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Item 5 (b) of the provisional agenda

Review of implementation of the 2016–2017 workplan: policy

Ratification of amended Protocols that have not yet entered into force

Note by the ad hoc group of legal experts

Summary

At its thirty-fourth session (Geneva, 18 December 2015), the Executive Body for the Convention on Long-range Transboundary Air Pollution welcomed the note by the ad hoc group of legal experts on ratification of the amended protocols that have not yet entered into force, submitted to the session as informal document No. 5, and requested the secretariat to submit the note as an official document for the Executive Body's consideration at its thirty-fifth session (ECE/EB.AIR/133, para. 40).



I. Background and problem identification

1. At its thirty-third session (Geneva, 8–11 December 2014), the Executive Body for the Convention on Long-range Transboundary Air Pollution asked the ad hoc group of legal experts to provide advice on the legal implications of the ratification by a State of an amended protocol to the Convention by a State not Party to the original protocol, before the amendments have entered into force (ECE/EB.AIR/127, para. 67 (e)). The background to this issue is that the three most recent protocols to the Convention have been amended, but most of those amendments have not yet entered into force; some States not Party to the original versions of these three protocols wish to become Parties but may not wish to be bound by certain commitments in the original, unamended versions.

2. The following protocols have amendments that have not entered into force:

- (a) The Protocol on Persistent Organic Pollutants (the Protocol on POPs);¹
- (b) The Protocol on Heavy Metals;²
- (c) The Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg Protocol).³

3. The present note aims to provide an independent legal basis for discussion and decision-making in accordance with the Executive Body's request.

II. Ratification and acceptance of amendments

4. Ratification is defined in article 2, paragraph 1 (b), of the Vienna Convention on the Law of Treaties (Vienna Convention) as “the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty”. This should be distinguished from obtaining parliamentary approval of a treaty, which may be required under national constitutional arrangements and is sometimes misleadingly referred to as “ratification”.⁴ This advice concerns the international ratification and not these domestic processes. Under the Protocol on POPs, the Protocol on Heavy Metals and the Gothenburg

¹ In 2009, Parties to the Protocol on POPs adopted decision 2009/1 (to amend annexes I, II, III, IV, VI and VIII), decision 2009/2 (to amend annexes I and II), and decision 2009/3 (to amend annexes V and VII). The amendments to annexes V and VII entered into force for most of the Parties on 13 December 2010. In line with article 14, paragraph 3, of the Protocol, the entry into force of the amendments to the Protocol itself and to its annexes I, II, III, IV, VI and VIII requires acceptance by two thirds of the Parties. The amendments set out in decisions 2009/1 and 2009/2 have not yet entered into force.

² In 2012, Parties to the Protocol on Heavy Metals adopted decision 2012/5 (to amend the text of and annexes other than III and VII) and decision 2012/6 (to amend annex III). The amendment to annex III entered into force on 9 January 2014. In line with article 13, paragraph 3, of the Protocol, the amendments to the text of the Protocol and its annexes other than III and VII require acceptance by two thirds of the Parties. The amendments set out in decision decision 2012/5 have not yet entered into force.

³ The Gothenburg Protocol was amended in 2012 by Executive Body decisions 2012/1 (to amend annex I) and 2012/2 (to amend annexes II to IX). The amendments to annex I entered into force on 5 June 2013. In line with article 13, paragraph 3, of the Protocol, the amendments to the text of the Protocol and its annexes II to IX and the addition of new annexes X and XI requires acceptance by two thirds of the Parties. The amendments set out in decision 2012/2 have not yet entered into force.

⁴ See, Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge and New York: Cambridge University Press, 2007), p. 103.

Protocol, the process of ratification is effected by depositing an instrument of ratification with the Secretary-General of the United Nations, who acts as the depository.⁵

5. Certain amendments to the three Protocols in question require acceptance by two thirds of the Parties before they can enter into force; this involves depositing an instrument of acceptance with the depository.⁶ No State or regional economic integration organization may deposit an instrument of acceptance of these amendments unless it has previously, or simultaneously, deposited an instrument of ratification, acceptance or approval of or accession to the Protocol.⁷

III. Previous advice and options

6. The question of the ratification of amended protocols has been previously considered by the ad hoc group of legal experts. The ad hoc group prepared a note for consideration by the Working Group on Strategies and Review at its forty-fifth session (Geneva, 31 August–4 September 2009),⁸ which illustrated particular issues to be taken into account regarding both an amended and a new protocol, focusing primarily on the situation for countries in Eastern and South-Eastern Europe, the Caucasus and Central Asia.

7. The 2009 note identified a number of potential options to address the situation of non-Party States that wished to ratify amended Protocols without being bound by certain obligations in the original, unamended Protocols.⁹ These are as follows:

(a) Non-Party States ratifying the Protocol and upon ratification declaring that they only ratify the amended version of the Protocol;

(b) Non-Party States ratifying the Protocol subject to reservations regarding the provisions they are not able to implement until such time as those provisions are amended;

(c) Reaching an informal agreement between the Parties, that the Implementation Committee will not consider cases of non-compliance that relate to the obligations set out in the existing protocol where these obligations have been amended, but prior to entry into force of the amendments, and in respect of a country from Eastern and South-Eastern Europe, the Caucasus and Central Asia that has ratified the protocol as amended but was never a Party to the original Protocol;

(d) The Parties to the existing protocol could decide to temporarily suspend the operation of these provisions for certain specified Parties as provided for under article 57, subparagraph (b), of the Vienna Convention;

(e) The Parties to the Protocol could enter into a waiver agreement — a consensus agreement on the basis of article 31, paragraph 3 (a), of the Vienna Convention to waive application of these provisions for certain specified countries.

8. All of these options are potentially available to address the situation in relation to the Protocol on POPs, the Protocol on Heavy Metals and the Gothenburg Protocol. This advice will focus on options (a) and (b), as these are considered to be the most practical.

⁵ Protocol on POPs, art. 17, Protocol on Heavy Metals, art. 16, and Gothenburg Protocol art. 15, para. 3, and art. 16.

⁶ Protocol on POPs, art. 14, para. 3, Protocol on Heavy Metals, art. 13, para. 3, and Gothenburg Protocol, art. 13, para. 3.

⁷ See art. 2 of Executive Body decisions 2009/1, 2009/2, 2012/2 and 2012/5.

⁸ Informal document No. 3, available from <http://www.unece.org/index.php?id=5290#/>.

⁹ See *ibid.*, sect. 2.2 (ii).

IV. Main options

A. Declaration upon ratification

9. Under option (a) in paragraph 7 above, a non-Party State would ratify the protocol and upon ratification declare that it is only ratifying the amended version of the protocol. This could be done by virtue of an analogous application of article 40, paragraph 5, of the Vienna Convention for a State ratifying before entry into force of the amending agreement.

10. This action would have the effect that the protocol in its original version would not enter into force for such a State either pending entry into force of the amendment(s) or, upon entry in force of the amendment(s), as regards those Parties that have not accepted the amendment(s). The amended protocol would become applicable once there were sufficient acceptances for it to enter into force.

11. This option should be distinguished from including a declaration in the instrument of ratification, before adoption or entry into force of the amendments, to the effect that the provisions of the existing, unamended protocol would not apply. Such declarations are likely to be deemed to be disguised reservations and the rules on reservations set out in articles 20 to 23 of the Vienna Convention would therefore apply (the option of using a reservation is discussed in section B below).

12. It is important to bear in mind what it would mean for a State to ratify only an amended protocol before the amendment(s) in question have come into force and the limitations on what this would achieve.

13. If a State is asserting that it is not yet bound by a protocol, that State could not be considered to be a Party for legal purposes, including for purposes of counting towards the number of acceptances from Parties required in order for the amendment(s) to the protocol to enter into force. The State would only become a Party once the amendment entered into force. Therefore, this option would not be a means of securing sufficient ratifications to bring the amended protocols into force. It would remain necessary for a sufficient number of Parties to the original protocols to accept the amendments in order to bring them into force.

14. This option would, however, enable non-Party States that cannot comply with the unamended protocols to nevertheless move forward with depositing instruments of ratification, even before the amendments come into force. The paperwork would be on the books for administrative purposes, thus avoiding delay in these States becoming Parties once the amendments to the protocols enter into force.

15. It should be noted that this option may also present a certain risk of confusion on the status of ratifications of the protocols in their unamended versions. An alternative approach, which would avoid this risk, would be for non-Party States interested in ratifying the protocol to complete as soon as possible their own internal treaty approval processes in order to be ready for the deposit of their instruments of ratification upon entry into force of the amended protocol. Such an approach would also permit non-Party States interested in joining the amended protocols to demonstrate their willingness to move forward with ratification in due course.

B. Ratification subject to reservations

16. Under option (b) set out in paragraph 7 above, a non-Party State would explore, in accordance with article 19 of the Vienna Convention, the possibility of ratifying the protocol subject to reservations regarding the provisions it is not able to implement until

such time as those provisions are amended. Such reservations could be written to expire upon entry into force of the relevant amendments.

17. This option would potentially enable non-Party States to become Parties to the Protocol on POPs, the Protocol on Heavy Metals and the Gothenburg Protocol (subject to the reservations as to those provisions they felt unable to comply with). These States would therefore count as Parties for the purposes of bringing the amendments into force.

18. A reservation must not be incompatible with the object and purpose of the treaty,¹⁰ and therefore a reservation may be difficult to justify in this context. This will depend upon what provisions are covered by the reservation and whether they include core obligations in the original protocol.

19. Any Party to a protocol may object on any grounds to a reservation entered by another Party. Accordingly, this option may not result in uniform application of a protocol to a State which enters a reservation, if not all the other Parties accept the reservation. One way of addressing this issue would be to secure some sort of understanding among the Parties to the protocol that they would not object to the reservation.

V. Conclusion

20. As stated in this document, the options identified in the 2009 note are potentially available. Of these, the options most likely to be practical are:

(a) Non-Party States ratifying the Protocol and upon ratification declaring that they only ratify the amended version of the Protocol;

(b) Non-Party States ratifying the Protocol subject to reservations regarding the provisions they are not able to implement until such time as those provisions are amended.

21. If non-Party States choose to ratify the Protocols in question and upon ratification declare that they only ratify the amended version of the Protocols, this would mean that they would not be Parties to the Protocols until the amendments entered into force. Their ratifications could not therefore be counted towards the number of acceptances necessary to bring the amendments into force. However, this option would enable these States to complete the process of lodging their instruments of ratification and avoid delay in these States becoming Parties to the amended Protocols once the amendments have entered into force.

22. If non-Party States choose to ratify the Protocols subject to reservations concerning those provisions which they feel unable to implement, then this would potentially enable them to be counted as Parties and count towards the number of acceptances required to bring the amendments into force. There would need to be some consideration of whether such reservations were compatible with the object and purpose of the Protocols. Furthermore, the option of securing some sort of understanding among the Parties to the Protocols that they would not object to the reservations may need to be considered.

¹⁰ Vienna Convention on the Law of Treaties, art. 19, subpara. (c).