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Working Group on Pollutant Release and Transfer Registers
(Second meeting, Geneva, 13 - 15 April 2005)

**AN ANALYSIS OF OPTIONS FOR RULES OF PROCEDURE TO THE UNECE
PROTOCOL ON POLLUTANT RELEASE AND TRANSFER REGISTERS (PRTR)^{*/}**

Introduction

1. Clear, comprehensive and precise rules of procedure are necessary to the functioning of bodies established to meet objectives under multilateral environmental agreements. As their purpose is largely a generic one – to regulate the conduct of business and facilitate joint action and decision-making in a predictable manner – rules of procedure across various types of organizations tend to have much in common. They are rooted in long-standing practice and generally reflect standards that have withstood the test of time.
2. Some differences and innovations may arise based on the complexity of the organization or the subject matter of the joint action. These variations, however, apply less to rules of procedure than to other sets of rules, such as those related to compliance mechanisms, for example. Where memberships of different organizations and their subject matter are similar, there is generally a very strong correlation in rules of procedure.

^{*/} Prepared by a consultant. This document was submitted late due to the need to hold consultations over the text with a number of leading experts on the topic of rules of procedure.

3. Within the UNECE context, various factors contribute to a tendency towards a high correlation of elements among the rules of procedure developed under various bodies. The first is their potential membership, i.e. member States of the UNECE, with consistent experiences and expectations over time. The second is the similarity of the subject matter, in particular the set of environmental conventions and protocols, with similar structures and decision-making processes. Third is a time frame in which various bodies come “online” rather continuously, so that the work on rules of procedure is consequential and progressive. And finally, the common UNECE secretariat ensures that the developments in one forum are taken into account in others, including through feedback loops that may result in amendments of earlier sets of rules.

4. The present paper has been prepared with a view to assisting the Working Group on PRTR in preparing draft rules of procedure for sessions of the Meeting of the Parties to the Protocol on PRTRs for possible adoption at its first session.

I. BACKGROUND

A. The relevant provisions of the Protocol

5. The Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention was adopted at an extraordinary meeting of the Parties to the Aarhus Convention on 21 May 2003.

6. Article 17, paragraph 2, of the Protocol sets the legal basis for the preparation and adoption of rules of procedure:

“The Meeting of the Parties shall keep under continuous review the implementation and development of this Protocol on the basis of regular reporting by the Parties and, with this purpose in mind, shall:

....

(g) At its first session, consider and by consensus adopt rules of procedure for its sessions and those of its subsidiary bodies, taking into account any rules of procedure adopted by the Meeting of the Parties to the Convention.”

B. Mandate of the Working Group on PRTRs

7. The Working Group on PRTRs established by the Meeting of the Parties to the Convention at the time of the adoption of the Protocol is charged with identifying and carrying out activities that need to be undertaken pending the entry into force of the Protocol. The Working Group noted that the adoption of rules of procedure would be addressed by the Parties at their first session. The Working Group had requested the secretariat to prepare a paper setting out various options for rules of procedure which could be used as a basis for further discussion at its second meeting (MP.PP/AC.1/2004/2, para. 44).

II. SCOPE OF THE PAPER

8. This paper summarizes the main options that could be relevant for the rules of procedure of the Meeting of the Parties to the Protocol and presents their possible implications, including their advantages and disadvantages. The options draw from rules of procedure under both UNECE and global instruments. In particular, this paper takes note of the progress made by the Legal Board of the Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) in the preparation of legal documents for the Meeting of the Parties to the Protocol on Water and Health, including the rules of procedure for their meetings.

III. POSSIBLE OPTIONS FOR RULES OF PROCEDURE FOR THE MEETING OF THE PARTIES TO THE PROTOCOL

9. The options to be considered include directly applying the Convention's rules of procedure to the Protocol; using the Convention's rules of procedure as a model for developing similar rules of procedure for the Protocol; or developing separate rules of procedure for the Protocol without any particular reference to those developed under the Convention.

A. Option A: Direct application of the rules of procedure of the Convention

10. The option of directly applying the Convention's rules of procedure to the Protocol's bodies offers the advantage of simplicity and would require only the adoption of a decision *mutatis mutandis*. This option presents multiple advantages. It is cost-effective, it draws upon the experience of Parties and NGOs with the functioning of the Convention, and could be easily accepted by those Parties which are also Parties to the Aarhus Convention.

11. With regard to its cost-effectiveness, this option would lead to the adoption of the rules of procedure without prior lengthy negotiations. Such negotiations would require the allocation of necessary funds for covering the related meeting costs, or, even where the meetings are held in conjunction with other meetings, at a minimum the costs of preparation, including time and background materials.

12. This option would be efficient in particular for those Parties and other states and organizations that have participated in the processes under the Aarhus Convention, having the experience of applying the Convention's rules of procedure for more than two years, since their adoption at the first meeting of the Parties to the Convention held in Lucca, Italy, in October 2002. Moreover, the Working Group on PRTRs, as a subsidiary body of the Meeting of the Parties to the Convention, is covered by the Aarhus Convention's rules of procedure during its sessions.

13. Direct application of the Convention's rules of procedure is also the most straightforward way to satisfy the requirement under article 17, paragraph 2, of the Protocol that its rules of procedure should take into account those developed under the Convention. This is particularly relevant in terms of the shared principles behind the two instruments related to the role of the

public and of NGOs, since the Convention's rules of procedure grant certain rights and status to these in the proceedings under the Convention.

14. The fact that the States and regional economic integration organizations that are not Parties to the Convention may become Parties to the Protocol is a significant consideration. Given that certain States that are Parties to the Protocol may not be Parties to the Convention, they may be less willing to accept the automatic adoption of rules that are not binding on them in another context. Furthermore, certain States that are not Parties to the Convention, but may intend to ratify the Protocol, could encounter difficulties with some of the provisions of the Convention's rules of procedure, which could constitute an impediment to their ratification or acceptance of or accession to the Protocol. This may be particularly true of States that are not UNECE members but which are still eligible to become Parties under articles 24 and 26 of the Protocol. On the other hand, the status of States and regional economic integration organizations as observers or signatories to the Convention has meant in practice that they have had an opportunity to influence the text of the Convention's rules of procedure.

15. A decision on direct application would preclude negotiations that might lead to improvements in or more specific adaptation of the Convention's rules of procedure, based on the lessons learned from their application under the Aarhus Convention, or lessons learned in other relevant forums, including the work of the Legal Board of the Water Convention.

16. The automatic application of the Convention's rules of procedure could prove problematic or difficult where there are differences between the two regimes that need to be taken into account. This would arise in the interpretation and application of the phrase *mutatis mutandis*. Such cases may be avoided by the adoption of rules of procedure specific to the Meeting of the Parties to the Protocol.

17. The decision, moreover, would have to deal with the issue of how to handle any future amendments to the rules of procedure under the Aarhus Convention. Two options are:

- (a) Automatic application of the rules as amended to the Meeting of the Parties to the Protocol,
 - i) With the possibility for the Parties to the Protocol to expressly reject the amendments; or
 - ii) Without the possibility for the Parties to the Protocol to expressly reject the amendments; or
- (b) Express acceptance of the rules as amended by the Meeting of the Parties to the Protocol required.

18. Direct application would not automatically trigger a common bureau for the two Meetings of the Parties, as the members of the bureaux are normally elected during each meeting of the Parties (see rules 18 and 22 of the rules of procedure under the Aarhus Convention). This 'common bureau' approach is mostly used for closed protocols in the meaning of a protocol open only to Parties to the parent convention, especially where the Meeting of the Parties to the parent convention serves as the Meeting of the Parties to the protocol. Examples are found in the different protocols to the UNECE Convention on Long-range Transboundary Air Pollution.

19. The most extreme version of option A would involve a single bureau elected by the Meeting of the Parties to the Convention servicing both Meetings of the Parties, combined with

automatic application of any future amendment of the rules of procedure to the sessions of the Meeting of the Parties to the Protocol. Such an option would give maximum emphasis to the link between the Convention and the Protocol and would send a signal to Parties to the Protocol that are not Parties to the Convention that to enjoy the full privileges under the Protocol they should become Parties to the Convention.

20. On the other hand, a decision that the Bureau of the Convention shall be the Bureau of the Protocol would entail certain complications. It would mean, for example, that certain Parties to the Convention that are not Parties to the Protocol would have more say in decisions affecting activities under the Protocol than would Parties to the Protocol themselves. Furthermore, a complication would arise if it became necessary to replace certain members of the Bureau that represent Parties to one or other, but not both, of the instruments. In addition, the technical expertise related to the Protocol is rather distinct from the kind of expertise relevant to the Convention, which may require different representatives or delegations for each.

B. Option B: specific rules of procedure under the Protocol using as a model the rules of procedure under the Convention

21. This option implies using the rules of procedure under the Convention as a basis for developing rules of procedure for the sessions of the Meeting of the Parties to the Protocol with relevant adaptations. It differs from option C primarily to the extent that the adaptations in option B are more limited and technical. Such technical adaptations range from simple correspondence of terms, such as changing the way in which references to the Convention's provisions are made, or ensuring the proper incorporation of definitions, to substantive adjustments based on differences in the terms of the two instruments.

22. Adaptations considered under this option would also include the introduction of amendments or additions based upon the experience of implementation of the Convention's rules of procedure. This option does not include, however, the consideration of amendments or additions derived from "non-Aarhus" contexts, even where the Convention's rules of procedure are used as a model for rules adopted in the service of other instruments. Such considerations are handled under option C.

23. A major advantage of this option is that, by allowing more in-depth negotiations among the Parties, potentially necessary clarifications could be made with respect to the scope and extent of the automatic application of the Convention's rules to the Protocol. Thus, this option can be said to spell out the technical meaning of the term 'mutatis mutandis,' as used in a potential decision under option A, and would avoid future uncertainty or disagreement as to adaptation.

24. It would also allow for the opportunity to add new elements or make amendments to the rules of procedure, based on the experience gained during the application of the rules of procedure under the Aarhus Convention. In effect, it would mean the adoption of state-of-the-art rules as the Meeting of the Parties to the Convention would adopt them if it were considering them today. As such the Protocol's rules of procedure could also have an impact on the further development of the Convention's rules of procedure.

25. While not as straightforward as option A, this option would also substantively would meet the requirement of article 17, paragraph 2, of the Protocol that the Convention's rules of procedure should be taken into account. In particular, this option, in order to be based upon the Convention's rules of procedure, would need to uphold their innovative elements, including:

- (a) Public access to meeting documentation;
- (b) Opening the meetings to members of the public; and
- (c) One NGO representative as an observer in the Bureau.

26. As the Convention's rules of procedure are the most recent ones adopted in the UNECE context, this option also ensures that the Parties to the Protocol could take advantage of the latest developments in such rules as applied in bodies with the same membership dealing with a similar subject matter, subject to any adjustments that should be made to take into account the subsequent practice involving these rules.

27. Some of the disadvantages of option A can be avoided through the application of option B - for example, the lack of certainty in the application of one body's rules to another, and the problems related to subsidiary bodies with a potentially different membership. One disadvantage which clearly remains, however, is related to the lack of acceptance of some provisions of the Convention's rules of procedure by certain potential Parties to the Protocol (see para. 14 above). A set of rules based firmly on the Convention's rules of procedure might still run the risk of discouraging certain states from becoming Parties. This could be mitigated, however, by the fact that any State or regional economic integration organization, once it becomes a Party to the Protocol, would have an equal say in deciding on the Protocol's rules of procedure.

28. A disadvantage compared to option A is that the separate rules of procedure under the Convention and the Protocol could gradually drift apart through amendment, decisions or practice, whereas under option A the clear cross reference to a single set of rules would help to ensure that they are more consistently applied in both contexts.

29. Compared with option C, apart from an appeal to the principle of keeping as close as possible to the Convention's rules of procedure (which is arguably implicit anyway in art. 17, para. 2), as a practical matter, once engaged in negotiations, it would be difficult to limit the scope of amendments. Thus, the advantages over option C must be considered limited.

30. When conducting negotiations based on option B, the following elements for improvement could be given further consideration:

- (a) Insert provisions for coordination between the two bureaux and Meetings of the Parties; and
- (b) Specify the procedure for replacing the NGO observer to the Bureau, in the event that he/she is unable to perform his/her duties until the end of the assigned term of office.

C. Option C: rules of procedure developed taking into account other similar models

31. This option involves the development of draft rules of procedure using various models within the UNECE and global contexts. While as a practical matter, for the reasons given in

paragraph 24 above, negotiations on the basis of either option B or option C cannot exclude inputs based on any model, for purposes of discussion a distinction has been made because this option would consider the Aarhus Convention on an equal footing with other instruments.

32. This option cannot imply a disregard for the Convention's rules of procedure due to the operation of article 17, paragraph 2, of the Protocol. Considering the common basis of the two instruments and the specific reference to the Convention's rules that are known to be innovative in certain areas, a strong presumption exists that the innovative elements included in the Aarhus Convention's rules especially in the area of public rights should be retained in a set of rules for the Protocol, unless there is a clear reason to do otherwise.

33. Apart from the requirement of article 17, paragraph 2, the rules of procedure adopted under the Convention are the most recently adopted in the UNECE context, and represent the state of the art in many respects, not only in the field of public rights. Thus, these rules should be taken into account in any case.

34. Under option C, a survey could be undertaken of global and regional rules of procedure, to determine whether certain justifiable innovations could be incorporated into the Protocol's rules of procedure. On the basis of a preliminary analysis, including the rules of procedure under the Basel Convention and the Convention on Biological Diversity, and of the World Heritage Committee under the Convention Concerning the Protection of World Cultural and Natural Heritage, it would appear that rules of procedure are largely consistent and show little variation apart from necessary changes to correspond to specific elements and structures that result in no principled differences. The rules of procedure under these instruments have not incorporated innovations found under the Aarhus Convention, however, such as NGO observers in the bureau, or the possibility for members of the public to attend meetings.

35. It is worth mentioning that the draft rules of procedure for the Meeting of the Parties to the Protocol on Water and Health prepared by the Legal Board of the Water Convention have taken on board many of the innovations of the Aarhus Convention's rules of procedure.¹ The Legal Board could not agree, however, on provisions related to the participation of NGO representatives in the meetings of the Bureau without the right to vote, and this issue was referred to other bodies for decision.²

36. For the most part, the same considerations, advantages and disadvantages entail as between option B and option C for the reasons given in paragraph 29 above.

37. Option C additionally implies that innovations and developments under instruments other than the Aarhus Convention might be given substantial weight, which would be more likely to result in differences between the two sets of rules. This divergence in rules would possibly create confusion and reduce efficiency, although many refinements could eventually be taken into account in the Convention's rules as well, where they do not undermine 'core Aarhus values.'

38. Apart from the issue related to the participation of NGO representatives in meetings of the Bureau, the Legal Board of the Water Convention has made other refinements in rules of procedure with respect to the definition of consensus, electronic notification, accreditation of

alternates and advisers, etc. These, too, should be taken into account in the development of the rules of procedure under the Protocol on PRTRs, if options B or C are pursued.

39. For the global context, a useful approach would be to identify in the rules of procedure under non-UNECE agreements those elements that are not already incorporated in the rules of procedure under the Aarhus Convention and include them in the draft rules of procedure under the Protocol. For example, when conducting negotiations based on this option, in addition to those elements set forth under paragraph 30 above, the need for adopting more detailed rules with regard to voting procedures in case of elections could be considered. Such options could take into account rules 50-51 of the Conference of the Parties to the Convention on Biological Diversity and rules 50-51 of the Conference of the Parties to the Basel Convention.

IV. CONCLUSIONS

40. The option of applying *mutatis mutandis* the Convention's rules of procedure to the Protocol has the potential for a simple and cost-effective solution, but introduces risks and uncertainties that may outweigh the benefits. The more extreme versions of this option could be seen as problematic for the potential Parties to the Protocol that are not intending to become Parties to the Convention, although the extent to which such potential concerns should be anticipated and accommodated is at present a moot point. This option is less problematic, however, if clear distinctions are made with respect to specific issues such as separate bureaux.

41. Both options B and C involve the opening of negotiations on a text, which naturally entails the possibility of substantial divergence from the Convention's rules depending on the course and outcome of the negotiations. However, the requirement under article 17, paragraph 2 (g), of the Protocol that the Meeting of its Parties should take into account any rules of procedure adopted by the Meeting of the Parties to the Convention means that the distinction between the two options is more one of emphasis than of limitation.

42. Option B might serve to restrict the scope of negotiations by excluding non-UNECE solutions and sticking closely to core Aarhus values. It could however allow for the possibility of introducing improvements such as those explored by the Legal Board of the Water Convention. But even under option C, the same argument could be made on the basis of the clear language in article 17, paragraph 2, of the Protocol. Substantive improvements or other changes could be introduced at any time from any source.

¹ See MP.WAT/AC.4/2004/2 and 6.

² See MP.WAT/AC.4/2004/6, paragraph 17. The Working Group on Water and Health considered this issue at its meeting in December 2004 and agreed that the Bureau should invite two representatives of NGOs to participate in its meeting without the right to vote.