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**LEGAL OPTIONS FOR ADDRESSING THE PRIORITY ISSUES
ON TRANSPORT, ENVIRONMENT AND HEALTH**

Summary of documents prepared by a consultant to the UNECE and WHO/Euro secretariats

A. MANDATE AND BACKGROUND

1. The present document summarizes the arguments developed in two documents prepared by a consultant to the UNECE and WHO/Euro secretariats, on the legal options available for addressing the three priority issues identified by the Joint UNECE-WHO Ad Hoc Expert Group on Transport, Environment and Health^{1/}.

^{1/} a) "Legal and policy issues for the assessment of the appropriateness of the elaboration of an international instrument on transport, environment and health" submitted to the first session of the Joint UNECE – WHO Ad Hoc Expert Group on Transport, Environment and Health ("Expert Group") on 26-27 November 2001; b) "On the options available for addressing the priority issues" submitted to the second session of the "Expert Group" on 18-19 March 2002; c) Annex thereto "On the possible elements of an international instrument on transport, environment and health".

B. SUBSTANTIVE AND PROCEDURAL PROVISIONS

2. The present paper analyses the options available for addressing the priority issues identified by the Joint UNECE-WHO Ad Hoc Expert Group on Transport, Environment and Health from a legal point of view. In particular, the paper considers two possible options, namely the adoption of a legally binding (e.g. a Framework Convention) or of a non-legally binding instrument.

3. In order to best appreciate the comparison between the two options, an initial distinction has to be made with respect to the nature of the provisions set out in a possible new instrument, regardless of its legal form. On the one hand, substantive provisions (e.g. those spelling out aims and goals, or standards and parameters) usually appear to be of a soft-law nature, equally in non-legally binding instruments and in framework conventions. However, the latter usually reflect, through ratification, a higher degree of political commitment.

4. On the other hand, procedural provisions (e.g. those setting-up bodies in charge of implementation review, financial arrangements, the preparation of protocols, adoption of amendments), may also be equally set out in non-legally binding instruments or in framework conventions. However, if they are contained in a non-legally binding instrument, they operate and are implemented on a voluntary basis. If they are set out in a framework convention, they bear the legal force of the conventional nature of the instrument in which they are contained. Therefore, in this case they would be of a hard-law nature.

5. In accordance with the above, the priority issues could be addressed through a non-legally binding instrument, such as a “Ministerial Declaration”, “Programme of Action”, “Charter”, “Model Rules”, etc. Among the possible non-legally binding options for the implementation of the selected priority areas, the possibility of establishing a Pan-European Programme on Transport, Environment and Health has been given particular consideration, also with a view to providing a framework for the rationalization of work on transport, environment and health at the pan-European level.

6. Attention has been devoted to a comparative analysis of the key elements that need to be considered, analysed and weighted against each other before a rational decision to start negotiations of a Framework Convention on Transport, Environment and Health, as mandated, can be taken. The following elements seem to be of particular importance in this regard:

I. Negotiation

7. The negotiating process of a non-legally binding instrument appears easier, faster and less resource intensive than that for the elaboration of a binding one. At the same time, practice shows that non-legally binding instruments are thoroughly debated during negotiations, which are usually no less lengthy and costly than those for the elaboration of legally binding text.

II. Entry into force

8. Non-legally binding options are characterized by the flexibility of the procedure for their adoption and their entering into operation. Since non-legally binding instruments do not require parliamentary approval, they can enter into force more easily and quickly. There is, however, a possibility also for legally binding instruments to become effective immediately after their negotiation has been completed, by applying the accepted practice of interim application of international conventions pending their ratification.

III. Amendments

9. Non-legally binding options offer a maximum of flexibility and easiness concerning amendment procedures as they do not require the application of the general principle of unanimity. Conventional practice, however, particularly in the field of environmental law, shows that also legally binding instruments supersede the general unanimity principle with regard to adoption - even entry into force - of amendments thereto.

IV. Level of commitment

10. The main characteristic of a framework convention is that the domestic parliamentary approval represents, and is seen to represent, a greater degree of political commitment compared to a non-legally binding instrument. Furthermore, parliamentary approval provides legal justification for domestic administrations in the allocation of financial resources and suitably qualified human resources for the implementation phase. Likewise, at the international level, a framework convention would provide a sound legal basis for the institutional and procedural follow-up to a given instrument. Special reference has been made to the provisions establishing the meetings of the parties usually in charge of continuous review of the implementation of the instrument in point. However, nothing prevents that similar institutional arrangements are made through non-legally binding instruments.

V. Possible conflicts with already existing instruments

11. In principle, the elaboration of a framework convention on transport, environment and health could be carried out without introducing normative conflicts in those areas where EU policy and legislation are already in place. A thorough research of both the UNECE environmental treaty-making practice and that of the EU environment policy and legislation over the last three decades shows consistent interactions. The former has prompted the development of the latter, providing it with important normative guidance and vice-versa. This is corroborated by the fact that the European Community has become a Party to several UNECE conventions. Were EU legislation more stringent than the regulation contained in a possible framework convention, EU Member States would still be in the position of applying more stringent standards.

VI. Subsidiarity

12. The so-called subsidiarity principle (i.e. the principle according to which decisions are to be taken at the lowest possible level) within States does not affect the treaty-making power of the central governments of these States. In view of the possibility that the implementation of a number of provisions of a possible framework convention might depend on action taken at the sub-State level, the issue would be properly addressed by a provision stating that “action to achieve the objectives of the instrument in point should be taken at the lowest appropriate administrative level” (e.g. Article 5 of the 1999 London Protocol on Water and Health).

C. CONCLUSION

13. The above short analysis leads to the conclusion that international law is basically neutral with regard to the choice between a legally binding and non-binding option. The difference between the two primarily lies in the degree of political commitment attached to them.
