Convention on Long Range Transboundary Air Pollution, CLRTAP
Legal considerations of the Ad Hoc Group of Legal Experts
for an amended or new Protocol –
focusing on the Gothenburg Protocol and EECCA and SEE countries

1. Background and Problem Identification

A question has arisen regarding the choice of legal instrument for revising the Gothenburg Protocol, especially as regards which method would best facilitate a quick ratification of the Protocol by countries in Eastern Europe, Caucasia and Central Asia (EECCA) and South East Europe (SEE). The choice is between an amended and a new Protocol.

It would appear that the EECCA and SEE countries are reluctant to ratify the current Protocol due *inter alia* to compliance difficulties regarding certain provisions, for example concerning base years, timescales and existing sources. The Protocol would have to be amended to introduce enhanced flexibility in order for these countries to be able to ratify it.

At its forty-forth session in April 2009, the Working Group on Strategies and Review (WGSR) asked the Ad Hoc Group of Legal Experts to prepare a document illustrating particular issues to be taken into account regarding both an amended and a new Protocol, focusing primarily on the situation for EECCA and SEE countries. The legal group presented preliminary considerations orally at that session. This paper, for consideration by the forty-fifth session of the WGSR in September 2009, is a follow-up of that oral presentation.

This paper aims to provide an independent legal basis for discussion and decision making, in accordance with the request by WGSR. Although the focus is primarily on EECCA and SEE countries, the paper also considers the potential consequences of an amended and a new instrument in a broader sense that is also applicable to other Parties, regarding *inter alia* the relationship between new and current provisions dealing with the same subject matter.

There are two main points of consideration, namely (i) the ratification process (including timeframes); and (ii) the relationship between new and existing provisions. Both points of consideration are explored in the context of an amended versus a new Protocol. The considerations are of general application to the Protocols to the Convention, although the current discussions primarily concern the Gothenburg Protocol.

This paper is also a follow-up to informal document 14 prepared by the legal group before the twenty-sixth session of the Executive Body in December 2008, which briefly considers legal aspects of the options for further work on revising the Gothenburg Protocol and also the relationship between the Protocols to the Convention, as requested by WGSR at its forty-second session in September 2008.

2. Ratification process

Ratification is defined in Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT) as *'the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'*. Although parliamentary approval of a treaty may well be required – and be referred to, most misleadingly, as 'ratification' – that is a quite different, and entirely domestic process.[1] The considerations below concern for the most part the international ratification and not the domestic implementation procedure. The ratification process is different depending on choice of instrument, as is further set out below.

2.1 New Protocol

A new Protocol would contain a provision on ratification, acceptance, approval and accession similar to that in Article 15 of the Gothenburg Protocol. All Parties to the Convention, including those that have not yet ratified the Protocol, would be able to participate on an equal footing in the elaboration and negotiation of the new Protocol. A new Protocol would also contain a provision on its entry into force similar to that in Article 17 of the Gothenburg Protocol. Current practice with Protocols to the Convention shows that it is usual to require ratification of a Protocol by 16 Parties to the Convention to secure entry into force.

As regards timeframes, the Parties would need an EB decision giving WGSR a mandate to initiate negotiations on a new Protocol. The scope of the mandate should be decided on by consensus of all the Parties to the Convention at a meeting of the EB [currently 51 Parties]. The scope of the mandate could be narrow or become much broader than the current draft amendments. Depending on the EB decision, negotiations could touch on a much broader set of issues than the current draft amendments and potentially, everything could be open for negotiation and the Parties could be facing extensive negotiations. There is no guarantee that the current Protocol or the amendments currently under consideration would form the basis of the negotiations, as all issues that have already been agreed would be open to re-negotiation. In effect, the negotiation of a new Protocol would start with a clean slate.

Ratification by the 16 Parties could be delayed if there were to be extensive changes in the new version. Another factor that would influence timeframes is each and every individual domestic implementation procedure. Some Parties may find it more difficult to conclude ratification of a new instrument as opposed to amendments to an existing instrument to which they have already shown a political commitment, either by virtue of signature or ratification.

It is impossible to predict with any degree of certainty the length of time that would be required to secure entry into force of a new Protocol. However,

[1] See, Anthony Aust, Modern Treaty Law and Practice, second edition, p.103.

looking at the time taken for entry into force of the Gothenburg, Heavy Metals and POPs Protocols under the Convention, a rough estimate would be approximately five years after adoption.[2]

2.2 Amended Protocol

With the choice of amendments to the Protocol there are two options regarding the point of time for ratification of the Protocol by the EECCA and SEE countries, i.e. (i) after entry into force of an amendment; or (ii) before entry into force of an amendment. The legal possibilities for the option (ii) differ depending on whether the amendment has been adopted or not.

EECCA and SEE countries that are not Parties to the existing Protocol would not formally be able to participate in the negotiations and elaborations of the amendments on an equal footing to Parties to the Protocol, which could be the case for instance if these countries were to choose ratification after entry into force of an amendment. The distinction however between Parties and non-Parties to a Protocol is not strictly enforced at meetings of the EB, where all Parties to the Convention are generally deemed to be on an equal footing.

The present amendment procedure is set out in Articles 13(3) and (4) of the Gothenburg Protocol. If the EECCA and SEE countries were to ratify the current Protocol as amended and *before* entry into force of the amendments, ratifications by these countries would be counted towards the number required for the amendment to enter into force. This means that any ratification of the Protocol by EECCA or SEE countries would count towards the two-thirds threshold required for entry into force of the amendment. The current amendment procedure under the Gothenburg Protocol applies the 'current time approach', which means that the number of Parties required to secure entry into force of any amendment is two thirds of the Parties from time to time, rather than two thirds of the number of Parties at the time when the amendment was adopted by the EB (the latter describing the 'fixed time approach').

With an amended Protocol the scope and number of amendments would influence the time required to negotiate those amendments. The current amendment procedure as described above would require 17 Parties to secure the entry into force of any amendments, but as each Party to accede to the Protocol is counted, the number of Parties required to secure entry into force is a moving target, and the timeframe is not easy to estimate. The notification timelines regarding the submission of amendments to the EB and national implementation procedures also have to be taken into account when considering the timescales for entry into force of an amendment. This is also the case with a new Protocol, although as indicated above it may prove to be easier for some Parties to

[2] The Heavy Metals Protocol was adopted on 24th June 1998 and entered into force on 29th December 2003; the POPs Protocol was adopted on 24th June 1998 and entered into force on 23rd October 2003; and the Gothenburg Protocol was adopted on 30th November 1999 and entered into force on 17th May 2005.

conclude ratification, and accordingly national implementation, when dealing with an amendment to an existing Protocol rather than a new Protocol.

At the moment there are no examples of adopted amendments to the Convention or its Protocols. For the purpose of comparison a reference may be made to the Montreal Protocol (under the Vienna Convention for the Protection of the Ozone Layer). There have been several amendments to this Protocol and they all entered into force about two years after adoption.[3] The 1972 London Convention (on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter) has been amended several times and almost without exception the time period from adoption until entry into force was about one year, as was the case with an amendment to the 1996 London Protocol.[4]

(i) Ratification after entry into force of an amendment

One way to proceed is for the EECCA and SEE countries to wait for the amendments to enter into force and ratify the Protocol afterwards. This could potentially take some time, but it would legally be relatively straightforward.

By virtue of Article 40(3) VCLT, every State entitled to become a Party to the treaty shall also be entitled to become a Party to the treaty as amended. According to Article 40(5) VCLT, any State which becomes a Party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: a) be considered as a Party to the treaty as amended; and b) be considered as a Party to the unamended treaty in relation to any Party to the treaty not bound by the amending agreement. This means that depending on the intention the country expresses at the time of ratification of the Protocol as amended, it will either be bound by the amended Protocol, or by the unamended version of the Protocol when ratifying after entry into force. Such a contrary intention could be expressed by means of declaration made at the time of ratification of the Protocol as amended.

(ii) Ratification before entry into force of an amendment

It has been argued that compliance difficulties for the EECCA and SEE countries prevent them from ratifying the current Protocol before entry into force of an amendment.

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[3] The London amendment was adopted in 1990 and entered into force in 1992, the Copenhagen Amendment was adopted in 1992 and entered into force in 1994, the Vienna Amendment was adopted in 1995 and entered into force the same year, the Montreal Amendment was adopted in 1997 and entered into force in 1999, the Beijing Amendment was adopted in 1999 and entered into force in 2002. It should be noted that amendments to the Vienna Convention for the Protection of the Ozone Layer and its Protocols are subject to the 'Current time approach' (Article 9 of the Convention) as is the case for the LRTAP Convention and its Protocols.

[4] It should be noted that, as for the Protocols to CLRTAP, the 'current time approach' applies (Article 21 of the London Protocol), although amendments to the annexes are adopted through a tacit acceptance procedure under which they will enter into force not later than 100 days after being adopted.

If the amendments have actually been *adopted* one solution is for the EECCA and SEE countries to ratify the Protocol and upon ratification declare, that they only ratify the amended version of the Protocol. This could be done by virtue of an analogous application of Article 40(5) VCLT for a State ratifying *before* entry into force of the amending agreement. This would have the effect that the Protocol in its original version would not enter into force for such country either pending entry into force of the amendment or, once the amendment has entered into force as regards those Parties that have not ratified the amendment. The amended Protocol would become applicable once there are sufficient ratifications for it to enter into force. Switzerland has followed this approach recently for a multilateral convention containing a series of consecutive amendments, the most recent of which is not yet in force. Switzerland declared that its ratification only applied to the convention in its latest, amended form. This was accepted by the depositary.[5]

An alternative could be to reach an informal agreement between the Parties, that the Implementation Committee will not consider cases of non-compliance that relate to the obligations set out in the existing Protocol where these obligations have been amended, but prior to entry into force of the amendments, and in respect of an EECCA or SEE country that has ratified the Protocol as amended but was never a Party to the original Protocol.

If the amendments have not been adopted, *or* if they have been adopted, but the EECCA and SEE countries do not wish to wait for the amendments to enter into force, which would be the consequence of the declaration described above, there are legally at least three potential additional ways to solve this. Where it is clear that a country would not be able to meet certain obligations set out in the current Protocol, its ratification of the current Protocol could be complemented by one of a number of actions in international law that would make it absolutely clear and beyond doubt that it would not be bound by those obligations in relation to any Party to the current Protocol, not bound by the amendment. The possible actions that could be taken are explained in more detail below.

a) *A Suspension Agreement*

If non-Parties ratify the current Protocol and it contains provisions that they are unable to comply with (and for which amendments are not yet in force) the Parties to the existing Protocol could decide to temporarily suspend the operation of these provisions for certain specified Parties as provided for under article 57(b) VCLT. This would practically mean that EECCA and SEE countries would deposit their instruments of ratification to the Protocol, while simultaneously all the existing Parties to the current Protocol could enter into a Suspension Agreement with respect to these EECCA and SEE countries. The suspension should be formulated to expire for each respective EECCA and SEE

[5]See the Paris Convention on Nuclear Third Party Liability and the footnote for Switzerland: 'On 9 March 2009, Switzerland deposited its instrument of ratification of the 1960 Paris Convention as amended by the 1964, 1982 and 2004 amending Protocols. As this ratification is effective only with respect to the 1960 Paris Convention as amended by all 3 Protocols, entry into force for Switzerland of the Paris Convention as so amended will only take place once the 2004 Protocol to amend the Paris Convention has itself entered into force'.

country once the amended Protocol has entered into force for that country and has also been ratified by all Parties to the original Protocol. Otherwise the original unamended Protocol would still apply to the EECCA and SEE countries in respect of any other Party to the Protocol that has not ratified the amendments. This type of agreement by all the Parties to the current Protocol could be reached at an EB meeting.

b) *A Waiver Agreement*[6]

This is an agreement to refrain from enforcing certain provisions of the Protocol. The Parties to the Protocol could reach a consensus agreement on the basis of Article 31(3)(a) VCLT to waive application of these provisions for certain specified countries. This type of subsequent agreement could be reached at an EB meeting. Simultaneously the countries in question can express their consent to be bound by the current Protocol just like any other Party.

A question remains as to whether the agreements in a) and b) can be agreed by the Parties to the Protocol or the Parties to the Convention. As there is a possibility to set a precedent for other Protocols, it may be prudent to consult with all the Parties to the Convention, including those that are not a Party to the Protocol, regarding any Suspension or Waiver Agreement.

c) *Reservations*

Another possible option would be for the EECCA and SEE countries to explore, in accordance with Article 19 VCLT, the possibility of ratifying the Protocol subject to *reservations* regarding the provisions they are not able to implement until such time as those provisions are amended. The primary requirement for a reservation is that it must not be incompatible with the object and purpose of the Protocol, which means that it may be difficult to justify in this context. It should also be noted that any Party to the Protocol may object on any grounds to a reservation entered by another Party. Accordingly, this option may not result in uniform application of the Protocol to all EECCA and SEE countries, unless either all the other Parties accepted the reservations, or there is a consensus decision or understanding by all the Parties to the Protocol that they will not object to such reservations. Including a declaration in the instrument of ratification, before adoption or entry into force of the amendments, to the effect that the provisions of the existing, unamended Protocol would not apply is likely

[6] There is little experience with the use of this form of agreement in international law, but it is nonetheless a legal possibility. See also the definition of the term as '*Agreed exemption from an obligation, usually for a limited period of time*' in Glossary of Terms in UNEPs Manual on Compliance with and Enforcement of Multilateral Environmental Agreements:" (p. 785). In addition, see articles IX:3 of the WTO Agreement and XXV:5 of the GATT, which provide for granting waivers, although in exceptional circumstances. WTO law also provides for an interesting example of a decision of the Contracting Parties which derogates from substantive provisions of the GATT and has *de facto* resulted in its amendment. This is the adoption of the 1979 Enabling Clause, which has enabled developed countries to grant preferential treatment to developing and least developing countries. Although there was no reference to VCLT made in this context, the Enabling Clause could be qualified as a subsequent agreement under Article 31(3)(a) VCLT.

to be deemed to be a disguised reservation and the rules on reservations set out in articles 20 – 23 VCLT would therefore apply[7].

3. Relationship between current and new provisions

It should be noted that to a large extent the same treaty law rules apply to the relationship between the current Protocol and a new Protocol, as well as the relationship between the current Protocol and an amended Protocol. In both cases we need to look to the treaty law rules concerning the application of successive treaties dealing with the same subject matter, although there are some differences between the two cases regarding *inter alia* the need for a conflict clause, as is further set out below.

3.1 New Protocol

As described in informal document 14 of the twenty-sixth session of the EB, the relationship between successive treaties dealing with the same subject matter can be complex. A new Protocol could contain a conflict clause addressing the relationship between the two Protocols. Article 103 of the UN Charter provides an example of this kind of clause:

'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

Another example is the Single Convention on Narcotic Drugs, 1961, which included the following clause:

'The provisions of this Convention, upon its coming into force, shall, as between the Parties hereto, terminate and replace the provisions of the [nine] treaties.'

However, such provisions would only be binding to the Parties to the new Protocol and not those that are only Parties to the existing Protocol.

In the absence of a conflict clause the general rule is contained in Article 59 VCLT, which provides that if *all* the Parties to the earlier treaty are also Parties to the later one, and the two treaties relate to the same subject matter, the earlier treaty shall be considered as terminated if the Parties so intend. Accordingly, there is a possibility to revoke an older Protocol where (i) both Protocols relate to the same subject matter; (ii) all of the Parties to the older Protocol have also become Parties to the newer Protocol; and (iii) all of the Parties to the older Protocol agree that its operation should be terminated.

When all the Parties to the later treaty do not include all the Parties to the earlier one, i.e. the Parties are not identical, which will often be the case, the general rules are more complicated. By virtue of Article 30(4) VCLT, as regards those

[7] Compare with the situations under (i) and (ii) above, p. 4-5, regarding declarations based on Article 40(5) VCLT, which would not be considered to be disguised reservations.

that are Parties to both treaties, the earlier treaty only applies to the extent that its terms are compatible with those of the later treaty, 30(4)(a); but as regards a Party to both treaties and a Party to only one of the treaties, the treaty to which both States are Party will apply, 30(4)(b).

As an example:

- Countries W, X, Y and Z are all Parties to the 2002 Carrot Protocol.
- Article 4 of the Carrot Protocol requires each Party to plant 10 fields of carrots every year.
- Countries A, B, C, X and Z are all Parties to the 2008 Carrot and Cabbage Protocol
- Article 4 of the Carrot and Cabbage Protocol requires each Party to plant 6 fields of carrots and 4 fields of cabbages every year.

What are the obligations of each of the Parties?

- Countries W and Y must plant 10 fields of carrots each year because they only have obligations under the Carrot Protocol
- Countries A, B and C must plant 6 fields of carrots and 4 fields of cabbages each year because they only have obligations under the Carrot and Cabbage Protocol.
- Countries X and Z must plant 10 fields of carrots and 4 fields of Cabbages each year. This is because they have obligations under the Carrot and Cabbage Protocol, but their obligations in relation to W and Y under the earlier Carrot Protocol have not gone away because Countries W and Y have not yet become Parties to the Carrot and Cabbage Protocol.

3.2 Amended Protocol

If not all Parties ratify the amended Protocol, there could be a mix of obligations between the Parties. The situation would be similar to the one with different Parties to the existing and new Protocols. This could potentially lead to lack of clarity, particularly if a number of separate amendments are made, as it may be difficult to "track" the amendments. It should, however, be noted that it is the more usual route in international law to 'update' an international instrument and has been used successfully in other MEAs.[8] It would also enhance legal certainty and clarity if the Parties were to agree on a bundle of amendments instead of a number of separate amendments.

Since it is a logical consequence that amended provisions will replace the initial versions upon entry into force, no specific provision, such as a conflict clause, on this issue has to be made. The relation between initial provisions and their amendments is furthermore described by Article 40(4) VCLT, according to which the amending agreement does not bind any State already a Party to the

[8] See, for example, the Montreal Protocol on Substances that Deplete the Ozone Layer and the London Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter and its 1996 London Protocol (see above 2.2, 'Amended Protocols', p. 4.).

treaty which does not become a party to the amending agreement. Article 30(4)(b)[9] applies in relation to such a State.

4. Conclusions

As stated in informal document 14, both an amended and a new Protocol are legally possible. The situation in principal is no different for the EECCA and SEE countries. Nevertheless, there are some specific considerations to bear in mind for these countries primarily connected to the ratification process and compliance issues, as described in this paper. The choice of instrument is therefore a political rather than a legal decision. Nevertheless, when making such a decision, there are several legal aspects to be considered, as described above. The choice will also largely depend on the scope and number of amendments to be made. In general, form should follow function, which means that the choice of instrument should be made once the nature of the proposed amendments is clear.

One starting-point for the discussion could be the more general remark that if there is a well functioning treaty of some form, one should have a very valid reason to replace it with a new Protocol and add another Protocol to the exceedingly complex situation with numerous Protocols under CLRTAP and also yet another instrument increasing the complex situation of International Environmental Law in general. In the context of UNECE, the commitment made by Ministers at the 2007 Environment for Europe Conference in Belgrade to focus on implementation rather than introduction of new legal instruments also needs to be borne in mind.

The rationale that introducing a new Protocol could save time and enable for the EECCA and SEE countries to ratify more quickly is not necessarily correct. On the contrary, an amended Protocol might be shown to be a faster route. This paper shows that the time aspect in isolation is not a sufficient reason to dismiss the possibility of an amended Protocol. The outcome of the negotiations on a new Protocol may be harder to predict than the outcome of negotiations on an amended Protocol. If the scope is broad and there are many amendments, a new Protocol could be deemed to be most appropriate. However, as form should follow function, such a decision should not be taken prematurely. At present it is not possible to set a definitive timeframe for either a new or an amended Protocol. All will depend on the political will of the Parties to the Protocol and to the Convention.

Regarding successive treaties dealing with the same subject matter, and the relationship between current and new provisions, the application can be complex and, as regards primarily a new Protocol, the Parties may in future wish to consider some form of conflict clause. To a large extent, the same treaty rules in respect of successive treaties apply for both new and amended treaties. However, a new Protocol could potentially touch on a broader set of issues, than would be the case with an amended version. Thus, on the subject of concurrent legal

[9] See above, 3.1 ‘New Protocols’, p. 7.

obligations, the amendment route could, due to less extensive changes to the provisions, be easier to handle, provided the Parties were to agree on a bundle of amendments.

On the other hand, if a large number of separate amendments are made, it may be difficult to 'track' the amendments (although this has been done successfully in respect of the Montreal Protocol). If each amendment were to be made individually, the patchwork of amendments that some Parties have ratified some and others have not could become complicated. This issue would not arise in respect of a new Protocol, provided the possibility for Parties to make reservations were to be excluded.

As indicated by this paper both routes have advantages and disadvantages. The decision is a political rather than a legal one, as stated above. This political decision should be made taking account of the points set out in this paper.