implementation is a closed group.

34. Besides the Bureau of the Conference of the Parties, the current bodies are as follows:

(a) The Working Group on Implementation has 10 members elected by the Conference of the Parties and is tasked with preparing the periodic review of implementation. This body must meet at least once in each period between the meetings of the Conference of the Parties and usually meets two or three times each year;

(b) The Working Group on Development has an open-ended composition and is open to representatives of all Parties. It is tasked with reviewing the text of the Convention, in particular annex I, and with the drafting amendments. It has met twice, in 2005 and in 2006;

(c) The Joint Ad Hoc Expert Group on Water and Industrial Accidents was established by the Parties to the Industrial Accidents and Water Conventions as a platform for cooperation on issues related to the prevention of accidental pollution of transboundary waters. The Expert Group has met once per year, on average, and typically comprises experts from about 10 countries.

35. The points of contact for notification and mutual assistance have come together every two or three years since 2003 to assess the effectiveness of the ECE Industrial Accident Notification System, in which they are registered, and to share experiences and information. The points of contact are organizations — typically crisis and emergency centres — that are therefore represented by experts from those organizations. This is not a subsidiary body.

36. In addition, short-lived task forces and small groups have been established to undertake specific tasks, generally as the result of decisions taken by the Bureau and the subsidiary bodies.

37. Under the other ECE MEAs, the following open-ended subsidiary bodies have been established:

(a) Under the Convention on Long-range Transboundary Air Pollution's Executive Body, which meets annually, there are three subsidiary bodies:

(i) The Working Group on Effects, which normally meets annually with about 20 Parties represented, among other participants;

(ii) The Working Group on Strategies and Review, which normally meets annually with about 35 Parties represented, among other participants;

(iii) The Steering Body for the Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe, which normally meets annually with about 30 Parties represented, among other participants;

(b) Under the Espoo Convention and its Protocol on SEA, the governing bodies of which meet jointly every three years, there is one subsidiary: a working group that meets about three times between meetings of the governing bodies (i.e., annually on average), with between 30 and 35 States represented, among other participants;

(c) Under the Water Convention, there are two such bodies, plus one under the Convention's Protocol on Water and Health:

(i) The Working Group on Integrated Water Resources Management, which normally meets annually, with between 25 and 30 States represented, among other participants;

(ii) The Working Group on Monitoring and Assessment, which normally meets annually, with about 20 States represented, but which has begun to hold joint meetings with the Working Group on Integrated Water Resources Management;

(iii) The Working Group on Water and Health, which meets annually with about 25 States represented;

(d) Under the Aarhus Convention, the governing body of which meets every three years, there is one such body, plus one for the Convention's Protocol on Pollutant Release and Transfer Registers:

(i) The Working Group of the Parties to the Convention, which meets about once annually with some 35 States represented;

(ii) The Working Group of the Parties to the Protocol, which has met annually since 2011 with about 20 Parties represented.

38. The above list reveals that, except for the Air Convention, there is a trend towards a single open-ended working group per treaty (and the Espoo Convention and its Protocol even share a working group), with the body meeting annually.

39. For the Industrial Accidents Convention, the following scenario might be considered:

(a) The Conference of the Parties continues to meet every two years;

(b) A new open-ended working group ("on industrial accidents" or "of the Parties") meets annually. Taking the Working Group of the Parties to the Aarhus Convention as a model, this new working group might be established to:

(i) Oversee the implementation of the workplan and to prepare the meetings of the Conference of the Parties;

(ii) Oversee and direct the activities of subsidiary bodies established by the Conference of the Parties;

(iii) Keep under review the need for amending the Convention;

(iv) Make such proposals and recommendations to the Conference of the Parties as it considers necessary for the achievement of the purposes of the Convention;

(v) Undertake any other duties as requested by the Conference of the Parties;

(c) The Working Group on Implementation continues to meet and to maintain its membership of 10.;

(d) The Working Group on Development could continue to be convened, as necessary, or its tasks could well be taken on by the new working group (as per item (b) (iii) above) with a small group established under it for the purpose of drafting amendments;

(e) The Bureau continues, incorporating the chairs of the new working group and the existing Working Group(s), and it might be reduced in size to a maximum of eight members as it would no longer have the primary responsibility for overseeing implementation of the workplan. The Bureau would meet less frequently, but would meet back to back with meetings of the new working group. It would have an organizational, consensus-building and monitoring role, rather than one of implementation and strategy;

(f) The Joint Ad Hoc Expert Group on Water and Industrial Accidents could continue to meet as at present, and the points of contact could come together as necessary.

40. These changes should not entail any costs domestically. However, there might be additional costs associated with having an open-ended subsidiary body, including the costs of individual experts participating and of providing financial support to eligible experts, perhaps including representatives of non-governmental organizations.

41. No amendment to the Convention should be necessary; the Conference of the Parties could itself decide on changes to the governance structure. The benefit could be more participatory and transparent oversight of the implementation of the Convention's workplan,. The drawbacks are the addition of another layer of governance, thus creating a risk of having both overlaps in the responsibilities of the governing bodies as well as an additional financial burden for the Parties and the secretariat.

42. It was also suggested at the seventh meeting of the Conference of the Parties that its rules of procedure should be reviewed. Included in the review of the 2005 reform of ECE (E/ECE/1468, annex III) are guidelines on procedures and practices for ECE bodies. While these guidelines do not apply to the Conference of the Parties, as it is not a subsidiary body of ECE, they may be adapted to provide sound guidance for the Convention's subsidiary bodies, including:

(a) It should be ensured that the work is carried out in a way that is member-driven, participatory, consensus-oriented, transparent, responsive, effective, efficient, results-oriented and accountable;

(b) The existing practice of inviting, without a right to vote, other relevant stakeholders such as international organizations, private sector representatives, members of academia or representatives of civil society should be continued;

(c) Candidates for the bureau should be nominated by Parties based on the person's expertise, professionalism and expected support from the membership. The list of candidates for election should be made available to all Parties well in advance of the elections and preferably agreed upon;

(d) Bureau members should be elected by the respective body according to the relevant rules of procedure and following consultations among Parties. Elected bureau members should serve collectively in the interest of all member States. In the absence of rules of procedure for such body, the composition of the bureau should take into account expertise, with due regard to as wide a geographical representation as possible; the term of office should be up to two years. Bureau members including the Chair can be re-elected for an additional term;

(e) The bureau should be free to invite major stakeholders active in the area of the Convention to attend the meetings of the bureau and contribute to its work, without the right to vote;

(f) The key functions of the bureau should be:

(i) To monitor and ensure implementation of the workplan and of past decisions and recommendations during intersessional periods;

(ii) To ensure effective and transparent preparations of forthcoming sessions and, for that purpose, to collectively reach out to and consult with all Parties, and other stakeholders, as appropriate;

(iii) To ensure effective conduct of business during the sessions in full compliance with their respective rules of procedure, and to facilitate reaching agreement on decisions and recommendations;

(g) In addition to these tasks, the bureau should help the consensus-building process by means of transparent and inclusive consultations on draft outcomes, including draft decisions, conclusions and recommendations that might be proposed by representatives of Parties;

(h) The bureau does not adopt the conclusions, recommendations, decisions and meeting reports of the subsidiary bodies;

(i) In its activities, the bureau should coordinate with the secretariat on all relevant issues;

(j) Draft conclusions, recommendations and decisions are formally adopted by the body at the end of the session. Drafts should be projected on a screen, where possible, and read out by the Chair.

43. The Working Group might wish to consider proposing that some or all of the above elements, or other elements in the guidelines on procedures and practices for ECE bodies, be adopted by the Conference of the Parties.

Key points emerging from the WGD-3 discussion:

- The Convention already has a well-functioning governance structure and there does not seem to be a need to add another layer of governance.
- Perhaps the TORs of the Bureau and the WGI could be adjusted however additional time would be required to accomplish this.
- Perhaps an annual update or newsletter which would be sent to national focal points would be helpful to keep Parties informed instead of creating another body.

III. Annex: Input from the consultant to the secretariat.

Analysis of possible amendments to the Convention on the Transboundary Effects of Industrial Accidents

Introductory Note

The current paper aims at examining proposals for possible amendments to the Convention on the Transboundary Effects of Industrial Accidents (the Convention), taking into account issues raised in other sections of this document as well as those raised during the meetings of the Working Group, and to present and explain the rationale for such amendments, their consequences and possible modalities in the light of the consistency of the provisions of the Convention as well as with the approach taken by other UNECE agreements and European Union legislation.

Other UNECE agreements include first of all the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (SEA Protocol) and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), as well as the Convention on Long-range Transboundary Air Pollution (Air Convention) and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention).

Relevant European Union legislation includes first of all the Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances (Seveso III Directive) but also the Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (EIA Directive), the Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive) and the Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (Public Participation Directive).

A. Revised and additional definitions (art.1)

1) Article 1(c) - definition of „Effects”

Rationale for the amendment: its purpose and basis in international and EU law

The current definition of „Effects” in Article 1 c is based on the wording of Article 3 of the EIA Directive in its original version of 1985 (Directive 85/337/EEC). The respective wording of the EIA Directive describes the scope of assessment and has been subsequently slightly changed since 1985. The most recent change is subject to the final stage of the legislative procedure due to be finalised in spring 2014. The wording proposed for Article 3 of the EIA Directive follows the wording of the definition of „environmental information” included in the Arhus Convention.

Possible approach

Bearing in mind that the current definition of „Effects” in Article 1 (c) of the Convention is outdated and does not reflect the state of the art in this respect –a revision may be considered. The revised definition could be based on the amended wording of article 3 of the EIA Directive, as adjusted for the purposes of the Convention.

Legal meaning, consequences and potential alternative solutions

The aim of the possible amendment would be to ensure that there is consistency between the scope of assessing the effects of industrial accidents and the scope of environmental impact assessment, as well as ensuring that it covers all environmental effects as they are currently understood.

2) Article 1 (j) - definition of „the public”

Rationale for the amendment: its purpose and basis in international and EU law

As indicated in paragraph 7 of the background paper the current definition of „the public” is not aligned with the internationally approved standard definition of “the public’ which includes a reference to NGOs, namely with the definition of “the public” used by the UNECE environmental agreements (including Aarhus Convention and Espoo Convention) and also by the relevant EU legislation, including the Seveso III Directive.

Possible approach

Bearing in mind that the current definition of „the public” in Article 1 (j) of the Convention is outdated and does not reflect the state of the art in this respect –a revision may be considered.

Legal meaning, consequences and potential alternative solutions

The aim of the possible amendment would be to ensure that there is consistency between the term „the public” in the Convention and in the respective UNECE and EU instruments which also include in this term associations, organizations and groups.

3) Preamble to the Convention

Rationale for the amendment: its purpose and basis in international and EU law

When considering amendments to the Convention, amendments to the Preamble may also be discussed with a view to align it with developments in international law concerning related issues, and thus acknowledge other UNECE legal instruments of special relevance to the Convention.

Possible approach

References to the Protocol on Strategic Environmental Assessment (adopted in Kiev, Ukraine, on 21 May 2003), as well as the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted in Aarhus, Denmark, on 25 June 1998 could be included in the preamble.

B) Revised scope (art. 2)

1) Article 2 paragraph 1

Rationale for the amendment: its purpose and basis in international and EU law

Article 2 paragraph 1 seems to divide the operative provisions of the Convention into those related only to industrial accidents capable of causing transboundary effects (articles 4-11) and those related to all industrial accidents, irrespectively of whether they are capable or not of causing transboundary effects (articles 12-16). While the very need for such a division is obvious, the way in which this is described in the Convention does not seem to be fully consistent and clear, and is different as compared with the approach taken by other respective UNECE agreements and the corresponding European Union legislation.

The Seveso III Directive aims first of all at harmonizing the domestic legal framework for the prevention of, preparedness for and response to all industrial accidents, irrespectively of whether they are capable or not of causing transboundary effects. The same approach is taken in case of the EIA Directive and SEA Directive in case of environmental assessment procedures. The Espoo Convention and the SEA Protocol also regulate the transboundary procedure in case of activities capable of causing transboundary effects on the basis of general obligations regarding the domestic scheme for the assessment of all activities likely to have significant impact on the environment.

The current text of the Convention is rather unclear as to the scope of obligations. For example in article 3 (General provisions) there are general obligations to “take appropriate measures and cooperate....to protect human beings and the environment against industrial accidents” and the entire article 3 never mentions “industrial accidents capable of causing transboundary effects”. The indirect reference to transboundary effects may be found only in paragraphs 3 and 5 which refer to hazardous activities, which themselves are defined in article 1 (b) as those “capable of causing transboundary effects”. While it is clear that some obligations (for example those referred to in articles 4 and 5 or in article 9 paragraph 2 or article 10 paragraphs 2 and 3, or article 11 paragraph 2) by their very nature are related only to industrial accidents capable of causing transboundary effects, it seems to be reasonable to consider, in the light of the general obligations in article 3, that for example, that the obligation in article 11 paragraph 1 concerning adequate response measures to be taken, applies to all industrial accidents and not only those “capable of causing transboundary effects”.

Possible approach

In order to achieve full clarity and internal coherence of the Convention and to make its approach coherent with the approach taken in the respective UNECE conventions (Espoo Convention and SEA Protocol) and respective EU legislation, in particular Seveso III Directive, an amendment of the two provisions of the Convention may be considered.

Firstly, the definition in art. 1 (b) of „hazardous activity" – should not include a reference to „causing transboundary effects" as a constitutive feature of the hazardous activity. This can be achieved by simply deleting this reference from the definition.

Similarly, the scope of application of the Convention obligations related to the prevention of, preparedness for and response to" should not only be limited to industrial accidents capable of causing transboundary effects. This can be achieved by either deleting such reference altogether or by indicating that the Convention applies „in particular" to industrial accidents capable of causing transboundary effects.

Legal meaning, consequences and potential alternative solutions

The proposed amendment would bring clarity to the meaning and scope of the obligations of the Convention related to the prevention of, preparedness for and response to industrial accidents. As opposed to the provisions related to international cooperation concerning mutual assistance, research and development, exchange of information and exchange of technology which are not confined only to industrial accidents capable of causing transboundary effects, the Convention is not very clear regarding which of the provisions related to the prevention of, preparedness for and response apply only to industrial accidents capable of causing transboundary effects and provisions which apply to all industrial accidents.

The common practice so far has been to interpret the Convention narrowly and to consider it as being only applicable to industrial accidents capable of causing transboundary effects. At the same time all Member States of the European Union, as well as the countries bound by international agreements to align their legislation with EU law, are subject to the Seveso III Directive which harmonizes their domestic legal frameworks for the prevention of, preparedness for and response to all industrial accidents, irrespectively of whether they are capable or not of causing transboundary effects.

This means a huge disparity between the situation in a vast majority of Parties which have similar domestic frameworks because they are subject to Seveso III Directive and a few Parties that are not subject to Seveso III Directive and thus, in the absence of harmonising rules in the Convention - may have different domestic legal framework for the prevention of, preparedness for and response to all industrial accidents, or no such a framework at all.

Lack of international obligations to harmonise domestic procedures (or lack of implementing them) – may seriously hamper the implementation of obligations related to activities capable of causing transboundary effects. The Espoo Convention has experienced this problem: in most instances the failure of Parties to follow their obligations related to activities with the potential for a transboundary impact have been found to be caused by inadequate (or even non-existent) domestic legal framework. Drawing from this experience, the SEA Protocol to the Espoo Convention is focused on the obligations to harmonise the respective domestic frameworks, which creates the basis for transboundary procedures in case of activities capable of causing transboundary effects.

Bearing in mind the fact that the existing (as well as the proposed) obligations under the Convention related to the prevention of, preparedness for and response to industrial accidents are all covered by the obligations under the Seveso III Directive – the proposed amendments concerning the scope of application of the Convention would neither create

any new obligations for the Member States of the European Union, nor for the countries bound by international agreements to align their legislation with the EU law (that is for the vast majority of the Parties to the Convention).

For the majority of Parties that are not bound by the Seveso III Directive the consequences of the amendment may be significant because they would be obliged to amend or sometimes even to establish a respective domestic framework for the prevention of, preparedness for and response to industrial accidents irrespectively of whether they are capable or not of causing transboundary effects. For some of those countries however these consequences might be beneficial because the amendment would create a stimulus to establish a modern system in this respect. Furthermore, such countries would be able to benefit from the internationally supported Assistance programme of the Convention for the East European, Caucasian and Central Asian as well as for the South-East European countries in the UNECE region. The Assistance Programme is intended to enhance their efforts to apply the Convention in practice which means that scope of its activities is formally limited to supporting activities subject to the Convention. Thus the proposed amendment of the Convention would formally clear the possibilities for funding activities related to establishing their domestic frameworks for the prevention of, preparedness for and response to industrial accidents irrespectively of whether they are capable or not of causing transboundary effects.

2) Article 2 paragraph 2

Rationale for the amendment: its purpose and basis in international and EU law

As indicated in paragraph 8 of the background paper in the context of the work of the Joint Ad Hoc Expert Group on Water and Industrial Accidents under the Industrial Accidents and Water Conventions, Parties to the Convention have expressed their desire to apply the principles of the Industrial Accidents Convention to tailings management facilities and/or to pipelines. There is recognition by some Parties that legal instruments are needed in these areas, with substantial safety benefits.

Worth noting in this respect is that both issues have been already treated as if they were subject to the Convention since in relation to both issues a special guidelines have been elaborated by the Joint Expert Group on Water and Industrial Accidents. In 2004 the Conference of the Parties to the Industrial Accidents Convention and the Meeting of the Parties to the Water Convention requested the Joint Expert Group on Water and Industrial Accidents to draft safety guidelines and good practices for pipelines. In 2006 The Conference of the Parties to the Convention on the Transboundary Effects of Industrial Accidents and the Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes mandated the Joint Expert Group on Water and Industrial Accidents to draw up safety guidelines and a summary of good practice for tailings management facilities.

During the meeting of the Working Group there was also a proposal raised to consider whether the activities listed in paragraph 2 of article 2 should be excluded from the scope of the Convention altogether or maybe only from the obligations related to the prevention of, preparedness for and response to the respective accidents.

Possible approach

As to the tailings management facilities and pipelines – regardless of whether they are implicitly already covered by the Convention – a clear language confirming that the Convention applies to tailings management facilities and to pipelines would contribute to legal certainty.

As to the proposal to consider whether the activities listed in paragraph 2 of article 2 should be excluded from the scope of the Convention altogether or maybe only from the obligations related to the prevention of, preparedness for and response to the respective accidents, the issue could be solved by adding an appropriate clause to the chapeau of paragraph 2 (in which case the amendment would cover all the activities listed in this paragraph) or to only some of the activities.

C) Provisions on land-use planning (art. 7)

Rationale for the amendment: its purpose and basis in international and EU law

As indicated in paragraph 12 of the background paper the November 2010 joint seminar on land-use planning around hazardous industrial sites, held under the Convention and the ECE Committee on Housing and Land Management, highlighted the need to address industrial safety in land-use planning. This need has been addressed in the Seveso III Directive (art. 13 and, to a lesser degree, art. 14). Parties might consider taking a similar approach under the Convention, noting that EU Member States evaluated such changes as worthwhile.

The current text of the Convention is somewhat limited and not precise enough to serve the purpose of assuring proper reflection of the need for reducing the risk of industrial accidents in land-use policies.

The major limitation that might be addressed is that the current text is limited to siting decisions and does not clearly address the overall land-use planning which is of outmost importance for ensuring proper planning in areas which could be affected by industrial accidents. Another limitation is related to internal coherence of the Convention: the current text provides no clear link to the general obligations under article 3, in particular those related to developing policies and strategies for reducing the risk of industrial accidents.

As far as the coherence with the obligations set by and terminology used in other UNECE agreements and the corresponding European Union legislation is concerned, it is worth noting is that in the context of the obligations related to the instruments of the overall land-use planning they use the term „plans and programmes". This is the case in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (SEA Protocol) and also the Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances (Seveso III Directive) , the Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive) and Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (Public Participation Directive).

Possible approach

As indicated in paragraph 12 of the background paper, industrial safety in land-use planning has been addressed in the Seveso III Directive (art. 13 and, to a lesser degree, art. 14). Parties might consider taking a similar approach under the Convention, noting that EU Member States evaluated such changes as worthwhile.

Thus the proposed provisions for amending article 7 of the Convention should follow in general the approach undertaken in the Seveso III Directive regarding land-use planning.

The precise wording of the proposed provisions should slightly differ however from the wording of the Directive in order to put the proposed provisions firmly within the context of the Convention, in particular its terminology and obligations under its other provisions (see below - Relation to other provisions of the Convention). On the other hand it is worthwhile to introduce to the Convention the terminology (namely the concept of "plans and programmes") which is used in the context of general land-use planning in other UNECE conventions and the corresponding European Union legislation.

Legal meaning, consequences and possible alternatives

On the basis of the above approach one can envisage at least two alternative courses of action: a less radical one assuming only supplementing the existing text in article 7 with the provisions regarding general land use planning based on the respective provisions of article 13 of the Seveso III Directive (Alternative 1) and a more radical one assuming substituting the existing article 7 with the entirely new text based on the structure and content of article 13 of the Seveso III Directive (Alternative 2).

Both alternatives assume adding some new provisions on policies and strategies regarding overall land-use planning in form of general plans and programmes and both should assume reflecting this in the title of the article 7 (Decision-making on siting and land-use planning).

Alternative, 1 would follow the proposal included in the background paper. It assumes maintaining the existing text of article 7 as paragraph 1 of this article and supplementing it with the two paragraphs based on paragraphs 2 and 3 of article 13 of the Seveso III Directive (slightly modified to assure terminological consistency with the other provisions of the Convention). Maintaining the existing text of article 7 means that obligation to establish policies on significant developments in areas which could be affected by an industrial accident arising out of a hazardous activity is relevant only to affected Parties – i.e. the Party of origin is not under obligation to consider this in relation to the risk arising out of a hazardous activity located in its own territory. Furthermore, there is no clear indication as to the types of new developments which should be taken into account in this context.

Finally, the legal obligation in the existing text of article 7 is formulated in a rather weak form („shall seek" and „within the framework of its legal system").

Both the limitation of the scope of the obligation (only to „affected Parties") and rather weak form of legal obligation seem to be not fully in line with the general obligation under article 3 paragraph 2 of the Convention which requires that „the Parties shall….develop and implement policies and strategies for reducing the risks of industrial accidents".

Adding two new paragraphs to the existing text of article 7 (as proposed in Alternative 1) does not seem to fully compensate for the above shortcomings of the existing text of article 7.

Alternative 2 would follow the structure of article 13 of the Seveso III Directive and should attempt to rectify the above mentioned shortcomings of the existing text of article 7 of the Convention. In paragraph 1 it should capture all the issues included in the existing article 7 but align them with article 3 paragraph 2, as clearly binding obligations. The obligation to establish policies and strategies on significant developments in areas which could be affected by an industrial accident arising out of a hazardous activity should be relevant to both the Parties of origin and on affected Parties. Thus it would be in line with article 3 paragraph 2 also in this respect. Furthermore, unlike Alternative 1, it should follow article 13 of the Seveso III Directive and include a clear indication regarding the types of new developments which should be taken into account in this context. Finally, in line with article 3, it should refer to both, policies and strategies.

Paragraphs 2 and 3 could be almost identical in the two alternatives with only minor editorial differences.

Relation to other provisions of the Convention

Article 7 of the Convention should use the concepts and terminology of the Convention. In terms of substantive obligations it should be consistent with the corresponding provisions of Article 3, in particular its paragraph 2 which refers to policies and strategies for reducing the risks of industrial accidents. Following the requirements under the SEA Protocol and Aarhus Convention, it should also be consistent with the provisions related to information and participation of the public in article 9. Proposed amendments to article 7 do not seem to entail any need to revise existing or provide any additional definitions.

D) Provisions on public participation, public information and access to justice (art. 9)

Rationale for the amendment: its purpose and basis in international and EU law

The existing text of article 9 of the Convention addresses the issues of access to information, public participation and access to justice in relation to matters covered by the Convention. Provisions of article 9 are complemented with some provisions in the Annexes addressing some specific elements of access to information and public participation. Overall the current legal scheme provided by the Convention in this respect is rather vague and imprecise. The terminology is not consistent, in particular between the provisions of the Convention and the Annexes. Furthermore, the provisions of the Convention do not reflect the state of the art in relation to access to information, public participation and access to justice in environmental matters. The state of the art in this respect is set generally by the Aarhus Convention, while in the matters related to industrial accidents it is set by the Seveso III Directive, which implements the Aarhus Convention in this respect.

Both the Aarhus Convention and the Seveso III Directive are broader in their range but cover basically most of the issues covered by the Convention. As most of the Parties to the Convention are also bound by the Aarhus Convention and by the Seveso III Directive, the existence of different legal schemes which are not co-related causes a lack of legal certainty and may create problems in practice. Bearing the above in mind it seems reasonable to consider amendments to the Convention which would bring the respective provisions of the Convention in line with the provisions of the Aarhus Convention and the Seveso III Directive. It does not mean replicating all the respective provisions of the Aarhus Convention and the Seveso III Directive nor does it imply the need to strictly copy these provisions.

What may be considered useful is to harmonize the respective provisions of the Convention with the corresponding provisions of the Aarhus Convention and Seveso III Directive while at the same time maintaining and even enhancing its conceptual and terminological integrity and internal coherence of the Convention.

Possible approach

In order to address the above issues, an amendment may be considered in which access to information, public participation and access to justice are regulated separately in self-standing articles. A reasonable option to this effect could be achieved by replacing existing article 9 with three separate articles: article 9 dealing exclusively with access to information, article 9bis dealing exclusively with public participation and article 9ter, dealing exclusively with access to justice.

A principal assumption for the concrete textual proposals regarding each of the above articles should be that they all should be based on the corresponding provision of the Seveso III Directive which implements the general provisions of the Aarhus Convention into the domain of industrial accidents. However, whenever a provisions of the Directive uses a term or wording specific for this Directive or refers directly to another pieces of EU legislation, the proposed wording for the Convention should use either a term or wording used already by the Convention (in article 9 or elsewhere in the Convention or its Annexes) or a term or wording used by the Aarhus Convention. Thus conceptually all the proposed amendments should be based on the provisions of the Seveso III Directive, while in terms of the precise wording and terminology they should be adapted to the specific needs of the Convention.

Relation to other provisions of the Convention

The provisions on access to information, public participation and access to justice must be seen in the context of other provisions. In this context it is worth mentioning the need to amend the provisions in article 1 Definitions in relation to the definition of „the public", which is crucial for all the three issues of access to information, public participation and access to justice. In both the Aarhus Convention and the Seveso III Directive it is a crucial term for the entire legal framework in this respect. Thus the definition in the Convention should be aligned with the definition used by both Arhus Convention and Seveso III Directive (see **Related changes in other provisions of the Convention and Annexes**).

Also worth mentioning is that both Arhus Convention and Seveso III Directive use, also use the term „public concerned" for some purposes. This term is not used by the Convention and it is not proposed to introduce it because the Convention uses the term „Parties concerned" and introducing the term „public concerned' could be confusing. Therefore, wherever this is necessary, the proposed amendments should use instead the term „the public on the areas capable of being affected" which is already used by the Convention.

Bearing in mind the willingness to align the Convention with the respective provisions of the Seveso III Directive and for the sake of ensuring consistency with the wording proposed in the Convention, it may be considered to also introduce some changes into Article 8 and the Annexes V and VIII to the Convention (see **Related changes in other provisions of the Convention and Annexes**).

Finally, it must be mentioned that the proposed changes in relation to access to information, public participation and access to justice should be well placed into other provisions of the Convention and they should be considered in the context of proposed changes to provisions on land-use planning in article 7.

Related changes in other provisions of the Convention and Annexes

1) Article 8

Rationale for the amendment

The need for the involvement of personnel working on-site towards the preparation of on-site contingency plans has already been considered necessary in the Seveso II Directive.

Therefore, a provision could be inserted in paragraph 2 of article 8 to this effect, based on the language employed in the Seveso III Directive in Article 12 paragraph 4.

Public participation in the preparation of plans „relating to the environment" is required by Article 7 of the Aarhus Convention as well as in the preparation of the external emergency

plans is required by Article 12 paragraph 5 of the Seveso III Directive. It may thus it may be considered that also in the Convention (in paragraph 3), opportunities for the public participation could be provided in the preparation of off-site contingency plans, with a wording consistent with the proposed amendments to Article 9, whereby public participation is proposed to be included in new Article 9bis.

2) Annexes

Bearing in mind the general principles of law-drafting, the terminology used throughout the entire Convention, including its Annexes, should be consistent when defining the same concepts. Following the above proposed amendments and with a view to assure internal consistency some amendments would be needed in Annexes V and VIII.

For example the current wording of Annex V is not consistent with the wording in the Convention itself, i.e., in Article 1 subparagraph (c) when defining the term „effects" uses the term „human being" and not the term „people". The same is in other provisions of the Convention – for example in Article 3 paragraph 1. The Convention consistently uses the term „environment" and does not use the term „non-human environment".

E) Revised scope of mutual assistance (art. 12)

Rationale for the amendment: its purpose and basis in international and EU law

As indicated in paragraph 17 of the background paper "the provisions on mutual assistance set out in article 12 and annex X might be considered of value for the provision of assistance, even when no transboundary effect is likely to occur. Delays in deploying assistance sometimes occur pending the resolution of issues such as conditions for entry, transit and liability, as covered by annex X. These provisions might even be considered of value in the event of other environmental or humanitarian emergencies, besides industrial accidents, where rapid agreement is also needed for the deployment of assistance".

As far as mutual assistance is concerned in case of industrial accidents when no transboundary effect is likely to occur, the respective provisions of the Convention (set out in article 12 and annex X) seem to be fully applicable already under the current text of the Convention.

Article 12 addresses mutual assistance in relation to industrial accidents in general and not only in relation to those having potential transboundary effect. The very definition of "industrial accidents" in article 1 (a) of the Convention does not confine this notion to only those accidents having potential transboundary effect. Similarly, article 2 which defines the scope of the Convention, as opposed to "the prevention of, preparedness for and response to" does not confine "mutual assistance" only to "industrial accidents capable of causing transboundary effects". Thus, the provision of mutual assistance in the case of industrial accidents, when a transboundary effect is unlikely, is already covered by the Convention and no amendment in this respect is required.

Another issue is to extend the scope of mutual assistance under the Convention to other events of environmental or humanitarian emergencies, besides industrial accidents, where rapid agreement is also needed for the deployment of assistance. Such events are not covered by the existing text of the Convention and there is nothing in the international or EU law that would specifically call for amending the Convention in this respect. On the other hand, there is nothing in the Convention that prevents Parties from including assistance in case of such emergencies into their bilateral or multilateral agreements regarding the assistance.

Possible approach

As already indicated above, in case of mutual assistance related to industrial accidents when no transboundary effect is likely, there is no need to amend the existing text of the Convention. The current wording of article 12, seen in the light of article 2 paragraph 1, already covers such situations. Article 2 paragraph 1, clearly divides the substantive provisions of the Convention into those related only to industrial accidents capable of causing transboundary effects (articles 4-11 and article 12 para 2) and those related to all industrial accidents, irrespectively of whether they are capable or not of causing transboundary effects (article 11 paragraph 1 and articles 12-16).

While there is no need to amend the Convention, there might a value in considering a need to emphasise the possibility of- and encouragement towards – applying in practice the provisions related to mutual assistance also in case of industrial accidents when no transboundary effect is possible. This may take the form of a special decision included or annexed to the Report of the meeting of the Conference of Parties and include a reference only to mutual assistance or to all issues covered by provisions of the Convention related to all industrial accidents, irrespectively of whether they are capable or not of causing transboundary effects (article 11 paragraph 1 and articles 12-16).

Extending the scope of mutual assistance under the Convention to other events of environmental or humanitarian emergencies would mean a significant extension of the scope of the Convention. It would involve not only amending article 12 of the Convention but also the amendment of some other provisions, at least of article 2, which defines the scope of application of the Convention. It would probably also require defining more precisely what sort of environmental or humanitarian emergencies would be covered by such mutual assistance, in particular bearing in mind the lists of accidents that specifically have been excluded from the scope of the Convention in article 2 paragraph 2.

Bearing in mind that there is no clear proposal as to what sort of additional environmental or humanitarian emergencies would be covered by such mutual assistance, it is difficult to speculate about alternative solutions, their legal meaning and consequences.

Conclusion

There is no immediate need to amend article 12 of the Convention. The current wording already covers mutual assistance related to industrial accidents when no transboundary effect is possible, while the proposal for extending the scope of mutual assistance under the Convention to other events of environmental or humanitarian emergencies seems to be neither substantiated nor elaborated enough to be considered as meriting an amendment.

F) Clarified frequency of meetings (art. 18, para. 1)

Rationale for the amendment: its purpose and basis in international and EU law

The current practice of the Conference of the Parties is to meet every two years, whereas the Convention requires annual meetings. The situation could be rectified since yearly meetings seem not to be needed, the only way to rectify this situation is to amend the respective provisions of the Convention.

Possible approach

The background paper proposes to amend the Convention by deleting the requirement for annual meetings and leaving it to the governing body to decide when to meet. Alternatively,

the Convention could fix any period of time within which the meeting must be held unless otherwise decided by the Parties. The later approach works quite well in the Aarhus Convention.

Legal meaning, consequences and possible alternatives

Leaving the absolute discretion to the governing body to decide when to meet might encourage a tendency to extend the intersessional periods. Therefore perhaps setting a suggested time frame, with a possibility to deviate from it, might also be considered.

G) Clarified or strengthened reporting obligations (art. 23)

Rationale for the amendment: its purpose and basis in international and EU law

The background paper identifies four main issues to be addressed when discussing the amendment of these provisions of the Convention:

- Legal basis for the format and intervals of the general implementation reports
- Legal basis for the format of the reporting of individual accidents with transboundary effects
- Public availability of the above reports
- Remedies for non-compliance with reporting requirements

All of them may- or may not – be included into the text of the Convention. Neither of them necessarily require an amendment of the Convention, some of them however merit to be included in the Convention.

Both types of reports (i.e the general implementation reports and reports related to individual accidents with transboundary effects) seem to be important elements for the proper implementation of the Convention and are routinely applied in international agreements regulating activities with transboundary element.

Public availability of the general implementation reports seem nowadays to be a routine practice in many environmental and other international agreements. Their frequency is usually correlated with the frequency of the meetings of the governing bodies. They must follow certain standardised format which does not require any confidential information to be released. Thus the general implementation reports are usually publicly available in their entirety.

As far as the reporting of individual accidents with transboundary effects is concerned, they may possibly include sensitive information which may be treated as confidential and thus, relevant parts of such reports may be excluded from disclosure.

As far as remedies for non-compliance are concerned – if failure to report is to be treated as non-compliance with the Convention, the legal basis for the governing body to apply such remedies could be included into the text of the international treaty. Some of the treaties (like for example Kyoto Protocol) have elaborated schemes in the treaty itself to regulate both some details of reporting and issues related to compliance with reporting requirements. However, for the majority of international environmental treaties, remedies for non-reporting are regulated under the general compliance scheme.

Possible approach

For the Convention it would seem useful to amend article 23 with a general legal basis for both types of reporting with a mandate for the Conference of the Parties to establish details

of the reporting, including details regarding their format and public availability. The issue of remedies for non-reporting does not seem to require any special approach and it could be addressed under the general compliance scheme.

H) Provisions on the review of compliance (art. 23)

Rationale for the amendment: its purpose and basis in international and EU law

The issue of compliance with international treaties has been gaining increased recognition, and a number of initiatives, both at the global and regional level, were launched to promote and strengthen compliance with multilateral environmental treaties. These initiatives, pushed by a couple of particularly active countries[1], resulted eventually in the adoption of some global[2] and regional guidelines[3], as well as in developing compliance mechanisms under a number of particular conventions that originally had not envisaged such mechanisms.

Following these initiatives, most of international environmental treaties, including the UNECE environmental agreements, have recently developed some quite strong compliance mechanisms which use an array of instruments to review the compliance of the Parties. Apart from monitoring implementation by way of reviewing the implementation reports submitted periodically by the Parties, such compliance mechanisms usually also include other instruments allowing to trigger reviews of compliance in concrete cases and separate from the standard arrangements regarding settlement of disputes and arbitration (which are often considered as confrontational and which are hardly used in practice).

Compliance mechanisms usually include a special body created exclusively to review implementation of and compliance with the respective treaty, as well as special procedures to trigger and conduct such a review, and finally often also an array of measures to be taken in order to bring about full compliance with the respective treaty.

It is rather rare for international treaties to include into the text of the treaty itself all the details regarding the compliance mechanism. Usually the treaty confines itself to provide the basic features of the mechanism while leaving it to the decisions of the governing body to set the details.

The UNECE environmental conventions originally entrusted the governing body with the task of monitoring implementation and did not have any special provisions regarding review of compliance. The only exemption was the Aarhus Convention which was the first UNECE environmental convention to introduce a special provision regarding a review of compliance. When the final text of the Aarhus Convention was adopted, there was already some experience with the compliance body established under the Air Convention.

Air Convention

In 1997 the governing body of the Air Convention (called Executive Body) established the Implementation Committee to review compliance by Parties with their obligations under

[1] Worth mentioning in this context is the role of some European countries, in particular the Netherlands and the UK, which at that time actively supported all such initiatives.
[2] See Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, adopted by UNEP Governing Council in 2002.
[3] UNECE Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements in the UNECE, adopted by Kiev Ministerial Conference Environment for Europe in 2003.

the protocols to the Convention. The Committee consists of nine Parties to the Convention, each elected for a term of two years. Its tasks include:

- t reviews periodically compliance with Parties' reporting obligations;
- It considers any submission or referral of possible non-compliance by an individual Party with any of its obligations under a given protocol;
- It carries out in-depth reviews of specified obligations in an individual protocol at the request of the Executive Body.

Following the experience with the establishment of the compliance body in the Air Convention only under a general mandate for the governing body in the treaty, the negotiators of the Aarhus Convention found it useful to elaborate a specific provision in the treaty itself to establish a compliance mechanism.

Current approach in most UNECE treaties to designing the text in the treaty regarding compliance often follows approach taken in the Arhus Convention.

1) Article 15 of the Aarhus Convention reads:

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature to review compliance with the Convention; such arrangements are required to allow for public involvement and may include the option of considering communications from members of the public on matters related to the Convention.

2) Article 15 of the Protocol on Water and Health reads:

Article 15 Review of compliance

The 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.

3) Article 22 of the Kiev Protocol on Pollutant Release and Transfer Registers reads:

Article 22 Review of compliance

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

A slightly different approach was taken by the Espoo Convention which originally did not have any provision regarding compliance but in the second amendment introduced a special clause regarding compliance which reads:

4) Article 14 bis of the Espoo Convention reads:

Article 14 bis Review of compliance

1. The Parties shall review compliance with the provisions of this Convention on the basis of the compliance procedure, as a non-adversarial and assistance-oriented procedure

adopted by the Meeting of the Parties. The review shall be based on, but not limited to, regular reporting by the Parties. The Meeting of Parties shall decide on the frequency of regular reporting required by the Parties and the information to be included in those regular reports.

2. The compliance procedure shall be available for application to any protocol adopted under this Convention.

Water Convention

Worth mentioning is also the fact that the Water Convention, although it has not followed the Espoo Convention and did not amend the convention itself to establish a separate legal basis for compliance mechanism, nevertheless it has recently created such a mechanism under a general mandate for its governing body (Meeting of the Parties). The Implementation Committee under the Water Convention was established at the sixth session of the Meeting of the Parties to the Convention (Rome, 28-30 November 2012), which adopted decision VI/1 on support to implementation and compliance. The objective of the mechanism is to facilitate, promote and safeguard the implementation and application of compliance with the Water Convention. The mechanism is to be simple, non-confrontational, non-adversarial, transparent, supportive and cooperative in nature, building on the distinctive collaborative spirit of the Convention.

The Implementation Committee consists of nine members, who serve in their personal capacity and objectively, in the best interest of the Convention. The decision VI/1 requires that members of the Implementation Committee shall be persons with experience and recognized expertise in the fields related to the Convention, including legal and/or scientific and technical expertise.

Conclusion

On the basis of the general mandate given in the treaty, the governing body has considerable discretion as to designing the details of the compliance mechanism. There are 3 key features in this respect: composition of the compliance body and its status, triggers for the compliance procedure and measures envisaged in case of non-compliance.

As far as composition is concerned, usually in the UNECE environmental treaties, the compliance body (called quite differently: for example Compliance Committee or Implementation Committee) consist of 8-9 members who elect the chair and vice-chairs among themselves. Usually such committee reports only to the main governing body (Conference or Meeting of the Parties) and is independent from other bodies under the Convention, including in creating its own rules of procedure.

There are two basic approaches to appointing members of such committees: either it consists of Parties or of persons serving in their individual capacity. If the former approach is applied the Parties selected may nominate whatever persons to serve in the committee and they are free to change them, if the latter approach is applied, there are usually some requirements envisaged as to the qualifications of the candidates. In both cases members of a compliance body are nominated by the main governing body (Conference or Meeting of the Parties) for a term of office (usually for two intersessional periods).

As far as triggers are concerned, usually in the UNECE environmental treaties they include submissions from Parties (where one Party submits its views regarding compliance by another party), self-referrals (where a Party may itself indicate problems with compliance and seek assistance) and referrals from the Secretariat. Some of the mechanisms envisage possibilities to directly trigger the procedure by the public (Aarhus Convention, Water and Health Protocol, PRTR Protocol) while others allow an indirect trigger by the public (like for example under Espoo Convention which allows procedure to be triggered by “any other

source"). The major difference between the two approaches is that in case of the former approach the member of the public who triggered the procedure is involved throughout the procedure while in latter it does not have any status in the procedure.

Worth mentioning is that, at least until now, the possibility of directly or indirectly triggering the procedure does not affect much the practical involvement of the public. While the possibilities under the Aarhus Convention are frequently used, the possibilities to directly trigger compliance procedures under the PRTR Protocol and Water and Health Protocol have hardly been used at all. On the other hand, an indirect possibility existing under the Espoo Convention has been explored several times by the public.

As far as the measures in case of non-compliance are concerned, among the UNECE treaties probably the most elaborated scheme in this respect has been elaborated under the Aarhus Convention which envisages in the Decision I-7 on compliance, that "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."'

Following this „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 Convention;

b) Make recommendations to the Party concerned;

c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention 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 Convention;

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

Possible approaches

Bearing in mind the above experience, there may not be a need to consider and decide on specific measures at this stage.

For the amendment it may be enough to provide only the basic features of such a mechanism and a mandate for the Conference of the Parties to elaborate the details. The most important basic features of the other mechanisms under the other UNECE conventions seems to be that they are non-confrontational and non-judicial and of consultative and assistance-oriented nature. A mention of public involvement may also be considered, without however indicating the details.

Legal meaning, consequences and possible alternatives

Establishing a clear legal basis in the Convention for a compliance mechanism may be considered useful, especially in order to be able to elaborate possible remedies in case of non-compliance, including with the reporting obligations.

Alternatively, if there is a wish to establish, following the experience of other UNECE Conventions, a compliance mechanism not limited to reviewing the implementation reports, a legal basis in existing article 18 may be employed which envisages in paragraph 29 (c) that the Conference of the Parties shall establish, as appropriate, working groups and other appropriate mechanisms to consider matters related to the implementation and development of this Convention".

Furthermore, regardless of the decision regarding the amendment, the Conference of the Parties at its in meeting in 2014 may consider establishing a special body (Task Force or Working Group) to elaborate proposals for a compliance mechanism which would be mandated to discuss all the relevant details and make a proposal for the next meeting of the Conference of the Parties.

I) Derogation (art. 26)

The deliberations on this item are covered under part L (governance structure of the Convention).

J) Accession by other Member States of the United Nations (art. 29)

Rationale for the amendment: its purpose and basis in international and EU law

Opening the Convention to other states members of the United Nations has been considered useful in a number of UNECE environmental legal instruments. There are a number of reasons for doing this, not always the same in each legal instrument. The most common reason is the fact that they all regulate issues which are not confined specifically to the UNECE region, but have worldwide application. Furthermore, they all could be considered as precedential in the world and in most cases have no equivalent international instruments in other regions or globally. For some instruments (like for example Espoo Convention or Aarhus Convention), attempts to create treaties regulating the respective issues globally), have been made and failed (as yet) – which prompted some countries to seek other solutions, including the possibility to join the existing UNECE instruments.

Opening the Convention to countries outside UNECE region, apart from the obvious increase of significance, would have the benefit of further extending the scope of safety issues related to industrial accidents.

Despite the interest shown, and even some attempts made, as yet, no country from outside UNECE has acceded to any of the UNECE environmental conventions. This may well be associated with the fact that such a possibility is of quite recent origin. Another factor, which has been clearly expressed in a number of occasions, is a deterrent requirement that any such accession by a country from outside UNECE, as opposed to accession by a country from within UNECE, is subject to approval by the hitherto Parties to the respective legal instrument. This is considered discriminatory and potentially humiliating a prospective candidate country and could involve, as a special paper prepared by the Aarhus

Secretariat shown[4], quite a lengthy procedure. Bearing this in mind the Parties to the Aarhus Convention at their IV meeting in 2012 in Chisinau adopted a decision encouraging the accession by States outside the UNECE region, and set out a simple procedure for doing so (ECE/MP.PP/11/Add1).

Prospect for a global convention

Activities at a global level were initiated already in the 1970s when the UN General Assembly in resolution 3071 (XXVIII) of 30 November 1973, recommended that the International Law Commission (ILC) should undertake at an appropriate time a separate study of the topic **"International liability for injurious consequences arising out of the performance of other activities"**, other than acts giving rise to responsibility for internationally wrongful acts. Following this, the topic of "International liability for injurious consequences arising out of acts not prohibited by international law" was included in the programme of work of the Commission in 1978.

As a result of the respective activities, the ILC prepared the draft the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the text of which is annexed to General Assembly resolution 61/36 of 4 December 2006 and draft articles on prevention of transboundary harm from hazardous activities, the text of which was annexed to resolution 62/68, adopted by the UN General Assembly on 6 December 2007.

The ILC has constantly recommended to the GA the elaboration of a convention on the basis of the draft articles. The issue was discussed already in 2007 and the GA, while commending the articles and principles as submitted by ILC, decided to seek comments on this issue and to come back to the issue at its sixty-fifth session in 2011. The issue was discussed again at the sixty-fifth session in 2011 and at the sixty-eighth session in November 2013. Each time there were some governments ready to follow the recommendation by ILC, some with a hesitant approach and some clearly stating that the draft articles and draft principles would be most effective if they remained in their current form. As a result of this situation, the GA decided to revisit the issue at its seventy-first session in 2016.

Conclusion

In light of the consistent opposition of some countries the prospect for starting negotiations towards a global convention the prospect of a dramatic change is rather meagre. The situation is thus different from the situation in relation to waters where attempts to initiate a global treaty have been successful and a bit similar to the situation of the Espoo and Aarhus conventions where prospects for respective global conventions are even less likely. Despite the differences in the situation at the global level, all the three UNECE conventions (Water, Espoo and Aarhus) decided that opening for non-UNECE countries would be beneficial.

Possible approach

However simple the procedure might be, the very requirement for the approval by Parties seem to be not only a deterrent for potential candidates but also burdensome. Therefore there must be some reasons for establishing such a requirement. While for example Parties of the Aarhus Convention found that the very nature of this instrument would merit such a requirement, the Parties to the Convention may well consider that in case of a willingness

[4] Note on accession of non-ECE states, 15 March 2010.

of any country to fulfil its obligations related to preventing and combating transboundary effects of industrial accidents, there is no need to introduce such a requirement.

Furthermore, the experience of other UNECE instruments shows that introducing a possibility for non-UNECE countries to accede is unlikely to succeed if it is conditioned by approval of Parties, let alone any other formal requirements. Thus, the burden of introducing an amendment to the Convention allowing accession by non-ECE countries, would be worth undertaking only if accession was unconditional and formulated the same way as for UNECE countries.

K) Application of amendments to new Parties (art. 29)

Rationale for the amendment: its purpose and basis in international and EU law

The application of amendments for new Parties that acceded to the treaty creates significant problems for many international treaties. Problems are particularly acute in the situation where the treaty envisages entry into force of any amendment after it has been ratified by at least three-fourth of the Parties. Such a requirement could be interpreted in such a way that makes entry into force of any amendment a "moving target" because of new Parties acceding to the Convention. Such a requirement is a rule in most international environmental treaties, including in the UNECE environmental treaties and some of them (like for example Aarhus Convention) struggled with the interpretation of this requirement for a long time.

The Convention on Industrial Accidents is in a more fortunate position as it requires a constant number (sixteen) of ratifications for the entry into force of an amendment. Thus, acceding to the Convention by new Parties, should not create any problem for the existing Parties, from the point of view of the entry into force of the amendments to the Convention. Similarly, it should not create problems for the amendments to Annex 1 which are subject to slightly different procedure under the Convention.

However, for the sake of legal certainty and in order to avoid unnecessary procedures, the possible addition of a provision clarifying situation of the new Parties in relation to the amendments to the Convention and its Protocols, may be considered useful.

L) Governance structures under the Convention and a possible Derogation clause (possibly added to art. 26)

Rationale for the amendment: its purpose and basis in international and EU law

When considering a need for an amendment regarding governance structure it is worth bearing in mind that in international law there is no general legal requirement as to any particular governance structure for international treaties. Neither there is any particular dominant model in this respect. As practically each international treaty develops its own structure according to its own needs - a variety of structures exists. Pretty much the same situation applies within the UNECE, where each of the environmental conventions has a slightly different structure and practically the only common feature in this respect is the fact that the UNECE is carrying out the function of secretariat for each of them.

The governance structure is rarely subject to any dramatic changes. Usually, at least in case of UNECE environmental conventions, any significant changes were related to creation of independent compliance bodies as well as to adoption of protocols.

Any attempts to change or modify the governance structure in international treaties are usually driven by the following reasons:

- clear overlap between the functions of the existing bodies
- lack of clarity regarding the functions of the existing bodies which results in creating tensions
- apparent lack of effectiveness in performance
- need to address new challenges

As already mentioned above, in practice this is usually only a need to address new challenges related to compliance or adoption of protocols, which as a result convinces Parties to introduce changes in the governance structure in given treaty.

As far as the derogation clause is concerned – there is nothing in the international law that would either mandate – or prevent – the introduction of a clause, similar to the derogation clause in the Seveso III Directive.

Possible approaches

In order to decide whether to undertake any attempt to change a governance structure of the Convention, it is worthwhile to consider if any of the reasons mentioned above exist and whether they are significant enough to merit a change.

A similar approach may be taken in relations to the derogation clause.