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Access to Justice in Environmental Matters
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(Item 4 (b) of the provisional agenda)

REPORT ON THE FIRST MEETING OF THE TASK FORCE ON COMPLIANCE MECHANISMS

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with the assistance of the secretariat

Introduction

1. On 11 and 12 November 1999 a task force met in London to consider review of compliance under article 15 of the Aarhus Convention. The task force met on the understanding that its members acted in a personal capacity, and not as representatives of States or organizations.

2 The task force was established, with the United Kingdom as lead country, at the first meeting of the Signatories to the Aarhus Convention. The Meeting of the Signatories had identified as the expected outcome of the task force's work:

> Draft elements to facilitate the discussion at the second meeting of the Signatories (or the first meeting of the Parties, if that takes place first).

3. The members of the task force had received two papers beforehand. An introductory paper, prepared by the United Kingdom, is at annex IX to this report. It describes the development of compliance mechanisms under

multilateral environmental agreements and discusses specific provisions in the Aarhus Convention. A second paper, prepared by the ECO Forum NGO Coalition and outlining that organization's proposals, is at annex X.

4. Bearing in mind the mandate that it had been given, the task force set out to produce elements that would assist the Signatories at their second meeting (or the Parties at their first meeting) in their deliberations. In particular, the task force did not attempt to prepare a compliance regime for adoption. Instead it concentrated on identifying particular questions that need to be answered and drafting some options that might be taken up by the Meeting of the Signatories, with a view to preparing the building blocks that might be used to construct a compliance regime. All texts were prepared only with a view to assisting the further deliberations of the Meeting of the Signatories. It was generally recognized that none of the texts proposed could be "the last word" on a particular issue. That said, the task force reached a consensus on some issues, and is therefore able to make some recommendations to the Meeting of the Signatories.

5. This report sets out the results of the task force's deliberations.

Reporting requirements

6. The task force noted that virtually all multilateral environmental agreements provided for the collection of data on the way Parties performed the obligations that arose under the agreements. These data provided raw material for compliance mechanisms. The more extensive the data, the more effective compliance mechanisms were likely to be. Although the task force was not mandated to make proposals on the collection of data, it was felt appropriate to point out that without a comprehensive and rigorous mechanism for the collection of data, any Aarhus compliance mechanism was unlikely to be effective.

7. It is therefore recommended that further work should be undertaken under the aegis of the Meeting of the Signatories or the Meeting of the Parties to provide for the collection of data, for example by preparing a draft decision for the Meeting of the Parties elaborating the requirement for regular reporting set out in article 10, paragraph 2, of the Convention.

How should the Meeting of the Parties establish a compliance mechanism?

8. The task force considered how a compliance mechanism should be established.

9. It noted that the compliance regimes of the UN/ECE Convention on Long-range Transboundary Air Pollution ("LRTAP") and the Montreal Protocol were established by decisions of the respective meetings of the Parties to those agreements.

10. It was thought that there might, in theory, be a number of alternative ways to establish compliance mechanisms. Nevertheless, the task force

recommended that the Aarhus compliance mechanism should be established by a decision of the Meeting of the Parties. Not only did article 15 seem to require the mechanism to be established in this way, but it was also considered that the negotiation of a more formal legal instrument would be time-consuming and that it would take too long before such an instrument entered into force.

Should a separate committee be established for the purposes of article 15 of the Aarhus Convention?

11. The task force then considered whether a separate committee should be established for the purposes of article 15. It was pointed out that it could be difficult and unwieldy for a compliance mechanism to be administered by the entire Meeting of the Parties to the Convention, for there might be a large number of Parties. Whilst it was noted that some compliance mechanisms functioned without a committee, it was considered unlikely that the article 15 mechanism would operate effectively without its own committee. The task force therefore recommends that a separate committee should be established. Such a committee might or might not be a subsidiary body of the Meeting of the Parties. In this context it might be relevant to note that the Montreal Protocol's compliance committee is a subsidiary body of the Conference of the Parties to that Protocol, and the LRTAP Implementation Committee is a subsidiary body of the Executive Body of that Convention.

"Optional"

12. The task force discussed the requirement under article 15 that compliance arrangements of an optional nature should be established. Two main alternatives for addressing the optionality requirement were put forward:

(a) Some participants preferred compliance arrangements to be developed as an integral package which would include an element providing for the consideration of communications from the public. The Parties would have the option of opting out of the arrangements in their entirety;

(b) Other participants preferred only the component of the arrangements relating to consideration of communications from the public to be optional, with Parties having the option of opting in to that component. All other aspects of the arrangements would be mandatory for Parties.

It was recognized that whether the optional character applied to the set of arrangements as a whole, or just to the part concerning the consideration of communications from the public, both 'opt-in' and 'opt-out' possibilities were theoretically available in either case.

"Appropriate public involvement"

13. Article 15 of the Convention requires that the compliance arrangements referred to in that provision should allow for “appropriate public involvement”. This requirement was borne in mind when drafting the remaining paragraphs of this report. The issue is discussed further in paragraphs 49 to 54 of annex IX.

The structure of the committee

14. One of the more complex issues considered by the task force was the structure of any committee that might be established and appropriate public involvement. In considering the terms on which a committee may be established, the Meeting of the Parties would have to address a number of questions, including the following:

- Should the committee membership be limited to a particular number, and if so, what should that number be?
- Should the members of the committee represent Parties and/or observers to the Meetings of the Parties, or should the committee be an independent expert body? Could the committee be a mixture of representatives and independent experts?
- How should the members of the committee be appointed?
- How often should the committee meet?
- Should the members of the committee have any particular qualifications?
- Should the members of the committee reflect the geographical distribution of the Parties to the Convention?

15. In order to assist further deliberations, the task force prepared draft elements, which are reflected in **annexes I and II**. These were not subject to detailed examination during the meeting.

16. First there are draft provisions based on extracts from the decision establishing the LRTAP Implementation Committee, and providing for the committee to include members who represent either Parties or entities entitled to participate in meetings of the Parties pursuant to article 10, paragraphs 4 and 5 of the Aarhus Conventon. Those provisions appear at **annex I** to this paper.

17. At **annex II** there are draft provisions based on extracts from the International Covenant on Civil and Political Rights. These provisions differ from those in **annex I** in a number of key respects. In particular, the committee members are independent and do not represent Parties, organizations or anyone else.

18. The task force identified a number of possible functions that the committee might have. These functions are identified below, in language that

could form the basis of provisions setting out the functions of the committee.

The functions of the committee

19. The committee might:

- Consider any submission or referral made in accordance with the relevant provisions of the decision and make appropriate recommendations;

- Satisfy itself, before considering a submission or referral, that it has all the necessary data for the purposes of its deliberations;

- Prepare, at the request of the Meeting of the Parties, and based on experience acquired in the performance of its functions, a report on compliance with or implementation of specific provisions in the Convention.

20. What is more, the committee might:

- Examine general compliance issues, on the basis of the reports submitted by Parties in pursuance of the reporting requirements of the Convention.

Or alternatively

- Examine general compliance issues, having access to any reports submitted by Parties in pursuance of the reporting requirements of the Convention.

All the functions of the committee should be performed with a view to reporting to the Meeting of the Parties. In this context paragraph 26 below is relevant.

Submissions and referrals

21. Considering the first suggested function of the committee, the task force then considered a key question: who should be entitled to make submissions or referrals to the committee? Four categories of persons were identified.

22. First, one or more Parties might have reservations about another Party's compliance. A draft (based on extracts from the decision setting up the LRTAP Implementation Committee) that provides for Parties to make submissions about the compliance of another Party appears in **annex III.**

23. Second, a Party might make a submission in respect of its own compliance. A draft provision to this effect, again based on LRTAP requirements, appears in **annex IV.**

24. Third, the secretariat might make referrals to the committee. Another LRTAP-based draft to cover this possibility appears at **annex V.**

25. Finally, the public might send communications to the committee. In this context it must be noted that article 15 expressly provides that compliance arrangements:

> "…may include the option of considering communications from members of the public on matters related to this Convention"

Draft provisions, based on articles in the first Optional Protocol to the International Covenant on Civil and Political Rights, providing for the option of considering communications from members of the public, appear in **annex VI.** The task force considered annex VI only briefly, and further

drafting work may be necessary. In particular, some members of the task force held that the text of annex VI should follow the scheme of the first Optional Protocol more closely.

Reporting to the Meeting of the Parties

26. The task force considered that the committee should report to the Meeting of the Parties, which in turn should take any final decisions that needed to be made following consideration by the committee. A paragraph with this effect and based on the LRTAP decision appears in **annex VII.**

Should the committee have any powers to gather information?

27. The task force considered that it might be appropriate to confer express powers on the committee to gather information. These powers are identified below, in language that could form the basis of provisions setting out the powers of the committee.

28. The committee might have powers to:

- Request further information, at hearings where necessary, on matters under its consideration;
- Undertake, with the consent of the Party concerned, information gathering by visiting the territory of that Party;
- Consider any information forwarded by the secretariat, a Party or the public concerning compliance with the Convention.

Do we need to refer to confidentiality?

29. Bearing in mind the principle of transparency reflected in the Convention, there are three elements of confidentiality that should be considered in the context of the compliance mechanism:

- Confidentiality of information in accordance with article 4 of the Convention;

- Confidentiality upon request with respect to the identity of the member of the public submitting information;

- Confidentiality in cases where a State provides a submission in respect of its own compliance.

Should there be a provision that prevents Parties from participating in the preparation and adoptions of reports or recommendations?

30. If members of the committee are to represent either Parties or organizations and are not to be entirely independent (for example, if there are provisions on the committee along the lines of annex I), there may be a case for prohibiting the participation of a Party in the preparation and adoption of a report or recommendations made following a submission or referral made with respect to that Party. An example of what might be appropriate provisions, based on an extract from the LRTAP compliance mechanism, appears in **annex VIII.**

Resources

31. It is imperative to ensure that whatever arrangements are adopted by the Meeting of the Parties are supported by appropriate administrative resources. Bearing this in mind, it would be helpful if the secretariat could identify what administrative resources would be necessary to support the various options outlined in this paper.

Annex I

The Committee shall consist of representatives of [eight] Parties to the Convention and of the bodies entitled to participate in meetings of the Parties to the Convention in accordance with article 10, paragraphs 4 and 5 thereof. 1/ The Meeting of the Parties shall, as soon as practicable, elect [four] members to the Committee for a term of four years and [four] members for a term of two years. At each session thereafter, the Meeting of the Parties shall elect [four] new members for a term of four years. Outgoing members may be re-elected for one consecutive term, unless in a given case the Meeting of the Parties decides otherwise. The Committee shall elect its own Chairman and Vice-Chairman.

The Committee shall, unless it decides otherwise, meet twice a year. The secretariat shall arrange for and service its meetings.

Note

1/ The Chairman of the task force would like it to be noted that the reference to article 10, paragraphs 4 and 5, proved particularly problematical. Some members of the task force considered that the reference had the effect that the representatives of the bodies referred to in those provisions would participate as observers in the meetings of the committee. The Chairman’s personal view is that annex I would not have this effect. The status of committee members clearly needs to be considered further and set out in clear wording to be included in the final text establishing the committee.

Annex II

1. There shall be established a Committee. It shall consist of [sixteen] members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the Parties to the Aarhus Convention who shall be persons of high moral character and recognized competence in the fields to which that Convention relates, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity [and may not be employed by a public authority of any Party or by any of the bodies entitled to participate in the meetings of the Parties to the Convention in accordance with article 10, paragraphs 4 and 5, of the Convention].

4. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in paragraph 2 and nominated for the purpose by the Meeting of the Parties to the Aarhus Convention [and/or the bodies entitled to participate in the meetings of the Parties that are referred to in paragraph 3].

5. Each Party or observer may nominate not more than two persons.

6. A person shall be eligible for renomination.

7. The Committee may not include more than one national of the same State.

8. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the principal legal systems.

9. The members of the Committee shall be elected for a term of [four] years. They shall be eligible for re-election if renominated. However, the terms of [nine] of the members elected at the first election shall expire at the end of [two] years; immediately after the first election, the names of these [nine] members shall be chosen by lot by the Chairman of the Meeting of the Parties.

Annex III

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 Convention. Such a submission shall be addressed in writing 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 Party whose compliance is at issue. Any reply and information in support thereof shall be submitted to the secretariat and to the Parties involved within three months or such longer period as the circumstances of a particular case may require. 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 practicable.

Annex IV

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 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 practicable.

Annex V

Where the secretariat, in particular upon reviewing the reports submitted in accordance with the Convention's reporting requirements, 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. 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, the secretariat shall bring the matter to the attention of the Committee.

Annex VI

1. The Committee may receive and consider communications from or on behalf of the public subject to the jurisdiction of a Party who claim to be victims of a violation by that Party of any of the rights of access to information, public participation in decision-making, and access to justice in environmental matters set out in the Convention.

2. A written communication may be submitted to the Committee for consideration pursuant to paragraph 1.

3. [**Option 1:** The Committee shall consider inadmissible any communication under this decision which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this decision or with the Convention.

Option 2: The Committee shall consider inadmissible any communication under paragraph 2 which is anonymous, which it considers to be manifestly unreasonable or which is submitted later than six months after available domestic remedies have been exhausted.]

4. Subject to the provisions of paragraph 3, the Committee shall bring any communications submitted to it under paragraph 2 to the attention of the Party alleged to be violating any provision of the Convention.

5. The receiving Party shall, as soon as possible but not later than [six] months after any communication is brought to its attention, submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that Party.

6. The Committee shall consider communications submitted to it pursuant to paragraph 2 in the light of all written information made available to it by the public and by the Party concerned.

7. The Committee shall not consider any such communication unless it has ascertained that:

(a) The same matter is not being examined under another procedure of international investigation or settlement;

(b) All available domestic remedies have been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

8. [The Committee shall hold closed meetings when examining communications submitted pursuant to paragraph 2.] [The Committee may consider closing its meetings when asked to do so by anyone who submitted a communication pursuant to paragraph 1 [or by the Party alleged to be violating the Convention].]

9. The Committee shall forward its views to the Party concerned and to the person who submitted the communication.

10. For the purposes of this decision, references to “the public” are to that term as defined in article 2, paragraph 4, of the Convention.

Annex VII

1. The Committee shall report [how often?] on its activities to the Meeting of the Parties 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 no later than ten weeks in advance of the session of the Meeting of the Parties at which it is to be considered.]

2. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon measures [of a non-discriminatory nature] to bring about full compliance with the Convention, including measures to assist a Party's compliance.

Annex VIII

A Party in respect of which a submission or referral is made shall be entitled to participate in the consideration by the Committee of that submission or referral, but shall not take part in the preparation and adoption of any report or recommendations of the Committee in accordance with [paragraph …].

Annex IX

ARTICLE 15: REVIEW OF COMPLIANCE

Introduction

1. The first meeting of the Signatories to the Aarhus Convention took place in Chisinau, Republic of Moldova, from 19 to 21 April 1999.

2. The Meeting discussed, amongst other things, article 15 of the Convention (see CEP/WG.5/1999/2, paras. 44-49), which requires Parties to establish arrangements for reviewing compliance with the provisions of the Convention. In particular, the Meeting:

(a) Decided to establish a task force with the United Kingdom as lead country, to draft elements for compliance mechanisms to be presented to it or to the Meeting of the Parties, whichever convened first, for discussion;

(b) Requested the secretariat to provide assistance in contacting experts;

(c) Took note of the need to have in the task force experts with experience in compliance mechanisms under human rights instruments;

(d) Decided to revise paragraphs 37-39 of the work-plan accordingly.

3. Paragraph 39 of the work plan identifies as the expected outcome of the task force's work:

> Draft elements to facilitate the discussion at the second meeting of the Signatories (or the first meeting of the Parties, if that takes place first).

4. The task force is going to meet in London on 11 and 12 November.

5. The objective of this paper, which has been prepared by the United Kingdom, is to provide participants in the task force with some background material in order to help them to prepare draft elements. The paper is in two parts. Part I summarizes compliance procedures established under other multilateral environmental agreements ("MEAs"). Part II mentions particular issues that are raised by article 15 of the Aarhus Convention, and may lead the task force to draft elements that are not to be found in other compliance procedures established under other MEAs.

6. The objective of the task force will be closely to follow the mandate given at the first meeting of the Signatories. The task force should therefore

aim to facilitate discussion at the second meeting of the Signatories (or first meeting of the Parties) so that the latter can make decisions on the compliance mechanism. It is to be hoped that the task force will produce draft elements that cover a range of options. It almost goes without saying that those options must be within the parameters set by article 15 of the Convention. So, for example, it would be inappropriate for the task force to propose confrontational or judicial elements, for article 15 expressly provides for non-confrontational, non-judicial elements.

PART I: COMPLIANCE PROCEDURES ESTABLISHED UNDER OTHER MEAs

Compliance

7. Although the terms are nowhere expressly defined for the purposes of international environmental law, “compliance” is generally understood to relate to the observance of its obligations by a Party to a treaty whilst “implementation” and “enforcement” relate to the legislative and other action taken internally by a Party to enable it to demonstrate that it is in compliance. Compliance procedures have been developed under a number of MEAs because of an understandable desire on the part of Parties to know whether their fellow Parties are actually fulfilling their treaty commitments. Whilst the submission of an annual report describing the action a Party has taken is very useful for this purpose, the data provided may be seen as subjective. What many Parties want is an objective assessment of such data.

8. All MEAs contain dispute settlement provisions. In principle these could be used for supervising the performance of individual Parties. To date, however, they have never been used. There would seem to be four main reasons for this:

- Dispute settlement procedures are expensive, time-consuming and confrontational;
- Even when successful, they do not ensure results that will safeguard the environment or improve it;
- With rare exceptions, the procedures will apply only if there is “common agreement” to their use between the parties to the dispute and in most cases such common agreement is unlikely to be forthcoming; and
- Compliance procedures are multilateral whilst dispute settlement procedures are bilateral; most MEA breaches of obligation are inherently multilateral in nature.

9. To bypass the confrontational and judicial nature of dispute settlement procedures and place more emphasis on getting Parties to fulfil their commitments, the compliance regimes that have been developed have deliberately focused on:

- Avoiding complexity; and

- Being non-adversarial, transparent and cooperative.

The regimes all place much emphasis on the fulfilment by Parties of their reporting obligations.

10. To date, four MEAs have compliance regimes in operation:

- Montreal Protocol on Substances that Deplete the Ozone Layer, 1987;

- Convention on Long-range Transboundary Air Pollution, 1979;

- Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (“CITES”); and
- Convention on the Conservation of European Wildlife and Natural Habitats, 1979 (“Berne Convention”).

Negotiation of two other MEA compliance regimes is not yet complete:

- United Nations Framework Convention on Climate Change, 1992 (in that case called a “multilateral consultative process”); and
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989.

Work is about to start on developing a compliance regime and a multilateral consultative process for the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

Montreal Protocol

11. The Montreal Protocol’s compliance regime (developed between 1989 and 1992; reviewed in 1998) has accumulated the most operative experience. Its procedure is generally considered to provide a successful blend of stick and carrot.

12. Where there are concerns as to a Party’s compliance with its Protocol obligations, scrutiny of its performance may be triggered in one of three ways:

- By another Party;
- By the secretariat; or
- By the Party in respect of itself.

13. All references are forwarded to the Implementation Committee composed of 10 members chosen from the Parties on an equitable geographical basis.

14. The Implementation Committee aims to bring about an “amicable solution”, but cannot take decisions itself. The most it can do is make recommendations to the Protocol’s governing body, the Meeting of the Parties.

15. Unlike the Implementation Committee, the Meeting of the Parties does have the power to make decisions. To date it has used it in a restrained way (i.e. offering assistance and advice rather than threatening suspension).

16. The Implementation Committee has worked well. In seven years and 21 meetings, the cases it has considered have been referred either by the secretariat or by Parties in respect of themselves: no Party has reported another to the Implementation Committee, thereby echoing the reticence of Parties about directly challenging other Parties under the dispute settlement procedure. To date, the Implementation Committee has reviewed and made recommendations on the performance of many Parties. The Meeting of the Parties has consistently accepted the advice forwarded to it by the Implementation Committee.

Convention on Long-range Transboundary Air Pollution

17. The Parties to this Convention recently concluded that the time has come for them to move from producing new protocols to focusing on better compliance with the protocols that are already in place. They have been sufficiently impressed by the Montreal Protocol’s model to copy it almost totally.

18. The Convention’s compliance regime operates through an Implementation Committee composed of eight members. To date, the Implementation Committee has met three times. Much of its energies so far have been concentrated on organizing its working methods. The obligations in the Convention are, for the most part, less specific than those of the Montreal Protocol and hence the scope for making clear-cut assessments of compliance will be harder.

CITES

19. In 1992 the CITES Conference of the Parties adopted a resolution directing its secretariat to identify Parties with insufficient implementing legislation. In fulfilling its task, the secretariat has employed outside consultants to analyse national compliance. To date two reviews have been completed; a third is under way.

20. The first review resulted in the Conference of the Parties recommending that those Parties whose legislation was found to be incomplete should take steps to improve it by the time of the next meeting of the Conference.

Technical assistance was available to those that requested it. Several countries took up the offer.

21. Though initially reluctant to take stronger action, the Conference of the Parties in 1997 decided temporarily to suspend CITES trade with Parties that had a substantial trade in Convention species but which were believed generally not to meet any of the CITES implementation requirements. This stronger approach worked well. Certain Parties have now introduced the necessary legislation and their suspensions have been lifted. The process is continuing with a number of countries currently facing suspension unless improvements are made by the autumn.

Berne Convention

22. The Standing Committee of the Council of Europe's Berne Convention (its Conference of the Parties) operates a compliance procedure based on the receipt of complaints or grievances from individuals, NGOs or Parties themselves alleging failure by a Party to comply with the provisions of the Convention. The decision to "open a case file" rests with the Standing Committee, which has discretion regarding the procedures to be followed. The Standing Committee closes files once complaints or grievances have been resolved to its satisfaction. Success with this procedure, which operates at an administrative rather than legal level, depends largely upon the degree of peer pressure that can be brought to bear on a non-complying Party through the Standing Committee.

Convention on Climate Change

23. The original aim of a number of Parties to the Convention on Climate Change was that the Convention should have a compliance regime similar to that of the Montreal Protocol. During the negotiations, however, a significant number of countries doubted the need for such a regime, with the result that the Convention provides merely for a multilateral consultative process to be developed.

24. The multilateral consultative process developed for the Convention on Climate Change differs from the Montreal Protocol's compliance regime principally in that it focuses on providing Parties that seek help with advice and recommendations on the procurement of technical and financial resources for the resolution of difficulties encountered in the course of implementation.

25. It is, thus, an advisory system (i.e. a "help desk"), whilst the Montreal regime is supervisory. Given the very general nature of the Convention's commitments, an advisory approach may prove to be the most appropriate. It is expected that the multilateral consultative process will

be used principally by developing country Parties.

26. The multilateral consultative process is not yet in operation because of continuing disagreement on one point concerning the composition of its Multilateral Consultative Committee. It is hoped that this issue can be resolved at this year's meeting of the Conference of the Parties (which is taking place as this paper is being written).

Basel Convention

27. There is no requirement in the Basel Convention for a compliance regime to be developed. Some Parties have, nevertheless, been pressing for one to be drawn up under the general powers of the Conference of the Parties. Three meetings on the matter have already taken place, but progress is slow.

28. This paper has been prepared a few weeks before the fifth conference of the Parties to the Basel Convention (6-10 December 1999). There is a proposal that the Conference of the Parties should request a consultative subgroup of legal and technical experts to prepare a proposal, for adoption at the sixth conference of the Parties, establishing a mechanism on implementation and compliance.

Kyoto Protocol

29. The Kyoto Protocol provides for the development of both a compliance regime and a multilateral consultative process.

30. The range of its obligations is considerable, varying from "ordinary" requirements whose details are fully spelt out in the Protocol (e.g. duty to achieve the emissions target; duty to report to the Conference of the Parties) to more complex obligations whose detail will, to a large extent, result from rules and procedures that have yet to be drawn up and agreed by the Parties.

31. Whilst there will, no doubt, be a continuing role for an advisory multilateral consultative process and a supervisory compliance regime for the Kyoto Protocol, a complicating factor in developing such regimes is likely to be the wish of certain Parties to see breaches of a number of the obligations made subject to legally binding penalties, whilst others continue to be nervous about the prospect of supervision of their compliance.

Trends and cnclusions

32. Experience in the design and operation of compliance regimes to promote better protection of the environment under MEAs remains limited. The process remains very much in its infancy. Nevertheless certain trends can be detected and conclusions drawn:

(a) **Sovereignty**. The negotiation of compliance procedures to date has demonstrated that some countries remain sensitive about external scrutiny of the quality of their performance in meeting their MEA obligations. As a result, it has been necessary to overcome their sensitivities by designing procedures that are supportive, constructive and respectful of national sovereignty rather than ones that lead to individual Parties being found "guilty" and penalized;

(b) **Tailoring**. There is not a single compliance procedure for all MEAs. Every treaty is different. The balance of obligations and the list of Parties will vary from one instrument to the next. The procedures developed may well need to be tailored to suit individual cases;

(c) **Composition of the Implementation Committee**. It has been suggested that implementation committees would be more efficient if composed of elected individuals rather than elected countries. Such nominations, it is said, would result in increased objectivity, greater expertise and more consistent attendance at meetings. Some countries, however, have been nervous of such a step, although it has been shown to work well in other contexts. A change of this kind may be unlikely in the near future;

(d) **Need for precise obligations**. It is much easier to design and operate a compliance regime for an MEA (such as the Montreal Protocol) that lays down precise standards to be met by Parties, than a framework instrument with unspecific and, even, unclear obligations (such as the Convention on Climate Change).

(e) **Confidence building**. It takes time for implementation committees to establish themselves in the eyes of the Parties to an MEA and for the Parties to get used to their performance being reviewed on a regular basis and not fear the process. Every MEA that incorporates a compliance regime is likely to have to go through such a confidence-building process and the resulting slow start should not be seen as a failure.

PART II: SPECIAL CONSIDERATIONS ARISING UNDER THE AARHUS CONVENTION

33. Article 15 of the Aarhus Convention says:

> "The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."

34. Some of the detail in article 15 is either unusual or unique. In this part of the paper, an attempt will be made to discuss the particular issues raised by that article.

"Consensus"

35. Article 15 expressly provides for compliance arrangements to be adopted by consensus.

36. The Aarhus Convention rules of procedure have yet to be adopted. (They will be adopted at the first meeting of the Parties under article 10, paragraph 2(h). It is therefore impossible to predict with complete certainty how the Meeting of the Parties will make decisions.

37. That said, it is usual for the rules of procedure of MEAs to provide for decisions to be taken by majority. 1/ If the Aarhus Convention's rules follow those of other MEAs, the article 15 requirement for action by consensus will be exceptional. Any Party will be free to block the establishment of a mechanism in a particular form, and it follows that any proposal for article 15 arrangements must accommodate, in one way or another, the concerns of all the Parties.

38. Those involved in the negotiations of the Aarhus Convention will recall that article 15 was difficult to agree, not least because some States had misgivings about the provision for compliance arrangements. It may follow that those misgivings will have to be overcome before compliance arrangements may be established.

39. It remains to be seen how this can be done. It might be worth considering whether compliance arrangements can be established step by step, building up to more comprehensive arrangements as Parties' confidence in the mechanism grows.

40. What is more, the express provision to the effect that the mechanism must be "optional" may allow a degree of flexibility that will give some security to any Parties that remain uncomfortable with article 15.

"Optional"

41. It is not entirely clear, at least to the author of this paper, what is meant by the express requirement, in article 15, for compliance arrangements to be "optional". At least two interpretations seem to be possible.

42. First, the word "optional" could mean that the participation of Parties in the arrangements will be optional. It would follow that the arrangements

will have to provide expressly that the compliance of Parties will not be reviewed unless they opt into the article 15 arrangements, or alternatively that the compliance of Parties will be reviewed unless they opt out.

43. Second, the word “optional” may mean that some features of the arrangements may be optional. For example, in the field of human rights, a Party to the International Covenant on Civil and Political Rights may recognize the competence of the Human Rights Committee to consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that Party of any of the rights set out in the Covenant. States may recognize this competence by ratifying the first Optional Protocol to the Covenant.

“Non-confrontational and non-judicial”

44. It is commonplace that compliance mechanisms are non-confrontational and non-judicial (see paras. 6 to 8 above).

“Consultative”

45. It is not entirely clear what the word “consultative” means in the context of article 15.

46. The Oxford English Dictionary defines the word thus:

> “Of or pertaining to consultation; having the right or power to advise or join in consultation; deliberative, advisory: said chiefly of a body whose function is to take part in a consultation, but not to vote upon the decision.”

47. It may follow that the consultative arrangements referred to in article 15 are to be “consultative” in so far as they will be deliberative, but leave any decision that is to be made to another body. This would be consistent with the approach that has been widely used so far in the development of compliance mechanisms. 2/

48. What is more, it seems possible, but by no means certain, that article 15 may have been intended to indicate that the arrangements should be similar to the multilateral consultative process being developed under the Convention on Climate Change (see paras. 23 to 26 above).

“Appropriate public involvement” and “the option of considering communications from members of the public"

49. In establishing the article 15 arrangements, the Meeting of the Parties will have to take a view on what amounts to “appropriate public involvement”.

50. Under article 2, paragraph 4, of the Aarhus Convention, “the public” means “one or more natural legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”. It will be necessary for the Parties to consider whether, in the context of the Aarhus Convention, there is to be appropriate involvement of the entire “public” (within the meaning of the Convention) or a section of it.

51. The Meeting of the Parties will also have to take a view on how the public may be involved, and at what stage.

52. Whilst the arrangements have yet to be settled, if they follow precedents established under MEAs there may be at least three stages at which the public could be involved.

53. First, the public could be involved in any decision-making process that occurs as a result of the compliance arrangements. In this context it might be worth noting that if standard MEA practice is followed, the Meeting of the Parties will make such decisions. The foundations for the participation of the public in the Meeting of the Parties already exist – see article 10, paragraph 5 of the Convention.

54. Second, if the arrangements provide for an implementation committee, the public might participate in the committee.

55. Third, there is the possibility that the arrangements may be triggered by communications from members of the public. Indeed it is quite clear that this was contemplated by those who negotiated the Convention, as the possibility is expressly provided for in article 15.

56. In this context, a number of questions may be raised. For example, if there are to be communications from the public, should such communications be direct, or should they be screened in some way? Should the public be able to send communications with respect to the article 15 arrangements only after they have exhausted all domestic remedies, or should they be able to send communications straightaway?

Conclusion

57. Article 15 of the Aarhus Convention expressly raises a number of issues

that must be addressed by the task force in the course of its work.

Notes

1/ See, for example, rule 37 of the rules of procedure of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context:

1. Save as otherwise provided by the Convention and by paragraph 2 of this rule, the Meeting of the Parties shall make every effort to reach its decisions by consensus. If all efforts at consensus have been exhausted, and no agreement reached, **the decision shall, as a last resort, be adopted by a three-fourths majority vote of the Parties present and voting at the meeting**.

2. Decisions of the Meeting of the Parties on procedural matters shall be taken by **a simple majority vote of the Parties present and voting at the meeting.** (emphasis added)

2/ See, for example, paragraph 23.1 of the Lucerne declaration of 1993, in which Ministers urged Contracting Parties to Conventions in UN/ECE region to work towards non-compliance regimes which “leave the competence for the taking of decisions to be determined by the Contracting Parties” and “leave the Contracting Parties to each convention to consider what technical and financial assistance may be required, within the context of the specific agreement”.
Also see paragraph 14 above.

Annex X

PROPOSAL OF THE ECO FORUM, NGO COALITION

Prepared by Mr. Jonas Ebbesson (Stockholm University)

The compliance mechanism for the 1998 Aarhus Convention should reflect the notions of the Convention itself by involving members of the public

1. The "three pillars" of the Aarhus Convention – public participation in decision-making, access to information, and access to justice – all have connections to international environmental law as well as international human rights law. The rationales behind these three issues are the improved protection of the environment and the enforcement of environmental laws, the furtherance of international human rights law, and the promotion of legitimacy of environmental decision-making. The overriding notion is to promote active participation and involvement of non-governmental actors, such as individuals and environmental NGOs, in environmental matters. These notions and connections should be reflected also in the compliance mechanisms to be established under article 15 of the Aarhus Convention.

2. In practice this means that the compliance mechanism should be available for the members of the public and not limited to the Parties to the Convention. While the obligation to implement the Convention basically rests with the Parties to the Convention, the review of compliance should be carried out by a body with a fair degree of independence from the Parties. This view, in turn, implies three issues to be discussed by the task force in London, on 11-12 November 1999:

- The arrangements for compliance review under article 15 of the Aarhus Convention should consist of an independent compliance committee with the function of reviewing compliance by the Parties to the Convention. The committee should have the competence to decide whether it finds that a Party does not comply with the Convention, and to make recommendations on how the matter should be resolved amicably;
- Members of the public should have the right to complain to the compliance committee about a failure by a Party to comply with the Convention;
- The involvement of the public should be reflected also in the nomination of members of the compliance committee.

3. These three points are further developed below. If adequately reflected in the arrangements for compliance review, the Aarhus Convention could add to the development and integration of international environmental and human rights law. If, on the other hand, these points are not reflected in the compliance mechanism, it could be questioned whether the Parties to the Aarhus

Convention really subscribe to the notions implied by the Convention itself. In addition to these concerns, the compliance mechanism should include issues such as monitoring, reporting, and observations involving independent groups of experts. Even though these matters are not further dealt with in this paper, the ECO Forum NGO Coalition proposes that they should be discussed at the meeting in London.

Establishing an independent compliance committee

4. Experience from international environmental cooperation reveals the need for independent assessments of the Parties' compliance with the international agreements (or regulations adopted in accordance with the agreements). During the 1990s, therefore, steps have been taken towards establishing particular compliance regimes within a number of international environmental agreements. The design and competence of these bodies differ, and so does their degree of independence.

5. In the case of the Aarhus Convention, the human rights dimension should also be considered. In all existing international human rights conventions, some kind of compliance review has been established. The most far-reaching is the European Convention on Human Rights, which establishes a court system. The various United Nations conventions on human rights set up treaty bodies — committees — for the purpose of reviewing compliance (International Covenant on Civil and Political Rights, arts. 28-45; International Convention on the Elimination of All Forms of Racial Discrimination, arts. 8-16; Convention on the Elimination of All Forms of Discrimination against Women, arts. 17-22; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 17-24; and Convention on the Rights of the Child, arts. 42-45).

6. While article 15 of the Aarhus Convention precludes the establishment of a court, it provides a basis for an independent committee with the task of reviewing compliance. The members of the compliance committee should serve in their personal capacity, and should not be allowed to be employed by a public authority of any Party or by any NGO concerned.

7. The compliance committee should receive complaints and investigate the matter in its own right. The committee should also have the competence to decide whether it finds that a Party has failed to comply with the Convention, and to make recommendations on how to resolve the matter amicably. This degree of independence is essential in order to avoid self-serving reviews by the Parties.

Allowing for complaints by members of the public

8. According to article 15 of the Aarhus Convention, the compliance review should allow for public involvement and may include the option of considering

communications from members of the public on matters related to the Convention. The possibility for members of the public to complain to an international body is important for the effectiveness of the Convention. In addition, it is crucial for the trustworthiness of the compliance review and of the Convention itself.

9. This issue has not been much developed in existing international environmental agreements, and a right to complain to an international body would be an innovative step in the field of international environmental law. The Aarhus Convention already focuses on issues that have not previously been much dealt with in international environmental law. It is in line with the Aarhus Convention itself that individuals and NGOs may complain to an international body about the failure of a Party to comply with the Convention. As pointed out initially, all three pillars of the Convention have international human rights connotations.

10. Therefore, in this respect it is more adequate to look at existing international human rights conventions, in particular the International Covenant on Civil and Political Rights, as models. According to the Optional Protocol to the Covenant, the Human Rights Committee may “receive and consider” complaints from individuals who claim to be victims of violations of the Covenant. In addition to the United Nations human rights instruments, the Constitution of the International Labour Organization allows NGOs in the field of labour, i.e. industrial associations of employers or workers, to complain about the failure of a Party to the ILO Constitution to “secure in any respect the effective observance within its jurisdiction of any [ILO] Convention to which it is a party” (art.24).

11. The compliance committee under the Aarhus Convention should allow for complaints from members of the public who claim to be victims of non-compliance. In the Aarhus Convention, environmental NGOs are given a particular status by being deemed to have an interest in environmental decision-making that makes them “concerned”. Moreover, the Convention sets out that the interest of an NGO in an environmental case shall be deemed sufficient for the purpose of having access to legal review. It seems logical that NGOs should also be able to complain about unsatisfactory compliance to the compliance committee under article 15.

12. The task force should discuss the practical as well as legal arrange-ments for such complaints at its meeting in London.

Involving non-State actors in the nomination of members of the committee

13. The last issue to be addressed is that of involving non-State actors in the nomination of members to the compliance committee. In most multilateral environmental agreements, environmental NGOs may participate as observers, but

without formal rights to nominate persons to committees. However, article 15 of the Aarhus Convention speaks about “appropriate public involvement” in the review of compliance, which should also include the nomination procedure. One option could be to allow the NGOs present at the meeting of the Parties to nominate a candidate to the committee. For instance, NGOs have been able to make such proposals for the special rapporteurs to the United Nations High Commissioner on Human Rights. The Parties to the Aarhus Convention could also be obliged to nominate persons with experience from NGOs. Although differently structured, the ILO Constitution may serve as a source of inspiration in this respect.

Summary

14. The compliance mechanism under article 15 of the Aarhus Convention should consist of a compliance committee with the function of reviewing compliance by the Parties to the Aarhus Convention.

15. The members of the committee should serve in their personal capacity, and may not be employed by a public authority of any Party or by any NGO concerned.

16. The committee should consider communications submitted by the Parties and complaints by members of the public, i.e. individuals as well as NGOs. Complaints by members of the public shall be considered where all domestic remedies are exhausted, or the application of domestic remedies is unreasonably prolonged or these remedies obviously do not provide an effective and sufficient means of redress.

17. The committee shall receive complaints in writing and shall investigate the matters brought before it. The Parties shall cooperate with the committee and support the fact-finding process by all means. The committee shall forward its views to the Party concerned and, respectively, to the Party or member of the public that submitted the communication. The report of the committee shall include facts and reasons under the Convention, and as far as possible a recommendation on how to amicably resolve the matter. The committee shall report annually to the Executive Secretary of ECE. All reports of the compliance committee shall be made public.

18. The compliance mechanism should allow for involving members of the public and independent groups of experts also in the monitoring, reporting and observation of compliance.