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**CONSIDERATIONS ON A FACILITATIVE IMPLEMENTATION MECHANISM
UNDER THE WATER CONVENTION**

Discussion Paper submitted by the Chairperson of the Legal Board*

BACKGROUND AND PROPOSED ACTION BY THE LEGAL BOARD

1. The Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, at its fifth session (Geneva, 10-12 November 2009),¹ entrusted the Legal Board with the following tasks:

(a) To study possible options for assisting Parties with solving implementation problems and preventing or settling differences regarding the interpretation and application of the Convention, taking into account countries' needs and the Convention's distinctive cooperative spirit;

(b) On the basis of such a study, to prepare a proposal on the objectives, structure, tasks, functions, measures and procedures of an institutional and procedural mechanism to facilitate and support implementation and compliance, for possible adoption at the sixth session of the Meeting of the Parties in 2012.

2. This paper is intended to provide background information in order to facilitate exchange of views and substantive discussion on the possible options for the mechanism. In particular, the paper has a twofold purpose:

a) to illustrate the general considerations militating in favour of the flexible and facilitative nature of the would-be mechanism in point, hence, its non-confrontational, non-judicial and consultative nature;

b) to submit for discussion different basic options concerning the main features of the would-be mechanism, which could later serve as possible parameters in drafting the rules for the establishment and functioning of such a mechanism.

3. The Legal Board is invited to discuss the paper and make preliminary observations on how to develop further the proposal on an institutional and procedural mechanism.

* This discussion paper was developed by Prof. Attila Tanzi (Italy), elected as Chairperson of the Legal Board at the fifth meeting of the Legal Board (Geneva, 2-3 October 2008).

¹ For documentation of the 5th session see http://www.unece.org/env/water/mop5/mop5_docs.htm

PART I

GENERAL CONSIDERATIONS

I. BACKGROUND RELEVANT TO THE PRESENT EXERCISE

4. Institutional and procedural arrangements for facilitating, reviewing and promoting compliance on a multilateral and co-operative basis are increasingly being provided under multilateral environmental agreements (MEAs).² At the same time, a significant number of *soft-law*

² **Within the UNECE region, compliance review mechanisms (CRMs) have been set up for the following instruments:**

- 1979 *Convention on Long-range Transboundary Air Pollution* (18 I.L.M. (1979) at 1442) [hereinafter LRTAP]. Executive Body's Decision 1997/2 (*Report of the Fifteenth Session of the Executive Body* [hereinafter LRTAP CRM], doc. ECE/EB.AIR/53, annex II) established an Implementation Committee for the review of compliance with obligations under all protocols to the Convention. Currently, the status of the Implementation Committee is governed by Decision 2006/2 concerning the Implementation Committee, its structure and functions and procedures for review;
- 1998 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* [hereinafter Århus Convention] (38 I.L.M. (1999) at 517), through Decision I/7 of the First Meeting of the Parties in 2002 [hereinafter Århus CRM];
- 1991 *Convention on Environmental Impact Assessment in a Transboundary Context* [hereinafter Espoo Convention], through Decision II/4 on the review of compliance. Currently, the Implementation Committee's structure, functions and procedures are governed by Appendix to Decision III/2 and the operating rules (Annex to Decision IV/2).
- 1999 *Protocol on Water and Health* to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes through decision I/2 on review of compliance, adopted by the first session of the Meeting of the Parties in 2007.

Outside the ECE context, see:

- 1987 *Montreal Protocol* to the 1985 *Vienna Convention on the Protection of the Ozone Layer* [hereinafter Montreal Protocol] (26 I.L.M. (1987) at 1529 and 1550), through Decision IV/5 in 1992 (*Report of the Fourth Meeting of the Parties*, doc. UNEP/OzL.Pro.4/15, 25 November 1992) [hereinafter Montreal CRM];
- 1989 *Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal* [hereinafter Basel Convention] (28 I.L.M. (1989), at 649), following the decision taken at the Sixth Conference of the Parties (see *Mechanism for promoting implementation and compliance - Revised text of the annex in document UNEP/CHW.6/9 proposed by the Working Group on a Compliance Mechanism*" [hereinafter Basel CRM], Doc. UNEP/CHW.6/CRP.12).
- 2000 *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* [hereinafter Cartagena Protocol] (39 I.L.M. (2000), at 1027). The activities of the Compliance Committee are governed by MOP 1 Decision BS-I/7 "Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety" and MOP 2 Decision BS-II/1 "Rules of procedure for meetings of the Compliance Committee".
- 1997 *Kyoto Protocol to the 1992 Framework Convention on Climate Change* [hereinafter Kyoto Protocol] (37 I.L.M. (1998), at 22). The mechanism was established by the Seventh Conference of the Parties of the FCCC in 2001 (*Report of the Conference of the Parties at their Seventh Session*, doc. FCCC/CP/2001/13/ Add.3, Annex [hereinafter Kyoto CRM]). It is governed by Decision 27/CMP.1 "Procedures and mechanisms relating to compliance under the Kyoto Protocol" (Annex: Procedures and mechanisms relating to compliance under the Kyoto Protocol) and Decision 4/CMP.2 "Compliance Committee" (Annex: Rules of procedure of the Compliance Committee of the Kyoto Protocol).
- 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (1996 Protocol to the London Convention 1972*, 36 I.L.M. (1997) at 1). The Second Meeting of the Contracting Parties to the Protocol in 2007 adopted "Compliance Procedures and Mechanisms Pursuant to Article 11 of the 1996 Protocol to the London Convention 1972", contained in the Annex 7 to the Report, hereby establishing a Compliance Group.
- 1991 *Convention on the Protection of the Alps* (31 I.L.M. (1992) at 767). In November 2002, the Alpine Conference adopted decision VII/4, providing for the establishment of a Compliance Mechanism of the Alpine Convention and its Protocols (Mécanisme de vérification du respect de la Convention alpine et de ses protocoles d'application).

Arrangements for CRMs under negotiation concern the following instruments:

- 1992 *Framework Convention on Climate Change* (31 I.L.M. (1992), at 1330) [hereinafter FCCC]. The fourth COP approved the text, prepared by an *ad hoc* Group, for a consultative process envisaged in Article 13, with

instruments providing policy and legal guidance on the topic have been produced, both within and outside the UNECE framework.

5. International guidelines on implementation and compliance issues concerning MEAs have been recently adopted within the UNEP³ and the UNECE⁴ frameworks. They both consider the advisability of the establishment of permanent procedures and bodies addressing implementation and/or compliance with MEAs and provide guidance thereto. Such guidance is by definition not mandatory. However, reference to it may prove to be a useful working method in order to best choose similar or, even, different formulas, keeping in mind that the rationale and the aims of those documents coincide with those of the present exercise, to the extent that they aim at the enhancement and facilitation of the implementation of MEAs.

6. Having specific regard to implementation, application and compliance issues arising out of the water agreements, in 1999 an Expert Group on the topic in hand, established within the framework of the UNECE Water Convention, produced a document called the *Geneva Strategy and Framework for Monitoring Compliance with Agreements on Transboundary Waters* [hereinafter *Geneva Strategy*],⁵ setting out principles and guidelines for the establishment of compliance promotion and review procedures for legal instruments negotiated under, or in connection with, the Water Convention.

7. The *Geneva Strategy* outlines three basic elements for a compliance arrangement: (1) a baseline (e.g., the assessment of the technical parameters required for there to be full compliance); (2) a procedure governing the compliance review; (3) an institutional body in charge with compliance review.

some “square brackets”, reserving final approval and the establishment of the Committee to a successive decision (Decision 10/CP.4, 6 November 1998)

- 1994 *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* [hereinafter *Desertification Convention*], 333 I.L.M.(1994) at 1328. The Conference of the Parties to the UNFCCC at its 9th session in 2009 decided to prolong the mandate of the Ad Hoc Group of Experts to examine further, and make recommendations on, procedures and institutional mechanisms for the resolution of questions on implementation (Decision 28/COP.9).
- 1998 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (38 I.L.M. (1999) at 1). The latest draft is presented in the Note by the Secretariat “Non-compliance: Procedures and institutional mechanisms for determining non-compliance with the provisions of the Convention and for the treatment of Parties found to be in non-compliance”, prepared for the Fourth meeting of the Conference of the Parties in Rome in 2008.
- 2001 *Stockholm Convention on Persistent Organic Pollutants* (40 I.L.M. (2001) at 532). The 4th Conference of the Parties in 2009 decided to consider further at its 5th meeting for adoption the procedures and institutional mechanisms on non-compliance. The latest development is presented in Decision SC-4/33: Procedures and mechanisms on compliance with the Stockholm Convention.
- 2001 *International Treaty on Plant Genetic Resources for Food and Agriculture*. The 3rd session of the Governing Body in 2009 discussed the Draft Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance (IT/GB-3/09/6 Rev.1).
- 2003 *Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*. Draft Decision on Review of Compliance (ECE/MP.PRTR/2010/L.3) is submitted for consideration to the first session of the Meeting of the Parties to the Protocol to take place 20-22 April 2010 in Geneva.

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

⁴ *Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements in the ECE Region* [hereinafter *UNECE Guidelines*], doc. ECE/CEP/107, 20 March 2003. The guidelines drafted by the Task Force on Environmental Compliance and Enforcement established by the ECE Committee on Environmental Policy, have been endorsed by the Fifth Ministerial Conference “Environment for Europe” in Kiev on 23 May 2003.

⁵ *Geneva Strategy and Framework for Monitoring Compliance with Agreements on Transboundary Waters*. Outcome of the joint UNECE-UNEP project with the Netherlands as lead country. Meeting of the Parties to the Water Convention, second session, The Hague, Netherlands, 23-25 March 2000, doc. MP.WAT/2000/4, 5, and add.1.

8. This document was endorsed in 2002 by the Working Group on Water and Health of the Water Convention, at its second meeting,⁶ and it later informed the work of the present Legal Board for the preparation of the compliance mechanism under the Protocol on Water and Health, which was eventually established in 2007 by the Meeting of the Parties to the Protocol at its first session.⁷ Even though the present exercise would eventually depart from the one which led to the Compliance Committee under the Protocol on Water and Health, it appears appropriate that mention be made of, and consideration given to, the *Geneva Strategy* document, together with the other relevant documents of guidance in the field, with a view to finding similar or different formulas.

II. THE LEGAL BASIS FOR THE ESTABLISHMENT OF A MECHANISM FOR THE FACILITATION OF IMPLEMENTATION AND APPLICATION OF THE CONVENTION

9. The Water Convention does not contain an express provision requiring the establishment of a specific mechanism of the kind under consideration, so called “enabling clause”. However, the legal basis for action to the same end may be found in Art. 17, on the Meeting of the Parties, vesting the latter with the duty to review the implementation of the Convention and, in most wide terms, with the power to take any action which it may deem necessary for the pursuit of the aims of the Convention. For the relevant part, para. 2, reads as follows

“At their meetings, the Parties shall keep under continuous review the implementation of this Convention, and, with this purpose in mind, shall:
[...]

(f) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention”.

10. The above approach would reflect an established practice concerning MEAs, both within and outside the UNECE framework, in which, absent an explicit and detailed “enabling clause”, the respective Meetings of the Parties have set up different Compliance Review Mechanisms (CRMs) based on their general powers.

One may recall the following precedents:

- 1979 *Long-Range Transboundary Air Pollution Convention* (hereinafter LRTAP Convention), whose Executive Body in 1997 established an Implementation Committee to review compliance with all Protocols to the Convention,⁸ based, *inter alia*, on Art. 10.2 of the Convention which provides the Executive Body with the general power to review implementation and application issues;
- 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (hereinafter the Basel Convention), whose sixth Conference of the Parties in 2002 adopted Decision VI/12 on the *Establishment of a Mechanism for Promoting Implementation and Compliance*⁹ based on Art. 15 of the Convention. The latter is not a fully fledged “enabling clause”, but, further to entrusting the Conference of the

⁶ See para. 2.7.3 of the *Report on the Second Meeting of the Working Group on Water and Health*, held in Budapest, Hungary, 28-29 October 2002.

⁷ *Decision I/2 Review of Compliance* in the Report of the Meeting of the Parties to the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes on its First Meeting (Geneva, 17-19 January 2007), doc. ECE/MP.WH/2/Add.3.

⁸ *Decision 1997/2 on the Implementation Committee, its Structure and Functions and Procedures for Review of Compliance*, doc. ECE/EB.AIR/53 (7 January 1997), Annex III, at 28.

⁹ *Decision VI/12 Establishment of a Mechanism for Promoting Implementation and Compliance*, doc. UNEP/CHW.6/40 (10 February 2003), Annex, at 45.

Parties to keep under continuous review and evaluation the effective implementation of this Convention,¹⁰ it contemplates for the Conference of the Parties the general power to “establish such subsidiary bodies as are deemed necessary for the implementation of this Convention”¹¹;

- 1992 Espoo *Convention on Environmental Impact Assessment in a Transboundary Context* (hereinafter the Convention) seems to represent the precedent most germane to the purposes of the present paper. Indeed, in 2001, the Meeting of the Parties, at its 2nd session, established a compliance review committee (called Implementation Committee),¹² based on the general provision set out in Art. 11, para. 2, to the effect that “[t]he Parties shall keep under continuous review the implementation of this Convention, and, with this purpose in mind, shall [...] [c]onsider and undertake any additional action that may be required for the achievement of the purposes of this Convention”.¹³

As it may be noted, this provision is identical to the relevant one contained in the Water Convention.

III. SOME BASIC CONCEPTS RELATING TO THE IMPLEMENTATION AND APPLICATION OF MEAs AND THEIR RELATION TO THE WATER CONVENTION

11. The term “implementation” of a treaty refers to the activity that its parties have to undertake in order to “apply” and, therefore, to “comply with” its provisions. Such activity is usually a combination of legislative, administrative and executive – possibly also judicial - measures that make up the State behaviour through which the relevant treaty rules are applied.¹⁴ They represent the degree of fulfilment by the contracting parties of their treaty obligations. Often, the terms *implementation*, *application* and *compliance* are used in an interchangeable way; so much so that in treaty practice the term “compliance” is often used to indicate the very measures taken by the parties to a treaty in order to implement and apply effectively within their domestic legal systems the obligations thereof. However, problems of implementation, or even of application, of the Convention by one Party may not automatically bring about violations of the rights of other Parties.

¹⁰ Basel Convention, *supra* note 2, Art. 15, Para. 5.

¹¹ Basel Convention, *supra* note 2, Art. 15, Para. 5, Lett. e).

¹² Decision II/4, Doc. ECE/MP.EIA/4 (7 August 2001), Annex IV, at 72-73.

¹³ It may be noted that, upon request by the Implementation Committee, the Meeting of the Parties to the Espoo Convention, at its third session, adopted a decision modifying the Committee’s functions (see *Report of the Fourth Meeting of the Implementation Committee*, doc. ECE/MP.EIA/WG.1/2004/3).

It may also be noted that, after the establishment of the Implementation Committee, the Meeting of the Parties in 2004, hence ex-post, adopted an explicit “enabling clause” in the form of an amendment to the Convention. It reads as follows: “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”. (*Decision III/7*, doc. ECE/MP.EIA/6, Annex VII, at 93. For the *status* of ratifications see <http://www.unece.org/env/eia>). From the quoted wording - as well as from the very fact that the Committee has been established prior, not only to the entry into force of the amendment in point, but also to its adoption – it appears that its *raison d’être* was not so much that of “enabling” the MOP to set up the Committee, but to introduce and regulate a reporting regime, on the one hand, and to extend the Committee’s competence to the implementation of and compliance with the protocols – present and future – under the Convention.

¹⁴ Ronald B. Mitchell, *Compliance Theory: An Overview*, in Cameron/Werksman/Roderick (eds.), *IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW*, London, 1996, at 5.

12. It is important to note that, while, on the one hand, lack of implementation, or even incomplete implementation, *may lead to* a situation at variance with the requirements of a treaty – *i.e.* not necessarily so¹⁵ – on the other, the term “non-compliance” is used, especially in relation to MEAs, to indicate the non-performance of treaty obligations, as a subtle terminological alternative to the term *breach* used under the Vienna Convention on the Law of Treaties, or to the terms *violation* and *infringement*. The expression “non-compliance” is meant to recognize that lack of performance of treaty obligations a) may not necessarily involve a claim for assessment of a breach (e.g. this is usually the case particularly with regard to due-diligence obligations of prevention which characterise most of the provisions of the Water Convention), b) may not be due to the outright unwillingness to comply with a given environmental rule by the State concerned, but rather to its inability to do so.

13. In line with the above, the terminological choice of the present exercise may be suggested to be that of focusing primarily on implementation and application, and only subsidiary on compliance. This choice has been made precisely with a view to emphasizing the fact that problems of implementation and application in a given State do not automatically amount to non-compliance. This appears particularly true in relation to a significant number of provisions of the Water Convention, with special regard to due-diligence obligations. This consideration, if accepted, may suggest that the mechanism under consideration be not only non-adversarial, but primarily geared towards assistance and facilitation for Parties in the implementation and application of the Convention, individually - or jointly, when problems arise between co-Riparian Parties - rather than necessarily that of being declaratory of situations of non-compliance.

14. The reasons for the inability to fully implement and apply, and, eventually, to comply with, an international obligation may be various.¹⁶ In particular, a given obligation may be particularly complex – from a conceptual or technical point of view – or not sufficiently detailed or determined in its content. Accordingly, States may face special difficulties in identifying the precise normative content of a given obligation, or they may lack the necessary technical – including legal and administrative, or technological - capacity to implement it effectively. Furthermore, considering that some of the key provisions of the Convention pertain to cooperation, some Parties may inevitably find themselves in a situation of impossibility of performance when a co-riparian is not available. This is clearly the case with regard to problems of implementation and application of the provisions under the Convention concerning cooperation.

15. The fact that the above difficulties were significantly perceived with respect to the Water Convention by a number of Parties and States considering accession prompted the elaboration and adoption by the Legal Board of the *Guide to Implementing the Convention* (hereinafter the *Guide*), adopted at the 5th session of the Meeting of the Parties in 2009.¹⁷ While the latter was inevitably drafted in general and abstract terms, the establishment of a permanent mechanism, endowed with an appropriate mandate, could facilitate the implementation and application of the Convention in

¹⁵ One may think of a situation in which a Party to a treaty would not adopt new express implementing legislation, while its domestic administrative, executive and judicial authorities kept applying previous domestic legislation whose regulatory standards were to be up to those required of by the treaty in point.

¹⁶ The UNECE Guidelines identify the following sources of non-compliance: (a) A lack of sufficient political attention to implementation; (b) A lack of awareness of the obligations arising under the MEA by the implementing authorities; (c) A lack of technical, administrative and financial capacity; (d) A lack of coordination among relevant national authorities; (e) A lack of understanding of implementation issues; (f) Insufficient preparation (as regards, for example, laws, regulations, training); (g) Uncertain or inaccurate data; (h) A lack or total absence of monitoring and/or review of implementation; (i) Unclear implementing rules/tools/ regulations (for example, related to the translation and interpretation of legal terms and provisions); (j) A failure to mobilize public support; (k) Insufficient budget allocations, changes in economic circumstances or unforeseen costs of implementation. (*supra* note 4, para. 5).

¹⁷ Draft Guide to Implementing the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, ECE/MP.WAT/2009/L.2, Annex, adopted at the 5th session of the Meeting of the Parties, Geneva, 10-12 November 2009.

specific situations by offering specific advisory assistance with the necessary flexibility on a case-by-case basis. The need for such a mechanism emerged precisely from requests for this kind of assistance repeatedly put forward to the Legal Board by a number of Parties during the preparation of the Guide.

16. In light of the above, it is suggested that consideration be given to the possibility that the mechanism under consideration be conceived to serve primarily, though not exclusively, as an advisory tool for individual Parties facing difficulties in the implementation and application of the Convention on a case-by-case basis. If this approach were accepted, it would undoubtedly have an impact on the functions of the would-be mechanism, actors entitled to set the mechanism in motion, confidentiality requirements and other features.

Considerations on the appropriateness of the non-adversarial nature and of the advisory role of a mechanism for the facilitation of the implementation and application of the Water Convention

17. Most problems of implementation and application of environmental conventional provisions may fall short of giving rise to a legal dispute, and this would certainly be the case with regard to the Water Convention. Precisely with a view to preventing such situations from evolving into disputes, they may benefit from third party assistance. This accounts for the fact that the mechanism under consideration has been suggested to serve primarily as an advisory tool for individual Parties facing difficulties in the implementation and application of the Convention. However, the following considerations are made with respect to the possibility that actual, or alleged, problems of implementation may give rise to differences, or disputes, between riparian Parties.

18. The establishment of a mechanism of the kind under discussion is also based on the assumption that arbitral and judicial means of dispute settlement as well as those of treaty law enforcement – such as the termination or suspension of the treaty, withdrawal of some privileges under the treaty, invocation of responsibility or liability - are frequently not entirely appropriate and may also be ineffective with regard to MEAs. Those means are of an adversarial nature, largely based on bilateral confrontation between the so called “injured State” and the so called “wrongdoing State”.

19. As to those means provided for under the law of treaties as a reaction to a breach of treaty, they may prove ineffective for our purposes. In particular, the suspension or termination of the treaty with respect to the wrongdoing party would not benefit other Parties, since many MEAs obligations are not of a purely bilateral and synallagmatic nature. This applies also the Water Convention, as it is amply shown in the Guide¹⁸.

20. As to arbitration and adjudication, when a jurisdictional ground allows for them to take place, they usually lead to an “all or nothing” kind of judicial solution of the dispute, which may not solve the substantive problem behind the same dispute. On this score, negotiated management of controversial situations, possibly within a collective facilitative body, together with the Meeting of the Parties, as opposed to a traditional bilateral adversarial approach, would better reflect the collective nature of the interests protected by MEAs.

21. Furthermore, still concerning problems of application of those provisions that bear on collective interests, in the prospect of judicial settlement, it would normally prove difficult to identify an “injured State” who could establish a sufficient legal interest to invoke State responsibility for breaches of the obligations under consideration. Accordingly, it would be highly

¹⁸ Draft Guide to Implementing the Convention, *supra* note 17, paras. 85, 148.

unlikely for a State to obtain standing before a competent international Court or Tribunal with regard to a breach of the obligations protecting collective interests.

22. Likewise, adjudication may not prove a fully satisfactory remedy with regard to problems of implementation and application concerning a large number of provisions of the Water Convention, with special regard to those that are of a programmatic or “goal-oriented” nature. Whenever legally admissible, a judicial procedure in connection with a breach of such an obligation would most likely lead to the mere assessment of a State’s failure to comply (declaratory judgement) and, possibly, to the imposition of guarantees of non-repetition. It would be difficult for an adjudicatory body to take comprehensively into account the difficulties by Parties in fully applying the obligations in point – apart from a situation of “state of necessity” - and to provide assistance in removing such difficulties.

23. Most importantly, given the transboundary scope of the Convention, problems of implementation and application in one Party may evolve into a dispute with Riparian Parties. In that respect, the facilitative mechanism under consideration, if resorted to at a sufficiently early stage, would serve as a useful means of dispute prevention. At a later stage, it would serve as an important tool of dispute management, possibly conducive to negotiated settlement.

24. In the latter case, the facilitative mechanism would assist Parties in the implementation of their obligation - under Art. 22, para. 1, of the Convention - to seek a solution to their disputes primarily “by negotiation or any other means of dispute settlement acceptable to the parties to the dispute”. Accordingly, the establishment of a facilitation mechanism would not be in contrast with judicial or arbitral settlement, which is optional under Art. 22, para. 2. On the contrary, the case can be made that, under appropriate circumstances, resort to the mechanism in point would fulfil the admissibility requirement of a prior attempt of amicable settlement, under the same provision.

IV. CONCLUDING OPERATIVE PRELIMINARY CONSIDERATIONS

25. While reference is being made throughout the present paper to existing practice concerning CRMs applicable to MEAs having differentiated, but common, features, this is without prejudice for the present exercise to depart from such common features, as they have been sketched in Part I of the present paper, but also and especially as they have been reported comparatively in Part II.

26. In line with the above, it is suggested that the mechanism under consideration may distinguish itself from recurring common features of CRMs, with a view to serve primarily as an advisory tool for individual Parties facing specific difficulties in the implementation and application of the Convention. In this regard, careful consideration should be given to the question whether the mechanism should perform general monitoring and reviewing functions.

27. The case has been made above that adjudication and arbitration, as well as the general rules on State responsibility and those of treaty law on the legal consequences of a material breach of treaty, may not be fully suitable to situations characterised by problems of implementation and application, eventually leading to cases of non-compliance, with regard to rules set out in MEAs. That being said, the existence of a facilitative mechanism of the kind under consideration would not set aside completely the option to resort to traditional dispute settlement within the conventional framework in which the mechanism in point would operate.

28. Accordingly, as it has already been noted, the establishment of a facilitation mechanism would not be in contrast with judicial or arbitral settlement, which is optional under Art. 22, para. 2, of the Convention. Furthermore, a mechanism of the kind in point should be without prejudice to the possibility - already existent - for the Meeting of the Parties to take necessary measures under

general international law in order.¹⁹ Arrangements for the harmonisation between CRM and dispute settlement procedures could also be considered as under other precedents.

29. Finally, it should be noted that existing treaty practice and international guidelines²⁰ show that the power to make the final assessment concerning any specific case involving problems of implementation and application would remain with the Parties as a whole, i.e. within the Meeting of the Parties, which will address the matter concerning individual, or more than one, Parties in a constructive and cooperative manner in order to secure generally agreeable solutions. The Meeting of the Parties may also decide to vest the body in charge of the mechanism in point with such a power.

¹⁹ See *Geneva Strategy*, *supra* note 5, para. 29. Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 YB INT'L ENV. L., (1992) at 123, especially at 155 *et seq.*, M. Fitzmaurice and Redgwell, *Environmental Non-Compliance Procedures and International Law*, 31 NETH. YB INT'L L. (2000) at 35, especially at 43 *et seq.*

²⁰ See UNEP Guidelines, *supra* note 3, para. 14(b)(iv).

PART II

PARAMETERS AND OPTIONS FOR DRAFTING A FACILITATIVE MECHANISM FOR THE IMPLEMENTATION AND APPLICATION OF THE WATER CONVENTION

I. INTRODUCTORY REMARKS

30. According to the UNECE Guidelines on the topic,²¹ the rules establishing a mechanism of the kind under consideration should address the following points:

- a) Objectives;
- b) Size and composition of any committees established under such rules and other organizational issues;
- c) Functions and mandate;
- d) Actors entitled to resort to the mechanism;
- e) Sources of information;
- f) Potential measures.

31. The advisability and appropriateness of addressing each of those points, and, especially, the way in which they will be addressed in the present exercise should take into account the specific normative features of the Convention, as illustrated in the Guide,²² i.e. the framework nature of the Convention and the due-diligence nature of its main provisions which are, nonetheless, subject to immediate implementation and application.

II. OBJECTIVES, SCOPE AND NAME OF THE BODY IN CHARGE WITH THE MECHANISM

32. Provisions enunciating the aims and scope of a mechanism of the kind under consideration are usually contemplated in the rules establishing such procedures, even though with some exceptions, also within the UNECE context. Apart from being suggested by the UNECE Guidelines, the inclusion of such provisions appears advisable. Similar provisions, however enunciatory rather than strictly normative in nature, would determine the rationale of the overall mechanism. They would set the basic standards for the actual drafting of the specific rules governing the mechanism in point, on the one hand, and for the appropriate interpretation and application of such rules by the future permanent body in charge of the mechanism in point, on the other. Similar provisions would also help conveying efficiently to the beneficiaries of the mechanism its basic nature.

33. Consequently, on the basis of the indications emerged from various Parties in the process that led to the decision of the Meeting of the Parties vesting the Legal Board with the mandate to undertake the present exercise, it is suggested that enunciation be made of the objectives of the future mechanism which would indicate its primarily facilitative purposes with respect to implementation and application of the Convention, as well as its non-confrontational, non-binding and preventive nature. This may suggest the need to consider whether the objective of general compliance review and monitoring is needed and would serve facilitative purposes, or whether general compliance and monitoring should not be part of the scope of the mechanism, where the promotion of compliance would then be suggested as an objective suitable to the mechanism under consideration.

²¹ See UNECE Guidelines, *supra* note 4.

²² See, in general, Guide to Implementing the Convention, *supra* note 17, at paras 57-71.

34. Although the Water Convention, in contrast to e.g. the Cartagena Protocol on Biosafety or the Basel Convention, does not make any reference to limited capabilities of some countries (in the case of the Basel Convention, developing countries, and in the case of the Cartagena Protocol, developing countries and economies in transition), there can be no denying that capabilities of Parties to the Water Convention are different. At the same time, the due-diligence nature of a large number of obligations under the Convention allows to pay due regard to and take into account the capacity of a particular Party when considering its implementation and compliance with obligations under the Convention. Therefore, it may be appropriate to consider whether for the purposes of the Water Convention's mechanism, indication should be made that the mechanism in point would give "particular attention to the special needs of [...] countries with economies in transition".²³

35. In line with the suggestion put forward above, under para. 33, to the effect that the main objective of the mechanism would be one of facilitation for Parties in the implementation and application of the Convention, one may suggest a title for the body in charge of the mechanism under consideration of the following kind: *Facilitative Body/Committee; Implementation Committee*.

A. SELECTIVE, NON-EXHAUSTIVE DRAFTING EXAMPLES:

KYOTO PROTOCOL CRM:

"I. Objective - The objective of these procedures and mechanisms is to facilitate, promote and enforce compliance with the commitments under the Protocol".

ESPOO CONVENTION CRM:

4. The objective of the Committee shall be to assist Parties to comply fully with their obligations under the Convention [...]

UNFCCC CRM:

Objective –

2. The objective of the process is to resolve questions regarding the implementation of the Convention, by:

- (a) Providing advice on assistance to Parties to overcome difficulties encountered in their implementation of the Convention;
- (b) Promoting understanding of the Convention;
- (c) Preventing disputes from arising.

CARTAGENA PROTOCOL CRM:

Objective, nature and underlying principles

²³ The quotation is taken from the Terms of Reference of the CRM of the Basel Convention (Para. 2), but a language to that effect may be found that can be appropriately inserted in the text establishing the mechanism in point.

1. The objective of the compliance procedures and mechanisms shall be to promote compliance with the provisions of the Protocol, to address cases of non-compliance by Parties, and to provide advice or assistance, where appropriate.
2. The compliance procedures and mechanisms shall be simple, facilitative, non-adversarial and cooperative in nature.
3. The operation of the compliance procedures and mechanisms shall be guided by the principles of transparency, fairness, expedition and predictability. It shall pay particular attention to the special needs of developing country Parties, in particular the least developed and small island developing States among them, and Parties with economies in transition, and take into full consideration the difficulties they face in the implementation of the Protocol.

BASEL CONVENTION CRM:

Objectives: 1. The objective of the mechanism is to assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with the obligations under the Convention.

PROTOCOL ON WATER AND HEALTH CRM:

1. Objective, nature and principles:

1. The objective of this compliance procedure is to facilitate, promote and aim to secure compliance with the obligations under the Protocol, with a view to preventing disputes, by:
 - (a) Addressing cases of non-compliance by Parties; and
 - (b) Providing advice or assistance to Parties, where appropriate.
2. The compliance procedure shall be simple, facilitative, non-adversarial and cooperative in nature, and its operation shall be guided by the principles of transparency, fairness, expedition and predictability.
3. The compliance procedure shall be conducted bearing in mind the interests of the Party facing difficulties, of the Parties as a whole and of populations potentially or actually adversely affected by non-compliance.

B. POSSIBLE ISSUES TO BE DISCUSSED BY THE LEGAL BOARD

- Should the primary objective of the mechanism be to facilitate the implementation of the Convention?
- Should reference be made to the ways the objective could be achieved? If so, which aspects should be mentioned?
- Should the mechanism in point include the objective of general compliance review and monitoring?
- Should any reference be made as to the need for the mechanism in point to take into consideration that Parties may have differentiated capacity?

- What could be the possible title for the body in charge of the mechanism under consideration?

III. SIZE AND COMPOSITION OF THE PERMANENT BODY IN CHARGE OF THE MECHANISM AND OTHER ORGANIZATIONAL ISSUES

36. As to the composition and organizational issues of the body in charge of the mechanism, against the background of the existing practice, the following three aspects deserve special attention:

a. Number of members

37. The Committee should be composed of a reasonably limited number of members, to be elected by the Meeting of the Parties. The number of members of existing CRMs ranges from eight (Espoo) and nine (Århus,²⁴ LRTAP, Protocol on Water and Health) to twenty (Kyoto) with intermediate solutions: ten (Montreal), fifteen (Basel and Cartagena). Having regard to the need for an adequate proportion of two components, i.e. water and legal experts, it may be suggested that consideration be given to an intermediate number, ranging between 9 and 12. Given that the body might also perform functions similar to those of conciliation, an odd number of members might be preferable.

b. Representatives of States Parties vs. independent members

38. A more delicate issue is whether the body under consideration should be composed of States representatives or of members sitting in their personal capacity. This issue should not be confused with that concerning public participation, let alone the fact that even if it was decided that the body should be composed of members serving in their personal capacity, the latter would be elected by the Governments.

39. Existing practice in areas no less delicate than ours, such as human rights, shows that Committees composed of independent members selected at the governmental level on the basis of their expertise offer a high degree of reliability and impartiality. This matter has been left open in both ECE and UNEP Guidelines²⁵ just as well as under the UNFCCC CRM. The Geneva Strategy opts for representatives of the Parties to the mother Conventions,²⁶ following the practice of early CRMs, such as the Montreal CRM and the LRTAP CRM. Under the Basel CRM the text was left ambiguous on this point, in the absence of agreement on more defined formulas, simply providing that members “shall serve objectively and in the best interest of the Convention”. Finally, the Kyoto CRM, Cartagena CRM and the Århus CRM provide for members of the Committee serving in their personal capacity. A mixed formula could also be considered.

c. Public participation in the process of electing members

40. The issue in point should be considered as separate from the one on transparency/confidentiality, which will be addressed below under Section VI. That is to say that formulas may be envisaged that would ensure forms of public participation while safeguarding the degree of confidentiality that the Legal Board may deem appropriate. Accordingly, the issue of public participation could be considered under two basic possible options. One option would be that of affording NGOs with the power to officially submit candidatures for the Committee’s

²⁴ The number of members in the Aarhus Convention’s Compliance Committee was increased from eight to nine at the second session of the Meeting of the Parties in 2005 by Decision II/5 where reference was made to “the steady increase in the number of Parties”.

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

²⁶ See Geneva Strategy, para. 19.

membership. This formula was adopted under the Åarhus CRM. A second option would be a milder version of the former option to the effect that only Parties would be entitled to nominate candidates, though, having to take into account proposals made also by NGOs. This option was adopted under the Protocol on Water and Health CRM.

d. Other organizational issues

41. Other issues concerning the composition and organization of the body under consideration relate to: *qualifications and expertise of members; nationality requirements and balance (including regional and expertise wise) in the composition; term of office; re-election and substitution; election of officers and rules of procedure; meetings.*

A. SELECTIVE, NON-EXHAUSTIVE DRAFTING EXAMPLES:

MONTREAL PROTOCOL CRM:

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

LRTAP CRM:

Structure - 1. The Committee shall consist of nine Parties to the Convention; each member of the Committee shall be Party to at least one protocol. The Executive Body shall elect Parties for terms of two years. Outgoing Parties may be re-elected for one consecutive term, unless in a given case the Executive Body decides otherwise. The Executive Body shall elect a Chair of the Committee from among the members annually.

ÅARHUS CONVENTION CRM :

I. Structure – 1. The Committee shall consist of eight members, who shall serve in their personal capacity [...]

KYOTO PROTOCOL CRM:

II. Compliance Committee –

3. The Committee shall consist of twenty members elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol [...]

6. Members of the Committee and their alternates shall serve in their individual capacities. They shall have recognized competence relating to climate change and in relevant fields such as the scientific, technical, socio-economic or legal fields.

BASEL CONVENTION CRM:

Composition and tenure:

3. A Committee for administrating this mechanism (“the Committee”) is hereby established. It shall consist of 15 Members nominated by the Parties, serving in accordance with paragraph 4, and based on equitable geographical representation of the five regional groups of the United Nations, elected by the Conference of the Parties.

4. If a Member of the Committee resigns or is otherwise unable to complete his or her term of office or to perform his or her functions, the Party who nominated that member shall nominate an alternate to serve for the remainder of the mandate.

5. Members of the Committee will serve objectively and in the best interest of the Convention. They shall have expertise relating to the subject matter of the Convention in areas including scientific, technical, socio-economic and/or legal fields.

6. At the meeting at which the decision establishing the mechanism is adopted, the Conference of the Parties shall elect five members, one from each region, for one term, and ten members, two from each region, for two terms. The Conference of the Parties shall, at each ordinary meeting thereafter, elect for two full terms new members to replace those members whose period of office has expired, or is about to expire. Members shall not serve for more than two consecutive terms. For the purposes of the present terms of reference “term” means the period that begins at the end of one ordinary meeting of the Conference of the Parties and ends at the end of the next ordinary meeting of the Parties.

7. The Committee shall elect its officers – a Chair, three Vice-chairs and a Rapporteur – based on equitable geographical representation of the five regional groups of the United Nations.

8. The Committee shall meet at least once between each regular meeting of the Conference of the Parties, and in conjunction with meetings of other Convention bodies. The secretariat shall arrange for and service the meetings of the Committee.

CARTAGENA PROTOCOL CRM:

1. A Compliance Committee, hereinafter referred to as "the Committee", is hereby established pursuant to Article 34 of the Cartagena Protocol on Biosafety to carry out the functions specified herein.

2. The Committee shall consist of 15 members nominated by Parties and elected by the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety on the basis of three members from each of the five regional groups of the United Nations.

3. Members of the Committee shall have recognized competence in the field of biosafety or other relevant fields, including legal or technical expertise, and serve objectively and in a personal capacity.

4. Members shall be elected by the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety for a period of four years, this being a full term. At its first meeting, the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety shall elect five members, one from each region, for half a term, and ten members for a full term. Each time thereafter, the Conference of the Parties to the serving as the meeting of the Parties to the Cartagena Protocol on Biosafety shall elect for a full term, new

members to replace those whose term has expired. Members shall not serve for more than two consecutive terms.

5. The Committee shall meet twice a year, unless it decides otherwise. The Secretariat shall service the meetings of the Committee.

6. The Committee shall submit its reports including recommendations with regard to the discharge of its functions to the next meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol for consideration and appropriate action.

7. The Committee shall develop and submit its rules of procedure to the Conference of the Parties serving as the meeting of the Parties for its consideration and approval.

B. POSSIBLE ISSUES TO BE DISCUSSED BY THE LEGAL BOARD

- Should members of the body under consideration serve in their personal capacity or be State representatives?
- What would be the options for nominating candidatures for the Committee's membership? Would there be a role for NGOs in the process?
- What would be the appropriate number of members and term of office?
- The Legal Board may wish to express its views on the nationality requirements and balance in the composition, re-election and substitution, election of officers, meetings and adoption of rules of procedure.

IV. MANDATE/FUNCTIONS

42. As to the functions of the permanent body in charge of the mechanism under consideration, practice shows that Compliance Review Committees (CRCs) are usually vested with a twofold task. On the one hand, they exercise a general monitoring function, primarily on the basis of periodical reports submitted by States, further reporting to the Parties as a whole. On the other, CRCs are given the power to consider submissions, referrals or communications, arising out of specific problems of implementation and application, usually giving rise to cases of non-compliance. Some sets of rules establishing CRMs (outside the ECE context) set out the mandate of CR bodies using language restating the non-confrontational nature of their functions.

43. As to the monitoring functions, it has already been noted that the Convention does not explicitly provide for a reporting regime, which would be a necessary precondition for the regular exercise of monitoring and reviewing functions. At the same time, it should also be noted that it would be possible for the Meeting of the Parties to take action, under Article 17, para.2, lett.(f), to establish such a regime. During the process of elaboration of the Guide, some Parties indicated that the need has emerged for a mechanism capable of providing assistance and expertise with regard to specific situations on a case-by-case basis. No specific mention has been made and no discussion has taken place with regard to the establishment of a reporting mechanism. Even though the above mentioned considerations may militate against vesting the body in charge of the mechanism in point with reviewing and monitoring functions and in favour of a flexible and agile mandate focusing on consultative and advisory functions, the issue deserves careful consideration. In addressing the

matter, the Parties may wish to note that periodic assessments of the state of transboundary rivers, lakes and groundwaters have become a regular activity under the Convention.

44. Since the mandate and functions of a body in question would be closely connected to and, to a certain extent, would determine the actors entitled to have access to the procedure, it is suggested for the purposes of discussion and further drafting that these issues may be reflected in a text addressing in one formula the functions of the body, as well as the issue of the procedure of the submissions to the body in hand. In this paper, issues to be discussed by the Legal Board – pertaining to both the mandate and the procedure for submissions - will be addressed in the subsequent section V in sub-section A on “Selective, non exhaustive drafting examples”, as well as sub-section B on “Possible issues to be discussed by the Legal Board”.

V. SUBMISSIONS AND THE ACTORS ENTITLED TO HAVE ACCESS TO THE PROCEDURE

45. Existing practice shows that it is generally taken that problems of implementation and application, including those of compliance, by a Party can be signalled to a competent body by that very Party with a view to seeking advice and assistance (so called self-submission).

46. International practice also shows that, in a number of cases, Parties may set in motion the CRM in relation to alleged problems of implementation and application of a given MEA by another Party. Although a fundamentally advisory function and a non-confrontational nature for the mechanism in point, if generally accepted, may be interpreted so as to doubt about the appropriateness of providing for the possibility for submissions by a Party in relation to alleged problems of implementation by another Party, it may also be interpreted in favour of admitting such submissions which would promote the role of the mechanism in dispute prevention, as well as the consistency of application of the Convention and its general cooperative spirit. There is no denying that the nature of most of the obligations for Parties under the Convention makes their implementation hardly possible without cooperation and interaction with other riparians, which would therefore call for considering the possibility to bring the issue of transboundary cooperation to the attention of the mechanism under consideration.

47. A consistent number of precedents in the field show that the Secretariat of a given Convention may refer to the Committee issues of the kind under consideration of which it has become aware, particularly upon considering the reports submitted in accordance with the reporting requirements, . The advisability of envisaging the possibility of referrals by the Secretariat would largely, though not exclusively, depend on the existence of a general compliance review and monitoring function for the mechanism under consideration.

48. The possibility also for the public to make submissions in procedures of the kind in hand has been taken into consideration by the “Geneva Strategy” which invites Parties to focus on “whether it is appropriate for the Compliance Review Committee to consider communications from the public”.²⁷ Existing practice on whether to include non-state actors among the subjects entitled to approach a CR Committee is far from established. Such an option was proposed and rejected under the Basel CRM. To date, the only CRMs granting non-state actors the possibility to raise compliance issues can be found in the procedure under the Åarhus Convention, whose Art. 15 on compliance review explicitly envisages “the option of considering communications from the public”, and under the Protocol of Water and Health.

49. Those two elements of practice may be explained by the common feature of the rationale of the Aarhus Convention and of the Protocol on Water and Health, to the effect of directly affecting

²⁷ Geneva Strategy, *supra* note 5, para. 23(a).

rights of individuals within the domestic sphere of the Parties. On the one hand, the Water Convention has a basically transboundary dimension, focusing on inter-State obligations, which makes it a different instrument from the Aarhus Convention or the Protocol on Water and Health. On the other hand, the fulfilment of vital human needs is a priority factor among the legal parameters for the application of the reasonable and equitable utilization principle enshrined in the Convention. The appropriateness of envisaging that the procedure under consideration may be set in motion by actors from the public should be considered in light of the above and taking into account the objective and non-confrontational nature of the mechanism in point.

50. The practice of the Espoo Convention's Implementation Committee in this regard may deserve attention. The Implementation Committee may become aware of a possible non-compliance having received information from "any other source" (rule 15.1(b) of the Operating Rules, in annex IV to decision IV/2). The Committee, having sought clarification as appropriate, may determine to begin a Committee initiative (appendix to decision III/2, para. 6) and request the Party concerned to furnish necessary information about the matter. Any reply and information in support shall be provided to the Committee within three months or such longer period as the circumstances of a particular case may require. The Committee shall consider the matter as soon as possible in the light of any reply that the Party may provide. This opportunity has been used several times by NGOs to attract the Committee's attention to possible cases of non-compliance by a Party, but it is not an automatic trigger for a Committee initiative: in deciding to act upon its own initiative (*motu proprio*), the Committee should take into account a number of factors, including the availability of Committee time and resources (rule 15.2 of the Operating Rules).

A. SELECTIVE, NON-EXHAUSTIVE DRAFTING EXAMPLES:

LRTAP CRM:

Functions of the Committee:

3. The Committee shall:
 - (a) Review periodically compliance by the Parties with the reporting requirements of the protocols;
 - (b) Consider any submission or referral made in accordance with paragraphs 4 and 5 below with a view to securing a constructive solution;
 - (c) Where it deems it necessary, be satisfied, before it adopts a report or recommendation on such a submission or referral, that the quality of data reported by a Party has been evaluated by a relevant technical body under the Executive Body and/or, where appropriate, by an expert nominated by the Bureau of the Executive Body; and
 - (d) Prepare, at the request of the Executive Body, and based on any relevant experience acquired in the performance of its functions under subparagraphs (a), (b) and (c) above, a report on compliance with or implementation of specified obligations in an individual protocol.

PROTOCOL ON WATER AND HEALTH CRM:

Functions of the Committee:

11. The Committee shall:

- (a) Consider any submission, referral or communication relating to specific issues of compliance made in accordance with paragraphs 13–22 below;
- (b) Prepare, at the request of the Meeting of the Parties, a report on compliance with or implementation of specific provisions of the Protocol; and
- (c) Monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 7, paragraph 5, of the Protocol.

12. The Committee may examine compliance issues and make recommendations or take measures if and as appropriate.

Submissions by Parties:

13. A submission may be brought before the Committee by a Party that concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligations under the Protocol. Such a submission shall be addressed in writing to the joint secretariat and shall explain, in particular, the specific circumstances that the Party considers to be the cause of its non-compliance. The joint secretariat shall transmit the submission to the Committee, which shall consider the matter as soon as practicable.

14. A submission may be brought before the Committee by one or more Parties that have reservations about another Party's compliance with its obligations under the Protocol. Such a submission shall be addressed in writing to the joint secretariat and supported by corroborating information. The joint secretariat shall, within two weeks of receiving a submission, send a copy of it to the Party whose compliance is at issue. Any reply and supporting information shall be submitted to the joint secretariat and to the Parties involved within three months or such longer period as the circumstances of a particular case may require, but in no case later than six months. The joint secretariat shall transmit the submission and the reply, as well as all corroborating and supporting information, to the Committee, which shall consider the matter as soon as practicable.

Referrals by Joint Secretariat:

15. Where the joint secretariat, upon considering the reports submitted in accordance with the Protocol's reporting requirements, becomes aware of possible non-compliance by a Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response or the matter is not resolved within three months, or such longer period as the circumstances of the matter may require but in no case later than six months, the joint secretariat shall bring the matter to the attention of the Committee, which shall consider the matter as soon as practicable.

Communications from the public:

16. On the expiry of 12 months from either the date of adoption of this decision or the date of the entry into force of the Protocol with respect to a Party, whichever is the later, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Protocol, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received. During the four-year period mentioned above, the Party may revoke its notification, thereby accepting that, from that date,

communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Protocol.

17. The communications referred to in paragraph 16 shall be addressed to the Committee through the joint secretariat in writing and may be in electronic form. The communications shall be supported by corroborating information.

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

- (a) Anonymous;
- (b) An abuse of the right to make such communications;
- (c) Manifestly unreasonable;
- (d) Incompatible with the provisions of this compliance procedure or with the Protocol.

19. The Committee should, at all relevant stages, take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

20. Subject to the provisions of paragraph 18, the Committee shall as soon as possible bring any communications submitted to it under paragraph 16 to the attention of the Party alleged to be in non-compliance.

21. A Party shall, as soon as possible but not later than five months after any communication is brought to its attention by the Committee, submit to the Committee written explanations or statements clarifying the matter and describing any response that it may have made.

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

BASEL CONVENTION CRM:

Procedures for specific submissions

9. Submissions may be made to the Committee by:

- (a) A Party that concludes that, despite its best efforts, it is or will be unable to fully implement or comply with its obligations under the Convention;
- (b) A Party that has concerns or is affected by a failure to comply with and/or implement the Convention's obligations by another Party with whom it is directly involved under the Convention. A Party intending to make a submission under this subparagraph shall inform the Party whose compliance is in question, and both Parties should then try to resolve the matter through consultations;
- (c) The secretariat, if, while acting pursuant to its functions under articles 13 and 16, it becomes aware of possible difficulties of any Party in complying with its reporting obligations under article 13, paragraph 3 of the Convention, provided that the matter has not been resolved within three months by consultation with the Party concerned.

10. Any submission, except one made under paragraph 9 (c), shall be addressed in writing to the secretariat, and shall set out:

- (a) The matter of concern;
- (b) The relevant provisions of the Convention; and
- (c) Where paragraph 9 (b) applies, information substantiating the submission.

11. Where a submission is made under paragraph 9 (a), the secretariat shall forward the submission, within two weeks of its receiving the submission, to the Committee for consideration at its next meeting.

12. The Party whose compliance is in question may present responses and/or comments at every step of the proceedings described in this decision.

13. In cases of a submission other than by a Party with respect to its own compliance, the secretariat shall send, within two weeks of its receiving the submission, a copy to the Party whose compliance with the Convention is in question and to the Committee for consideration at its next meeting.

14. Without prejudice to paragraph 12, additional information provided in response by the Party whose compliance is in question should be forwarded to the secretariat within three months of the date of the receipt of the submission by the Party in question, unless the circumstances of a particular case require an extended period of time. Such information will be immediately transmitted to the members of the Committee for consideration at its next meeting. Where a submission has been made pursuant to paragraph 9 (b), the information shall also be forwarded by the secretariat to the Party that made the submission.

15. Where a Party is identified in a submission or itself makes a submission, it shall be invited to participate in the consideration of the submission by the Committee. Such a Party, however, shall not take part in the elaboration and adoption of the conclusions or recommendations by the Committee. Conclusions and recommendations shall be shared with the Party concerned for consideration and an opportunity to comment. Any such comments shall be forwarded with the report of the Committee to the Conference of the Parties.

16. Meetings dealing with specific submissions relating to the compliance of an individual Party shall not be open to other Parties or the public, unless the Committee and the Party whose compliance is in question agree otherwise.

17. Under the compliance mechanism, a Party may also consider and use relevant and appropriate information provided by civil society on compliance difficulties.

18. The Committee may decide not to proceed with a submission which it considers is:

- (a) *de minimis*; or
- (b) manifestly ill-founded.

Facilitation procedure

19. The Committee shall consider any submission made to it in accordance with paragraph 10 with a view to determining the facts and root causes of the matter of concern and, assist in its resolution. As part of this process, the Committee may provide a Party, after coordination with that Party, with advice, non-binding recommendations and information relating to, inter alia;

- (a) Establishing and/or strengthening its domestic/regional regulatory regimes;
- (b) Facilitation of assistance in particular to developing countries and countries with economies in transition, including on how to access financial and technical support, including technology transfer and capacity-building;
- (c) Elaborating, as appropriate and with the cooperation of the Party or Parties faced with the compliance problems, voluntary compliance action plans, and review their implementation. A voluntary compliance action plan may include benchmarks, objectives and indicators of the plan, as well as an indicative timeline for its implementation;
- (d) Any follow-up arrangements for progress reporting to the Committee, including through the national reporting procedure under article 13.

Advice, non-binding recommendations and information other than those listed in subparagraphs (a) to (d) above should be provided in agreement with that Party.

ESPOO CONVENTION CRM:

4. The objective of the Committee shall be to assist Parties to comply fully with their obligations under the Convention, and to this end it shall:

- (a) Consider any submission made in accordance with paragraph 5 below or any other possible non-compliance by a Party with its obligations that the Committee decides to consider in accordance with paragraph 6, with a view to securing a constructive solution;
- (b) Review periodically, in accordance with guidelines or criteria formulated by the Meeting of the Parties, compliance by the Parties with their obligations under the Convention on the basis of the information provided in their reports;
- (c) Prepare the reports referred to in paragraph 11 with a view to providing any appropriate assistance to the Party or Parties concerned, for example by clarifying and assisting in the resolution of questions; providing advice and recommendations relating to procedural, technical or administrative matters; and providing advice on the compilation and communication of information; and
- (d) Prepare, at the request of the Meeting of the Parties, and based on relevant experience acquired in the performance of its functions under subparagraphs (a), (b) and (c) above, a report on compliance with or implementation of specified obligations in the provisions of the Convention.

Submission by Parties

5. A submission may be brought before the Committee by:

- (a) One or more Parties to the Convention that have concerns about another Party's compliance with its obligations under that instrument. Such a submission shall relate specifically to those concerns and shall be addressed in writing by the focal point of the Party in question to the secretariat and supported by corroborating information. The secretariat shall, within two weeks of receiving a submission, send a copy of it to the focal point of the Party whose compliance is at issue. Any reply and information in support thereof shall be submitted to the secretariat and to the focal points of the Parties involved within three months or such longer period as the Parties involved agree. The secretariat shall transmit the submission and the reply, as well as all corroborating and supporting information, to the Committee, which shall consider the matter as soon as possible; or

(b) A Party that concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligations under the Convention. Such a submission shall be addressed in writing to the secretariat and explain, in particular, the specific circumstances that the Party considers to be the cause of its non-compliance. The secretariat shall transmit the submission to the Committee, which shall consider it as soon as possible.

Committee initiative

6. Where the Committee becomes aware of possible non-compliance by a Party with its obligations, it may request the Party concerned to furnish necessary information about the matter. Any reply and information in support shall be provided to the Committee within three months or such longer period as the circumstances of a particular case may require. The Committee shall consider the matter as soon as possible in the light of any reply that the Party may provide.

B. POSSIBLE ISSUES TO BE DISCUSSED BY THE LEGAL BOARD

- Should the body in charge of the mechanism under consideration be mandated to exercise the general monitoring function on the basis of periodic reports submitted by States and, possibly, other information?
- Should the body in charge of the mechanism under consideration be approached by one Party or more Parties in relation to alleged cases of difficulties in implementation or application of the Convention by another Party(ies)?
- Should the Secretariat have a possibility to refer a matter to the body in charge of the mechanism under consideration, in case the mechanism includes a general function of the review of compliance through reporting and in case of the absence of such function?
- What could be the role of non-state actors (the public, international organisations) and Signatories in bringing the issues of difficulties in implementation or application of the Convention before the body in charge of the mechanism under consideration?

VI. INFORMATION GATHERING

51. As to the power of the Committee to gather the necessary information on factual, scientific, administrative and legal issues concerning problems of implementation and application of the Convention by the submitting Party, two approaches have emerged from the existing practice. One consists of a very general provision vesting the Committee with broad powers and wide discretion in the matter. A second approach consists of spelling out exhaustively the specific sources of information that may be resorted to by the Committee.

52. Given its specific advisory role and taking into account that information gathering and information giving should be considered themselves as part and parcel of the advisory process and advisory product, it might be appropriate to consider giving the body in question a broad discretion in the determination as to the possible sources of information. The fact should remain that, with specific regard to the possibility for the body in hand to conduct a fact-finding mission on the territory of Parties, it be made subject to the consent of the Party, or Parties, concerned.

A. SELECTIVE, NON-EXHAUSTIVE DRAFTING EXAMPLES:

LRTAP CRM:

Information gathering

6. To assist the performance of its functions under paragraph 3 above, the Committee may:

- (a) Request further information on matters under its consideration, through the secretariat;
- (b) Undertake, at the invitation of the Party concerned, information gathering in the territory of that Party;
- (c) Consider any information forwarded by the Secretariat concerning compliance with the protocol.

ÅARHUS CONVENTION CRM:

Information gathering

12. To assist the performance of its functions, the Committee may:

- (a) Request further information on matters under its consideration;
- (b) Undertake, with the consent of any Party concerned, information gathering in the territory of that Party;
- (c) Consider any relevant information submitted to it; and
- (d) Seek the services of experts and advisers as appropriate.

KYOTO PROTOCOL CRM:

General procedures

3. Each branch shall base its deliberations on any relevant information provided by:

- (a) Reports of the expert review teams under Article 8 of the Protocol;
- (b) The Party concerned;
- (c) The Party that has submitted a question of implementation with respect to another Party;
- (d) Reports of the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Protocol, and the subsidiary bodies under the Convention and the Protocol; and

(e) The other branch.4. Competent intergovernmental and non-governmental organizations may submit relevant factual and technical information to the relevant branch.5. Each branch may seek expert advice.

CARTAGENA PROTOCOL CRM:

Information and consultation

1. The Committee shall consider relevant information from:

(a) The Party concerned;

(b) The Party that has made a submission with respect to another Party in accordance with paragraph 1(b) of section IV.

2. The Committee may seek or receive and consider relevant information from sources such as:

(a) The Biosafety Clearing-House; the Conference of the Parties to the Convention, the Conference of the Parties serving as the meeting of the Parties to the Protocol, and subsidiary bodies of the Convention on Biological Diversity and the Protocol;

(b) Relevant international organizations.

3. The Committee may seek expert advice from the biosafety roster of experts.

4. The Committee, in undertaking all of its functions and activities, shall maintain the confidentiality of any information that is confidential under Article 21 of the Protocol.

PROTOCOL ON WATER AND HEALTH CRM:

VII. Information gathering

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

(a) Request further information on matters under its consideration;

(b) Undertake, with the consent of any Party concerned, information gathering in the territory of that Party;

(c) Consider any relevant information submitted to it; and

(d) Seek the services of experts and advisers, including representatives of NGOs or members of the public, as appropriate.

B. POSSIBLE ISSUES TO BE DISCUSSED BY THE LEGAL BOARD

- What could be the possibilities for the body in charge of the mechanism under consideration to seek and receive information?
- What could be the sources of such information?

VI. CONFIDENTIALITY

53. The degree of confidentiality would largely depend on the objective and functions of the mechanism under consideration. In case the primarily advisory and facilitative functions of the mechanism under consideration were to be generally shared by the Legal Board, a significant degree of confidence might be appropriate to enhance the efficiency of the mechanism in its fact-finding, consultative, propositive and conciliatory activities, with a view to putting the interested Parties in an easier position vis-à-vis the mechanism in point. Existing practice shows that confidentiality is usually the rule with respect to cases of self-submissions. Indeed, a similar attitude would increase the confidence of Parties vis-à-vis the mechanism in point, hence, encouraging its utilization, eventually improving the implementation and application record of the Convention. At the same time, considerations for promoting the implementation of the Convention by a broader number of Parties, as well as for providing more efficient assistance concerning the difficulties of implementation - including those due to the lack of capacity or poor technology - may favour a more open and transparent approach. Last but not least, the integrated approach to water management and protection, which lies at the heart of the Convention and is based on the concept of catchment area, could hardly be followed in case the activities of the body in charge of the mechanism were not accessible to co-riparian(s) sharing the same waters.

54. Also, one may indicate, as a downside of confidentiality, the difficulty that it may involve with regard to the possibility for the Committee to refer to the Meeting of the Parties for extra assistance. The issue may be given priority attention in the discussion also in connection with the outcome of the procedure.

A. SELECTIVE, NON-EXHAUSTIVE DRAFTING EXAMPLES:

BASEL CONVENTION CRM:

16. Meetings dealing with specific submissions relating to the compliance of an individual Party shall not be open to other Parties or the public, unless the Committee and the Party whose compliance is in question agree otherwise.

LRTAP CRM:

7. The Committee shall ensure the confidentiality of any information that has been provided to it in confidence.

MONTREAL PROTOCOL CRM:

15. The members of the Implementation Committee and any Party involved in its deliberations shall protect the confidentiality of information they receive in confidence.

16. The report, which shall not contain any information received in confidence, shall be made available to any person upon request. All information exchanged by or with the Committee that is related to any recommendation by the Committee to the Meeting of the Parties shall be made available by the Secretariat to any Party upon its request; that Party shall ensure the confidentiality of the information it has received in confidence.

ESPOO CONVENTION CRM:

8. The Committee shall ensure the confidentiality of information that has been provided to it in confidence, inter alia, with regard to the reports of its meetings.

Entitlement to participate

9. A Party in respect of which a submission is made or which makes a submission shall be entitled to participate in, or be present during, the consideration by the Committee of that submission [...]

PROTOCOL ON WATER AND HEALTH CRM:

VIII. Confidentiality:

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

25. The Committee and any person involved in its work shall ensure the confidentiality of any information that falls within the scope of the exceptions provided for in article 10, paragraphs 4 (c) and 5, of the Protocol and that has been provided in confidence.

26. The Committee and any person involved in its work shall ensure the confidentiality of information that has been provided to it in confidence by a Party when making a submission in respect of its own compliance in accordance with paragraph 13 above.

27. All information that may disclose the identity of the member of the public submitting the information or of a third person shall be kept confidential if submitted by a person who asks that it be kept confidential, unless the Committee considers that there are no reasonable grounds to believe that a member of the public may be penalized, persecuted or harassed because of the communication.

28. The meetings of the Committee shall be held in public unless otherwise provided for in this annex. If necessary to ensure the confidentiality of information in any of the above cases, the Committee shall hold meetings in private.

29. Committee reports shall not contain any information that the Committee must keep confidential under paragraphs 25–27 above. Information that the Committee must keep confidential under paragraph 25 shall not be made available to any Party. All other information that the Committee receives in confidence and that is related to any recommendations by the Committee to the Meeting of the Parties shall be made available to any Party upon its request; that Party shall ensure the confidentiality of the information that it has received in confidence.

B. POSSIBLE ISSUES TO BE DISCUSSED BY THE LEGAL BOARD

- Taking into account the discussion on the objective, functions and actors entitled to have access to the procedure, the Legal Board may wish to discuss the degree of confidentiality for the proposed body in charge of the mechanism.

VIII. OUTCOME OF THE FACILITATIVE PROCEDURE

55. The typical outcome of a compliance review procedure usually consists of a report containing recommendations on general, or specific, issues of non-compliance. Such recommendations are generally addressed to the Parties as a whole, i.e. the Meeting of the Parties, who have the power to take the final decision on the adoption of the report and of the appropriate measures to tackle the problems of compliance indicated in the report.

56. At the same time, the approach to the outcomes of the facilitative procedure would largely depend on the objective, nature and functions of the mechanism under consideration, and could, if necessary, depart from the one referred to above in the previous paragraph. In such case, the outcomes could consist of one or more communications, including of an informal and interactive nature, between the Committee and the Party, or Parties, concerned, of a consultative and advisory nature.

57. In any case, the formula to be found would be without prejudice for the power of the Meeting of the Parties to “consider and undertake any additional action that may be required” within the framework of its duty to “keep under continuous review the implementation of th[e] Convention” under Art 17. On this score, consideration should be given to the possibility to reconcile the issue of confidentiality with the appropriateness, or not, that the Committee may address the Meeting of the Parties in order to require further assistance.

A. SELECTIVE, NON-EXHAUSTIVE DRAFTING EXAMPLES:

MONTREAL PROTOCOL CRM:

Indicative list of measures that might be taken by a meeting of the Parties in respect of non-compliance with the Protocol:

[Source: Annex V of the report of the Fourth Meeting of the Parties]

A. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.

B. Issuing cautions.

C. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.

BASEL CONVENTION CRM:

Facilitation procedure

19. The Committee shall consider any submission made to it in accordance with paragraph 10 with a view to determining the facts and root causes of the matter of concern and, assist in its resolution. As part of this process, the Committee may provide a Party, after coordination with that Party, with advice, non-binding recommendations and information relating to, inter alia;

- (a) Establishing and/or strengthening its domestic/regional regulatory regimes;

(b) Facilitation of assistance in particular to developing countries and countries with economies in transition, including on how to access financial and technical support, including technology transfer and capacity-building;

(c) Elaborating, as appropriate and with the cooperation of the Party or Parties faced with the compliance problems, voluntary compliance action plans, and review their implementation. A voluntary compliance action plan may include benchmarks, objectives and indicators of the plan, as well as an indicative timeline for its implementation;

(d) Any follow-up arrangements for progress reporting to the Committee, including through the national reporting procedure under article 13.

Advice, non-binding recommendations and information other than those listed in subparagraphs (a) to (d) above should be provided in agreement with that Party.

Recommendation to the Conference of the Parties on additional measures

20. If, after undertaking the facilitation procedure in paragraph 19 above and taking into account the cause, type, degree and frequency of compliance difficulties, as well as the capacity of the Party whose compliance is in question, the Committee considers it necessary in the light of paragraphs 1 and 2 to pursue further measures to address a Party's compliance difficulties, it may recommend to the Conference of the Parties that it consider:

(a) Further support under the Convention for the Party concerned, including prioritization of technical assistance and capacity-building and access to financial resources; or

(b) Issuing a cautionary statement and providing advice regarding future compliance in order to help Parties to implement the provisions of the Basel Convention and to promote cooperation between all Parties.

Any such action shall be consistent with article 15 of the Convention.

ESPOO CONVENTION CRM:

4. The objective of the Committee shall be to assist Parties to comply fully with their obligations under the Convention, and to this end it shall:

(a) Consider any submission made in accordance with paragraph 5 below or any other possible non-compliance by a Party with its obligations that the Committee decides to consider in accordance with paragraph 6, with a view to securing a constructive solution;

(b) Review periodically, in accordance with guidelines or criteria formulated by the Meeting of the Parties, compliance by the Parties with their obligations under the Convention on the basis of the information provided in their reports;

(c) Prepare the reports referred to in paragraph 11 with a view to providing any appropriate assistance to the Party or Parties concerned, for example by clarifying and assisting in the resolution of questions; providing advice and recommendations relating to procedural, technical or administrative matters; and providing advice on the compilation and communication of information; and

(d) Prepare, at the request of the Meeting of the Parties, and based on relevant experience acquired in the performance of its functions under subparagraphs (a), (b) and (c) above, a report on compliance with or implementation of specified obligations in the provisions of the Convention.

[...]

11. The Committee shall report on its activities at each meeting of the Parties through the secretariat and make such recommendations as it considers appropriate, taking into account the circumstances of the matter, regarding compliance with the Convention. Each report shall be finalized by the Committee not later than ten weeks in advance of the session of the Meeting of the Parties at which it is to be considered. Every effort shall be made to adopt the report by consensus. Where this is not possible the report shall reflect the views of all the Committee members. Committee reports shall be available to the public.

KYOTO PROTOCOL CRM:

IV. Facilitative Branch:

3. In electing the members of the facilitative branch, the Conference of the Parties serving as the meeting of the Parties to the Protocol shall seek to reflect competences in a balanced manner in the fields referred to in section II, paragraph 6, above.

4. The facilitative branch shall be responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments under the Protocol, taking into account the principle of common but differentiated responsibilities and respective capabilities as contained in Article 3, paragraph 1, of the Convention. It shall also take into account the circumstances pertaining to the questions before it.

5. Within its overall mandate, as specified in paragraph 4 above, and falling outside the mandate of the enforcement branch, as specified in section V, paragraph 4, below, the facilitative branch shall be responsible for addressing questions of implementation:

(a) Relating to Article 3, paragraph 14, of the Protocol, including questions of implementation arising from the consideration of information on how a Party included in Annex I is striving to implement Article 3, paragraph 14, of the Protocol; and

(b) With respect to the provision of information on the use by a Party included in Annex I of Articles 6, 12 and 17 of the Protocol as supplemental to its domestic action, taking into account any reporting under Article 3, paragraph 2, of the Protocol.

6. With the aim of promoting compliance and providing for early warning of potential noncompliance, the facilitative branch shall be further responsible for providing advice and facilitation for compliance with:

(a) Commitments under Article 3, paragraph 1, of the Protocol, prior to the beginning of the relevant commitment period and during that commitment period;

(b) Commitments under Article 5, paragraphs 1 and 2, of the Protocol, prior to the beginning of the first commitment period; and

(c) Commitments under Article 7, paragraphs 1 and 4, of the Protocol prior to the beginning of the first commitment period.

7. The facilitative branch shall be responsible for applying the consequences set out in section XIV below.

[...]

XIV. Consequences applied by the Facilitative Branch: The facilitative branch, taking into account the principle of common but differentiated responsibilities and respective capabilities, shall decide on the application of one or more of the following consequences:

(a) Provision of advice and facilitation of assistance to individual Parties regarding the implementation of the Protocol;

(b) Facilitation of financial and technical assistance to any Party concerned, including technology transfer and capacity building from sources other than those established under the Convention and the Protocol for the developing countries;

(c) Facilitation of financial and technical assistance, including technology transfer and capacity building, taking into account Article 4, paragraphs 3, 4 and 5, of the Convention; and

(d) Formulation of recommendations to the Party concerned, taking into account Article 4, paragraph 7, of the Convention.

PROTOCOL ON WATER AND HEALTH CRM:

XI. MEASURES TO PROMOTE COMPLIANCE AND ADDRESS CASES OF NON-COMPLIANCE

34. The Committee may decide upon one or more of the following measures:

(a) Provide advice and facilitate assistance to individual Parties regarding their compliance with the Protocol, which may include assistance in seeking support from specialized agencies and other competent bodies, as appropriate;

(b) Request or assist, as appropriate, the Party concerned to develop an action plan to achieve compliance with the Protocol within a time frame to be agreed upon by the Committee and the Party concerned;

(c) Invite the Party concerned to submit progress reports to the Committee on the efforts that it is making to comply with its obligations under the Protocol;

(d) Issue cautions; and,

(e) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public.

35. Upon consideration of the report and any recommendations of the Committee, the Meeting of the Parties to the Protocol may, depending on the particular question before it and taking into account the cause, type, degree and frequency of the non-compliance, decide upon one or more of the following measures:

- (a) Take measures referred to in paragraph 34;
- (b) Recommend to Parties to provide financial and technical assistance, training and other capacity-building measures and facilitate technology transfer;
- (c) Facilitate financial assistance and provide technical assistance, training and other capacity-building measures, subject to financial approval, including, when appropriate, seeking support from specialized agencies and other competent bodies;
- (d) Issue declarations of non-compliance;
- (e) Give special publicity to cases of non-compliance;
- (f) 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 Protocol; or
- (g) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

B. POSSIBLE ISSUES TO BE DISCUSSED BY THE LEGAL BOARD

- What should be the nature of outcomes/findings of the procedure under consideration?
- What could be the possible measures that the body in charge of the mechanism could resort to?
- What could be the role of the Meeting of the Parties?

IX. ISSUES OF COORDINATION

58. The establishment of CRMs under a conventional system has been considered to pose problems of co-ordination with the dispute settlement provision in the convention concerned, i.e., in our case, under Art. 22 of the Water Convention. The issue has generated quite a debate in legal literature. It is against such a background that the issue has already been extensively addressed in Part I of the present paper²⁸. However, it appears that the matter has been settled with consistency in CRMs' practice as will be shown below.

59. The operation of CRMs has also been considered to raise issues of coordination between several CRMs, especially in view of the growing number of such mechanisms under MEAs. One may hardly deny that an issue of implementation of the obligations under the Water Convention may be closely linked to the implementation of obligations under other international treaty instruments, such as the Protocol on Water and Health, the Espoo Convention and the Aarhus Convention. Coordination with the CRM established under the Protocol on Water and Health may be considered of primary importance, in particular taking into consideration Article 13 of the Protocol on "Cooperation in relation to transboundary waters". In this regard one may note that, while, as a general trend, an international court, or tribunal, would likely consider inadmissible the case already brought before another international judicial or arbitral instance, such practice cannot be said to have formed among the existing CRMs. The most recent description of the relationship

²⁸ See above, paras 18-24, 27.

between the CRMs can be found in the Decision on Review of Compliance under the Protocol on Water and Health reproduced below.

A. SELECTIVE, NON-EXHAUSTIVE DRAFTING EXAMPLES:

BASEL CONVENTION CRM:

27. The present mechanism shall be without prejudice to the provisions of article 20 on settlement of disputes.

ESPOO CONVENTION CRM:

14. The present compliance procedure, as a non-adversarial and assistance-oriented procedure, shall be without prejudice to the settlement of disputes provisions in Article 15 of the Convention.

PROTOCOL ON WATER AND HEALTH CRM:

XII. RELATIONSHIP BETWEEN SETTLEMENT OF DISPUTES AND THE COMPLIANCE PROCEDURE

36. This compliance procedure shall be without prejudice to article 20 of the Protocol on the settlement of disputes.

XIII. ENHANCEMENT OF SYNERGIES

37. In order to enhance synergies between this compliance procedure and compliance procedures under other agreements, the Meeting of the Parties to the Protocol may request the Compliance Committee to communicate as appropriate with the relevant bodies of those agreements and report back to it, including with recommendations as appropriate. The Compliance Committee may also submit a report to the Meeting of the Parties to the Protocol on relevant developments between the sessions of the Meeting of the Parties to the Protocol.

38. The Committee may transmit information to the secretariats of other international environmental agreements for consideration in accordance with their applicable procedures on compliance. The Committee may invite members of other compliance committees dealing with issues related to those before it for consultation.

B. POSSIBLE ISSUES TO BE DISCUSSED BY THE LEGAL BOARD

- Is there a need for clarification as to the relationship between settlement of disputes and the compliance procedure (e.g. “The present compliance procedure shall be without prejudice to article 22 of the Convention on the settlement of disputes.”)?
- Is there a need for clarification as to coordination with other procedures, in particular the one under the Protocol on Water and Health?