

**MYKOLAS ROMERIS UNIVERSITY**

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**COMPLIANCE AND ENFORCEMENT  
MECHANISMS IN UNECE ENVIRONMENTAL  
AGREEMENTS: CASE OF  
THE UNECE CONVENTION ON THE  
PROTECTION AND USE OF TRANS-BOUNDARY  
WATERCOURSES AND INTERNATIONAL LAKES**

**Master Thesis**

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## ACRONYMS AND ABBREVIATIONS

<b>AARHUS CONVENTION</b>	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
<b>EIA</b>	Environmental Impact Assessment
<b>ESPOO CONVENTION</b>	Convention on Environmental Impact Assessment in a Trans-boundary Context
<b>EPRs</b>	Environmental Performance Review
<b>EU</b>	European Union
<b>COP</b>	Conference of the Parties
<b>ICJ</b>	International Court of Justice
<b>INDUSTRIAL ACCIDENTS CONVENTION</b>	Convention on the Trans-boundary Effects of Industrial Accidents
<b>IWRM</b>	Integrated Water Resource Management
<b>LRTAP CONVENTION</b>	Convention on Long-Range Trans-Boundary Air Pollution
<b>MEA</b>	Multilateral Environmental Agreement
<b>MOP</b>	Meeting of the Parties
<b>NGO</b>	Non-governmental organization
<b>UNECE</b>	United Nations Economic Commission for Europe
<b>NEW YORK CONVENTION</b>	UN Convention on the Law of the Non Navigational Uses of International Watercourses
<b>WATER CONVENTION</b>	UNECE Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes
<b>WG</b>	Working Group

## INTRODUCTION

„Currently, more than 40 per cent of the world’s population live in conditions of water stress and this percentage is estimated to grow to almost 50 per cent by 2025”.<sup>1</sup> In the UNECE region (56 countries), an estimated 120 million people do not have access to safe drinking water<sup>2</sup>. Fresh water became a global problem because of the increased use and decreased quality of the water and prognosis escalate only worsening in the future. The international environmental law principle of sustainable development, enshrined in the Rio Declaration, obliges all the nations of the world to meet the needs of the present without compromising the ability of the future generations<sup>3</sup>. The legal instruments regulating fresh water resources have to preserve and ensure the obedience of this principle. For this purpose it is essential that international environmental agreements possess well designed mechanisms to secure their full implementation and enforcement.

Currently there is no common global governance of freshwater resources yet and it is mostly regulated through bilateral and regional regimes, many of which do not possess compliance and enforcement mechanisms. In 1997 international community has negotiated a global UN Convention on the Law of the Non Navigational Uses of International Watercourses but it has not entered into force yet due to lack of ratifications. Even though this agreement is a big step forward in terms of providing an international legal framework encompassing many customary rules, it does not provide for a compliance mechanism either. Due to its stalemate and limited size of current work it will not be analysed.

Among number of bilateral and regional fresh water agreements throughout the world UNECE Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes (Water Convention) requires special attention. Firstly, because it is one of the most advanced regional framework agreements establishing a platform for the international cooperation in the area of trans-boundary water resources. It covers more than 150 major rivers and 50 large lakes that run along or straddle the border between two or more countries.<sup>4</sup> Secondly, it functions for more than seventeen years and even though does not have a compliance mechanism but the Parties are committed to

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<sup>1</sup> **Sands P.** Principles of International Environmental Law/2nd edition. - Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo: Cambridge University Press, 2003. – 460 p. – ISBN-13 978-0-511-07684-8, ISBN – 10 0-511-07684-3

<sup>2</sup> **Water Convention at your service**//Brochure.- Printed at United Nations, Geneva, 2009. - ECE/CEP/NONE/2009/2.

<sup>3</sup> Rio Declaration, Article 3.

<sup>4</sup> Id

develop one. Thirdly, it is very alike in its substance to the New York Convention<sup>5</sup> and has a potential to serve as a model in terms of a compliance mechanism. Fourthly, Water Convention was amended<sup>6</sup> to allow other than UNECE region countries to join the convention regime and undertake its obligations and perhaps has a potential to become a global regime.

The lack of compliance mechanism is a worrying fact that starts to impede the fluent functioning of the Water Convention. “The Water Convention’s Protocol on Water and Health provides for such a mechanism. Thus, the absence of an equivalent tool under the Water Convention is striking and difficult to justify. Perpetuating a situation in which the Convention singularly lacks such a mechanism could have broad negative effects on the Convention’s effectiveness as well as on its political credibility both within the region and outside it”.<sup>7</sup> The **actuality** of this problem and importance to our society was a reason why this topic was chosen.

Rationale of this work lays in the acknowledgement of “the need to establish a mechanism to review and support compliance” which is expressed in the document prepared by the Chairperson of the Legal Board under the Water Convention<sup>8</sup> in accordance with a decision made by the third meeting of the Working Group on Integrated Water Resource Management (Rome, 22–24 October 2008)<sup>9</sup> and based on the outcomes of sixth meeting of the Legal Board (Geneva, 29–30 April 2009)<sup>10</sup>. Working Group on Integrated Water Resources Management restated the fact at their fourth meeting in 8-9 July 2009 that the Convention does not have any specific mechanism for addressing “existing or potential conflicts of interests as well as cases of non-compliance”.<sup>11</sup> Certain practical problems were listed concerning facilitation of settlements of problems of implementation. There is lack of third party assistance available for prompt assessment of implementation difficulties. Legal Board, with unpredictable and changing composition cannot address country specific problems, therefore, Parties

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<sup>5</sup> **Tanzi A.** The relationship between the 1992 UNECE Convention on the Protection and Use of the Trans-boundary Watercourses and International Lakes and the 1997 UN Convention on the Law of the Non Navigational Uses of International Watercourses//Report of UNECE Task Force on Legal and Administrative Aspects. - Geneva, 2000.

<sup>6</sup> Amendment has not yet entered into force.

<sup>7</sup> **Reviewing and promoting implementation and compliance: a needed step in the Convention’s evolution**//Water Convention, 4<sup>th</sup> Meeting WG on Integrated Water Resource Management, 8-9 July 2009.

<sup>8</sup> Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes

<sup>9</sup> **Report of the Working Group on Integrated Water Resources Management on its Third Meeting**//Water Convention, WG on IWRM, Rome, 22–24 October 2008, ECE/MP.WAT/WG.1/2008/2

<sup>10</sup> **Report of the Legal Board on its Sixth meeting**//Water Convention, Legal Board, Geneva, 29–30 April 2009, ECE/MP.WAT/AC.4/2009/2

<sup>11</sup> **Reviewing and promoting implementation and compliance: a needed step in the Convention’s evolution**//Water Convention, 4<sup>th</sup> Meeting WG on Integrated Water Resource Management, 8-9 July 2009.



do not have a clear and permanent place to look for advice and support in the case of a potential or on-going problems of a procedural, legal and technical nature.<sup>12</sup>

Considering the importance and detrimental value of the Water Convention and its regulatory subject, practical problems that parties face and absence of compliance mechanism, it was decided to examine compliance and enforcement issues relevant to Water Convention and assist in creation of compliance mechanism. This work is not capable and thus, does not seek to construct the compliance mechanism for the Water Convention because it will be done by a group of experts<sup>13</sup> (Legal Board) entrusted to „define the procedures and institutional mechanisms for review of implementation and compliance“. **Aim of this thesis** is to contribute to this foreseen process with making preliminary considerations on what could be the most suitable model of compliance mechanism under Water Convention and give appropriate proposals/recommendations for the Legal Board. In order to achieve that, the author will review similar existing mechanisms in UNECE multilateral environmental agreements, compare their crucial elements, institutional settings as well as procedural regulations. Thesis will analyse the preconditions for such mechanism and institutional set up in the Water Convention.

In order to achieve the ultimate aim of the thesis there is a need to reach following **objectives**:

1. To conduct an overview of existing compliance (and enforcement) mechanisms under relevant multilateral environmental agreements:
  - 1.1. To reveal the emergence and rationale of the compliance mechanisms and main legal theories analysing their nature/complexity;
  - 1.2. To assess the roles of the enforcement and dispute settlement in the compliance mechanism;
  - 1.3. To establish the main elements comprising a compliance mechanism;
  - 1.4. To establish main influencing factors for effective work of compliance mechanism;
2. To analyse UNECE Water convention:
  - 2.1. To analyse its institutional and procedural system and identify what are (if any) existing components supporting and encouraging Parties to fulfil their obligations or otherwise affecting their compliance;
  - 2.2. To identify the elements that need to be established in order to construct effective compliance mechanism;

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<sup>12</sup> **Reviewing and promoting implementation and compliance: a needed step in the Convention's evolution**//Water Convention, 4<sup>th</sup> Meeting WG on Integrated Water Resource Management, 8-9 July 2009.

<sup>13</sup> Working Group put forward a proposal for consideration by the Parties, at their upcoming fifth session (Geneva, 10–12 November 2009), to entrust the Legal Board with the definition of the objectives, structure, tasks, functions, measures and procedures of this mechanism, for possible adoption at the sixth session of the Meeting of the Parties in 2012.

2.3. To assess what if any specific factors exist for compliance/non-compliance with the convention;

3. To discuss the most suitable options for the compliance mechanism in UNECE Water Convention by comparing already presented models of compliance and enforcement, taking into account the characteristics and other influential factors of the Convention.

This work uses qualitative research **methods** including collective case study,<sup>14</sup> description, conceptual analysis, legal comparative analysis and critical evaluation.

For the achievement of the objectives and aim of the work, firstly, the choice is made of the multilateral environmental agreements to be used for the comparative analysis. This choice is argued further in the thesis. This set of chosen cases will allow a better understanding of the compliance mechanisms and will provide a ground for discussion. The comparative analysis is based on the set of criteria allowing assessing crucial components of the compliance mechanisms in detail (i.e. legal basis for the compliance mechanism and procedures, reporting mechanism, institutional setting and procedural organisation of the compliance bodies, trigger entities, non-compliance response measures). Using UNECE information database author collected and organised information into the tables (that can be found in the annexes) in order to facilitate further comparison. Description is used to present the factual information concerning analysed compliance mechanisms. Conceptual analysis allows understanding the content of certain legal categories and the nature of the compliance mechanism.

Legal texts of the six treaties, large number of the working documents as well as decisions of the treaty parties are analysed in order to compare main components of the compliance mechanisms, their functioning, interdependence and challenges. Legal literature is reviewed with an aim of supporting author's critical evaluation, ideas and arguments with the opinions of scholars and legal experts. Relevant research already made by other scholars as well as their critical evaluation will be taken into account. Compliance and enforcement issues are present in works of many authors: Sands P., Birnie P.W *et al*, Fitzmaurice M., Weiss E.B., Tanzi A., Redgwell C., Beyerlin U. *et al*, and others. They focus mainly on global agreements, as well as UNEP Report on Compliance Mechanisms under Selected Multilateral Environmental Agreements. These authors analyse a lot of cross cutting issues and are important source of information in this work, however Water Convention topic is new and has not been analysed yet. Kakebeeke W. *et al* present certain elements important for compliance review procedure that are taken into account in our analysis. Nevertheless none of the authors make a comparative analysis of the UNECE multilateral environmental agreements with a view to facilitate creation of the compliance mechanism under Water Convention. Therefore, analytical work done in this thesis is a **new and original** contribution to academic research. In addition to that, knowledge and

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<sup>14</sup> **Bruce L.Berg.** Qualitative Research Methods for the Social Sciences/4<sup>th</sup> ed. – Boston, London, Toronto, Sydney, Tokyo, Songapore: Allyn and Bacon, 2000. – 229 p. - ISBN 0-205-31847-9.

experience gained through the careful and detailed analysis of five compliance mechanisms is valuable not only to the expert group of Water Convention, but as well for the future similar processes.

The paper consists of three parts each of which is divided into smaller ones. The first part gives a general overview of the compliance mechanisms, concepts and definitions of the main terms, the guiding legal theories and relations between compliance, enforcement and the classical dispute settlement mechanisms. The second part compares the compliance mechanisms in UNECE region's multilateral environmental agreements. Crucial elements for the compliance mechanism are grouped in the four categories, following UNEP approach: performance information review (national review of performance, its presentation to the treaty bodies, assessment by the treaty bodies and evaluation), non-compliance procedures, response measures and dispute settlement procedures and further detailed. Third part analyses the institutional organisation of the Water Convention, its procedural questions and the compliance influencing factors. Furthermore the attempt is made to establish missing and needed institutional, legal and procedural elements in order to draw the most suitable configuration of the compliance and enforcement mechanism to facilitate implementation and compliance of the Water Convention.

# 1. GENERAL ASPECTS OF THE COMPLIANCE WITH AND ENFORCEMENT OF THE MULTILATERAL ENVIRONMENTAL AGREEMENTS

## 1.1. Concepts and definitions

The issues of international law rules' vagueness, enforcement and compliance have been tackled a lot of times. "Compliance" and "enforcement" for a long time were the key words used in criticizing international law's limited capacity to achieve sizeable and effective improvements in world's order governance. However, contemporary international environmental law pioneered with a new approach that was widely used in many MEAs and that happened to be highly effective mechanism by overriding this particular weakness of international law. Since the revolutionary 1972 United Nations Conference on Human Environment in Stockholm numerous advanced techniques were introduced to reverse the situation from formal announcement and declarations on environmental welfare into real, actual improvement of the environment protection: variations of economic instruments, active involvement of NGO`s, technological development, creation of public education and information systems, reporting, certification systems, voluntary agreements and others. Environmental law's renaissance in international scene brought a whole range of new international multilateral accords encompassing so called facilitative compliance mechanisms.

Before continuing to 'dig' deeper into the topic, it is essential to start by defining **key terms** used in current thesis. While reading contemporary legal environmental literature one gets lost in the diverse meanings/usage of terms compliance and enforcement and the difference between them. Although the aim of this work is not to conduct extensive discussion of the both terms and their dividing lines, it is not possible to continue analysis of the topic without explanation of the meaning that enforcement and compliance will have in this paper.

In simple terms '**compliance**' refers to whether countries adhere to the provisions of the law and it implementing measures. UNEP guidelines<sup>15</sup> define compliance as "the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement". These obligations can be both, procedural, such as requirement to report, and substantive, such as an undertaking to control an activity.<sup>16</sup> It is also valuable to stress that compliance may be understood as a national law category – "state of conformity with obligations,

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<sup>15</sup> **Guidelines on compliance and enforcement of multilateral environmental agreements**, United Nations Environmental Programme, 1-14 p.

<sup>16</sup> **Weiss E.B.** Engaging Countries: Strengthening Compliance with International Environmental Accords//A Framework for Analysis. - Cambridge, Mass: MIT Press, 1998. – 615 p. – ISBN13 9780585078618.

imposed by a State, its competent authorities and agencies on the regulated community in implementing MEAs”.<sup>17</sup> This work nevertheless, focuses on the ‘compliance’ from the perspective of international law and relations between states.

**Enforcement** according to Downs G.W. is “the implementation of consequences for non-compliance”<sup>18</sup> while Sands P. formulates it as “the right to take measures to ensure the fulfilment of international legal obligations or to obtain a ruling by an appropriate international court, tribunal or other court, including an international organization, that the obligations are not being fulfilled”.<sup>19</sup> In this thesis ‘enforcement’ will be used in the sense of ‘compelling the observance of or obedience to’ international environmental accords as it is suggested by Sands P. In broad terms enforcement means “the securing of the compliance” and as Oral N. notes, international enforcement can be done by regulatory (agency supervised) means, diplomatic means, consultation, judicial remedies, compulsory and binding proceedings.<sup>20</sup>

Following the logic of the UNEP definition of ‘compliance’, a **‘non-compliance’** would be “a non-fulfilment by the contracting parties of their obligations under a multilateral environmental agreement” or in other words “act where a state does not meet its commitments, including its inability to give effect to substantive norms and standards; to fulfil procedural requirements; or to fulfil institutional obligations”.<sup>21</sup> In all of these cases the compliance mechanism’s procedures should come into place.

As laid down in the UNEP Training Manual on International Environmental Law, the **‘compliance mechanism’** is understood as a “tool to ensure efficacy of environmental treaties and to keep track of the implementation of MEAs”.<sup>22</sup> However this description seems to be a little vague and asks for specification. Compliance mechanisms, as a tool to assess, control and facilitate compliance, improve implementation of the treaty obligations and to achieve the ultimate purposes embedded in the

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<sup>17</sup> See footnote 14

<sup>18</sup> **Downs G. W.** Enforcement and the Evolution of Cooperation // Michigan Journal of International Law, 1998, no. 19, 320 p.

<sup>19</sup> **Sands P.** Principles of International Environmental Law/2nd edition. - Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo: Cambridge University Press, 2003. – 182 p. – ISBN-13 978-0-511-07684-8, ISBN – 10 0-511-07684-3.

<sup>20</sup> **Oral. N.** Problems with Compliance with the Barcelona Convention and it Related Protocols//Presentation.- Istanbul Bilgi University, 2007.

<sup>21</sup> **Kakebeeke W. et al.** Geneva strategy and framework for monitoring compliance with agreements on trans-boundary waters: elements of a proposed compliance review procedure, // ECE-UNEP Network of Expert on Public Participation and compliance. - Geneva 2000. - 40 p.

<sup>22</sup> **Training Manual on International Environmental Law/** edited by Kurukulasuriya L., Robinson A. N. - Nairobi, Kenya: Division of Policy Development and Law, United Nations Environment Programme, 2006. - 38 p. – ISBN 9280725548. Google e-book [ retrieved at15/07/ 2009 ]

agreement comprises a set of actions: monitoring, reporting, review of implementation, compliance verification and non-compliance procedures. As Oral N. puts it, “compliance mechanism does not simply address adherence to the obligations under the MEA but also operates to further the result that is sought to be achieved”.<sup>23</sup>

## 1.2. Roles of the enforcement and dispute settlement in the compliance system

Due to the multiple meaning and interpretations that legal categories as enforcement and compliance entail in the works of different authors, it is necessary to explain the exact scope of those and their interplay in this work. It is also important to understand what the role of the dispute settlement mechanism is in the whole new range of treaty compliance procedures, in particular compliance system.

Enforcement as it is defined in the UNEP Manual on Compliance with and Enforcement of the MEAs – meaning a national enforcement - is too broad category for the volume/coverage of this work, as it involves wide range of procedures and actions employable by the country. As mentioned above, here we involve enforcement only from the perspective of international law and relations between states. Thus, ‘enforcement’ as such talking about compliance mechanism comes into play only in a form of ‘strict’ measures/disincentives applied in the course of non-compliance procedure (such as suspension of the treaty operation) and through the dispute settlement as a right to obtain a ruling by an appropriate international judicial body. “Enforcement can either be external to the international agreement, or part of a treaty specific non-compliance procedure”<sup>24</sup> – acknowledges Fitzmaurice M. A. *et al.*

As stated in the UNEP Manual,<sup>25</sup> dispute settlement provisions in a treaty complement the provisions aimed at compliance with agreement. These two categories have fundamental differences: the goals, functions, access, consequences and so on. „Compliance mechanism procedures do not serve the same function as dispute settlement arrangements“, says Louka E.<sup>26</sup> She states that dispute settlement and compliance mechanism have different goals: former seeks to resolve the dispute

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<sup>23</sup> See footnote 19

<sup>24</sup> **Fitzmaurice M. A., Redgwell C.** Environmental Non-Compliance Procedures and International Law // Netherlands Yearbook of International Law / edited by Blokker N.M et al. – Cambridge, United Kingdom: Cambridge University Press, 2000, vol. 31, 35-65 p. - ISBN 9789067041430.

<sup>25</sup> **Manual on Compliance with and Enforcement of Multilateral Environmental Agreements/** Bruch C., Mrema E. – UNEP Division of Environmental Conventions, 2006. – 666 p. - ISBN: 92-807-2703-6

<sup>26</sup> **Louka E.** International Environmental Law: Fairness, Effectiveness and World Order. – Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo: Cambridge University Press, 2006. – 128 p. - ISBN-13: 9780511248047.

between parties, while latter seeks to achieve uniform compliance with a treaty and to trigger erga omnes compliance from the violating state. Fitzmaurice M. supports the statement by pointing out that “compliance procedures are designed to ensure continuing participation in a cooperative treaty regime and fulfilment of obligations that are not always reciprocal in nature”.<sup>27</sup>

As Sands P. writes, “international enforcement may occur at the instigation of one or more states, or an international organisation, or by non-state actors”.<sup>28</sup> To date, the only international institution which has been granted extensive powers and international legal personality to engage in enforcement activities is the EC Commission, which has brought more than two hundred cases to the European Court of Justice against member states alleging non-compliance with their environmental obligations.<sup>29</sup>

Louka E. also acknowledges that compliance procedure is not adversarial with a purpose to identify the implementation infringing elements and to facilitate the improvement. Fitzmaurice M. as well holds the same statements: “the main purpose of compliance procedures is to encourage non-complying state to return to compliance without accusing it of wrongdoing, or holding it to account for the consequences that entail from wrongdoing”.<sup>30</sup> Louka E. further notes that, by its nature „compliance mechanism affects the future behaviour of the party”,<sup>31</sup> whereas dispute settlement is by nature constructed as an adversarial and confrontational mechanism with the retroactive purposes – to re-establish the balance between the affected parties. „Compliance mechanisms establish multilateral fora that provide for the discussion of compliance problems before they develop into formal disputes“, says Fitzmaurice M. Currently almost all of the MEAs have a provision referring to the dispute settlement and their relation to the compliance saying: “compliance provisions shall be without prejudice to the settlement of disputes provisions”.<sup>32</sup>

From the discussion of this part it looks like in broad terms dispute settlement and compliance mechanisms are both performing a function of bringing party into compliance but with a different tools

<sup>27</sup> **Fitzmaurice M., Elias O.** Contemporary Issues in the Law of Treaties. - Eleven International Publishing, 2005. – 294 p. – ISBN: 9077596062, 9789077596067.

<sup>28</sup> **Sands P.** Principles of International Environmental Law/2nd edition. - Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo: Cambridge University Press, 2003. – 182 p. – ISBN-13 978-0-511-07684-8, ISBN – 10 0-511-07684-3.

<sup>29</sup> **Sands P.** Principles of International Environmental Law/2nd edition. - Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo: Cambridge University Press, 2003. – 78 p. – ISBN-13 978-0-511-07684-8, ISBN – 10 0-511-07684-3.

<sup>30</sup> **Fitzmaurice M., Elias O.** Contemporary Issues in the Law of Treaties. - Eleven International Publishing, 2005. – 291 p. – ISBN: 9077596062, 9789077596067. URL:

<sup>31</sup> See footnote 22

<sup>32</sup> **Review of Compliance**//Water and Health Protocol MoP Decision I/2, 2007, ECE/MP.WH/2/Add.3- EUR/06/5069385/1/Add.3

and rules. Thus compliance mechanisms and dispute settlement mechanisms exist as complementary units of the compliance system. Enforcement is a term that is much more visible and common to the dispute settlement than compliance mechanisms.

### 1.3. Emergence of the compliance mechanisms and some theoretical approaches

The statement by Montini M. that “during the 1990s various analyses of States’ compliance with their obligations stemming from multilateral environmental agreements showed a negative trend, labelled the ‘enforcement deficit’”<sup>33</sup> naturally raises the question: why international enforcement mechanisms cannot guarantee proper enforcement of international environmental obligations?

It is argued that the appearance of compliance mechanisms is mainly related to the limited capacity and use of the Law of State Responsibility tools: “The Law of State Responsibility is viewed as unsuitable to enforce MEAs”.<sup>34</sup> Firstly, because of the specific nature of the purpose and object of the environmental treaties, the sanctions like suspension or termination of the treaty against the wrongdoer embedded in Vienna Convention on the Law of the Treaties and applied in a classic dispute settlement procedure, are not effective in solving environmental issues. Environmental treaties seek to protect a common good, environmental welfare that is beneficial to all and when damaged is usually impossible to restore. In order to achieve the purpose of the treaty it is vital to ensure wide adherence of the treaty obligations, “compliance with the terms of the treaty”<sup>35</sup> rather than simply restoration of equality between parties. This argument is also reflected in one of the Water Convention meeting documents stating that “traditional means of dispute settlement and treaty law enforcement – e.g. the termination or suspension of the treaty, withdrawal of some privileges under the treaty, or invocation of responsibility or liability – are of little use and may prove ineffective or even counterproductive. Experience has shown that countries refrain from using them”.<sup>36</sup> Fitzmaurice M. et al also stresses that “the underlying logic here is that failure to fulfil these obligations will affect achievement of the common goals of the treaty. These treaty regimes are designed to protect environment in such areas where the pace, magnitude and irreversibility of environmental damage render inter parties

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<sup>33</sup> **Montini M.** Improving Compliance with MEAs: the Kyoto Protocol // Economic Globalisation and Compliance with International Environmental Agreements/ Kiss A., Shelton D., and Ishibashi K., editors. - Great Britain: Kluwer Law International. – 158 p. – ISBN 90-411-1995-7

<sup>34</sup> **Koskenniemi M.** Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol// Yearbook of International Environmental Law, 1992, no 3. 123 p.

<sup>35</sup> **Birnie P.W et al.** International Law and the Environment/3rd ed. – Oxford: Oxford University Press, 2009. – 238 p.- ISBN 978-0-19-876422-9

<sup>36</sup> **Reviewing and promoting implementation and compliance: a needed step in the Convention’s evolution**// UNECE Working Group on Integrated Water Resource Management, 4<sup>th</sup> Meeting, 8-9 July 2009



enforcement, in any event, ineffective”.<sup>37</sup> Secondly, it is usually hard or nearly impossible to establish the breach because the consequences or harm might appear after a considerable amount of time and in completely other place than it actually occurred and in order to evoke state responsibility the wrongdoing has to be proved.<sup>38</sup> Likewise, if more than one state is harming environment, it becomes complicated to establish each of their share in this activity as well as “accurately measure compliance against quantifiable targets”.<sup>39</sup> Crossen T. in his work takes note of the Werksman J. observation that “one of the difficulties with the Law of State Responsibility is identifying a state injured by breach of an MEA obligation”,<sup>40</sup> they might be as well a group of states and “the remedies of restitution or compensation under the Law of State Responsibility are inappropriate in the environmental context”.<sup>41</sup>

With just explained limitations of the State Responsibility law in a context of environmental protection, the emergence of the variety of compliance mechanisms and procedures is understandable step forward. International community had to find a way to secure full implementation of the agreed principles and norms. The divergence of compliance mechanisms in the MEAs is explained by the different nature of the treaties. Some of them are called ‘result oriented’ and some ‘action oriented’. It also argued that the compliance mechanism in the result oriented treaties is easier to construct and is more efficient. Naturally, some treaties, like Kyoto Protocol, Protocol on Water and Health establish concrete targets, thus it’s easier to control and estimate the level of compliance or non-compliance. However, the principle of compliance with the treaty obligations has to be retained no matter how different the substantial requirements, institutional organisation and appliance areas are.

The scholars analysing compliance and enforcement issues in environmental agreements have discovered a certain approaches common to MEA compliance. There are two mainstream legal theories trying to explain the manoeuvring of compliance and enforcement in the overall treaty compliance system.

The compliance with environmental law is analyzed from two perspectives: soft approach,

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<sup>37</sup> **Fitzmaurice M., Elias O.** Contemporary Issues in the Law of Treaties. - Eleven International Publishing, 2005. – 294 p. – ISBN: 9077596062, 9789077596067.

<sup>38</sup> **Montini M.** Improving Compliance with MEAs: the Kyoto Protocol // Economic Globalisation and Compliance with International Environmental Agreements/ Kiss A., Shelton D., and Ishibashi K., editors. - Great Britain: Kluwer Law International. – 160 p. – ISBN 90-411-1995-7

<sup>39</sup> **Fitzmaurice M. A., Redgwell C.** Environmental Non-Compliance Procedures and International Law // Netherlands Yearbook of International Law / edited by Blokker N.M et al. – Cambridge, United Kingdom: Cambridge University Press, 2000, vol. 31, 41 p. - ISBN 9789067041430.

<sup>40</sup> **Crossen T. E.** Multilateral Environmental Agreements and the Compliance Continuum // bepress Legal Series: working paper 36, 2003.

<sup>41</sup> **Fitzmaurice M. A., Redgwell C.** Environmental Non-Compliance Procedures and International Law // Netherlands Yearbook of International Law / edited by Blokker N.M et al. – Cambridge, United Kingdom: Cambridge University Press, 2000, vol. 31, 35-65 p. - ISBN 9789067041430. – Google ebook [retrieved at 27/07/2009]

emphasizing importance of inducement-based mechanisms, relying upon management tools, common sense of the public, and hard one, crediting command and sanctioning. Abram and Antonia Chayes, representatives of “managerial school”, argue that “coercive enforcement mechanisms are not only rarely used to ensure compliance with international treaties, but they are also likely to be ineffective if used” and therefore “management tools, such as transparency, reporting, verification and monitoring <...> and capacity building are the key to designing a compliance regime to encourage compliance”.<sup>42</sup> Managerial approach is challenged by Downs G.W., who argues that “it is a mistake to infer that enforcement is unnecessary from the relatively high compliance levels and lack of enforcement mechanisms”.<sup>43</sup> Downs critique comes from the assertion that current accords do not endow ‘deep cooperation’, in other words, many treaties only maintain status quo. Studies of Victor D.G *et al* as well suggest that „compliance often simply reflects that countries negotiate and join agreements with which they know they can comply“<sup>44</sup> with a little or no cost. This is also explained by the fact that with the proliferation of MEAs, environmental issues are not being solved.<sup>45</sup> Crossen, T., summarises the Downs’ian view by saying that “there is a connection between the depth of cooperation and level of punishment necessary to maintain compliance where there are strong incentives to defect”.<sup>46</sup>

Apparently none of these theories are employed in pure forms. Tallberg, J. finds that enforcement and management mechanisms are most effective when combined: “compliance systems that offer both forms of instruments tend to be particularly effective in securing rule conformance, whereas systems that only rely on one of the strategies often suffer in identifiable ways”.<sup>47</sup> Nowadays compliance systems tend to combine facilitative compliance mechanisms (sometimes incorporating certain enforcement elements in a form of non-compliance response measures) and classical enforcement mechanisms – dispute settlement through negotiation, arbitration, International Court of Justice etc.

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<sup>42</sup> **Crossen T. E.** Multilateral Environmental Agreements and the Compliance Continuum/bepress Legal Series: working paper 36, 2003.

<sup>43</sup> Id

<sup>44</sup> **Implementation and effectiveness of International Environmental Commitments: Theory and Practice**/edited by Victor D.G, Raustiala K., Skolnikoff E.B./Global environmental accord series. - Cambridge, Mass. : MIT Press, 1998. – 662p. – ISBN 0262720280 9780262720281.

<sup>45</sup> **Crossen T. E.** Multilateral Environmental Agreements and the Compliance Continuum // bepress Legal Series: working paper 36, 2003.

<sup>46</sup> Id

<sup>47</sup> **Tallberg J.** Paths to Compliance: Enforcement, Management, and the European Union// International Organization, 2002, vol. 56, no. 3, 609-643 p. - ISSN 1531-5088

#### 1.4. Compliance mechanism models in multilateral environmental agreements

As a departure point it is interesting to look at the Epiney's A. attempt to categorise the compliance and enforcement mechanisms. The scholar distinguishes three types of mechanisms whereas the first type is referred to as non-confrontational mechanism, which "tends towards "partnership solutions" of a non-confrontational character, involving reporting obligations, inspections, monitoring, assistance but also compliance control".<sup>48</sup> According to the author, the second type is "mechanisms which have a confrontational character such as quasi-judicial control or State responsibility and involves measures that compel Treaty parties to behave in a certain way or to do something, even without their consent and cooperation".<sup>49</sup> Finally, she claims that "there are mechanisms which cannot really be grouped in one of these categories, because they do not really oblige State to conform to Treaty obligations or to take measures compensating the non-compliance of Treaty obligations (i.e. the obligations of states to concede information rights or to accord standing in internal judicial review procedures)".<sup>50</sup>

The compliance mechanisms now functioning in UNECE multilateral environmental agreements are based on facilitative approach: "a non-confrontational, non-judicial and consultative nature for reviewing compliance" (Protocol on Water and Health Article 15), „non-confrontational, non-judicial and consultative nature for reviewing compliance“ (Aarhus Article 15), „non-adversarial and assistance-oriented procedure“ (Espoo Article 14bis). At the same time all of the agreements have a provision on dispute settlement. Certain elements of enforcement could be found in a form of non-compliance response measures having sanction-oriented features, but it is a matter of discussion and interpretation whether or not a measure can be held coercive.

To begin with, it is important to justify the particular choice of the multilateral agreements that were used as examples to follow. There are hundreds of international accords agreed and functioning in this wide field of environmental law, however due to the centre focus on the Water Convention, its regional character, and the fact that "every single MEA needs its own tailor made compliance control mechanism"<sup>51</sup> only UNECE regional multilateral conventions that have a developed compliance

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<sup>48</sup> **Epiney A.** *The Role of NGOs// Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia/* edited by Beyerlin U., Stoll P.T. and Wolfrum R. - *Studies on the Law of Treaties ; v. 2*; Leiden : Martinus Nijhoff, 2006. – 324 p. – ISBN 9004146172

<sup>49</sup> Id

<sup>50</sup> Id

<sup>51</sup> **Conclusions drawn from the Conference on Ensuring Compliance with MEAs//Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia/** edited by Beyerlin U., Stoll P.T. and Wolfrum R. - *Studies on the Law of Treaties ; v. 2*; Leiden : Martinus Nijhoff, 2006. – 360 p. – ISBN 9004146172

mechanism will be taken into consideration and further analysis. Water Convention belongs to a pan-European legal framework together with Protocol on Water and Health under the Water Convention, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Convention on Environmental Impact Assessment (EIA) in a Trans-Boundary Context (Espoo Convention), Convention on Long-Range Trans-Boundary Air Pollution (LRTAP Convention), Convention on the Trans-Boundary Effects of Industrial Accidents (Industrial Accidents Convention). These conventions were taken for comparative analysis. Conventions aim at protecting environment and encouraging sustainable development and have been negotiated by governments within the UN/ECE in response to regional challenges.

It has to be admitted that these treaties differ in their objects of regulation, but “there is significant synergy in terms of their substantive scopes and obligations and commitments”.<sup>52</sup> For the purposes of the compliance control mechanisms they are valuable examples to consider also because of their regional character, similar institutional arrangements and similar party composition. Interestingly enough, Aarhus convention compliance mechanism was developed taking as a model LRTAP Convention’s mechanism, Protocol on Water and Health working group was largely influenced by Aarhus model etc. The last but not the least remark is that the mentioned agreements and their differing nature will be taken into account while performing analysis, by giving a bigger weight to the most related ones.

*Protocol on Water and Health* done in London, on the 17<sup>th</sup> of June in 1999 is the “first international agreement of its kind adopted specifically to attain an adequate supply of safe drinking water and adequate sanitation for everyone, and effectively protect water used as a source of drinking water”.<sup>53</sup> It entered into force on 4 August 2005 and by 2009 has 23 parties. It also addresses the prevention, control and reduction of water-related diseases. Parties are required to establish national and local targets for the quality of drinking water and the quality of discharges, as well as for the performance of water supply and waste-water treatment.

Article 15 of the Protocol expressly refers to compliance mechanism: “Multilateral arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance shall be established by the Parties at their first meeting”.<sup>54</sup> At its first meeting on 21 April 2008, by its decision I/2 on the review of compliance, the MOP established the Protocol’s Compliance Committee and

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<sup>52</sup> **Draft Guide to Implementing the Convention** // Water Convention, 5<sup>th</sup> MOP/Draft Document, 10-12 November 2009, ECE/MP.WAT/2009/L.2

<sup>53</sup> Protocol on Water and Health

<sup>54</sup> Id

agreed on its structure and functions as well as procedures for the review of compliance.<sup>55</sup> The objective of this compliance mechanism is to facilitate, promote and to secure compliance with the obligations under the Protocol, with a view to *preventing* disputes, by: addressing cases of non-compliance by Parties and providing advice or assistance to Parties, where appropriate. The mechanism is guided by the principles of transparency, fairness, expedition and predictability and aims at entailing simple, facilitative and cooperative procedures: „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.<sup>56</sup> Mr. Tanzi, Chairperson of the Committee, reiterated that the Committee should carefully comply with the mandate that it had been given by the Meeting of the Parties, and that the Committee was not a judicial body and that it would always operate on the assumption of Parties' good faith.<sup>57</sup> The result oriented approach of the convention makes it easier to assess compliance issues.

*The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention) was adopted on 25th June 1998 and entered into force on 30 October 2001. It has 43 Parties at the moment. The Convention is a very special horizontal environmental agreement that links environmental rights and human rights, government accountability and environmental protection. Convention also establishes one essential principle: sustainable development can be achieved if all stakeholders are involved and have rights to participate in the environmental governance. Convention claims government accountability, transparency and responsiveness and obliges public authorities to grant essential rights for the public with regard to access information and justice.

Article 15 of the Aarhus Convention on review of compliance, requires the Meeting of the Parties to establish arrangements for reviewing compliance with the Convention. Following this obligation at their first meeting in October 2002 the Parties adopted the *decision I/7 on review of compliance* and elected the first Compliance Committee as the central body responsible for the review of compliance. Decision also sets the structure of the Committee and procedures that it has to follow. The modus operandi of the Compliance Committee is provided in the Guidance Document on the Compliance Mechanism of Aarhus Convention. The Committee has to report to the Meeting of the Parties about all the developments in relation to compliance and provide MOP with appropriate

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<sup>55</sup> **Report on the First Meeting of the Compliance Committee**//Protocol on Water and Health, 1<sup>st</sup> CC/Report, 2008, ECE/MP.WH/C.1/2008/2 EUR/08/5069385/6

<sup>56</sup> **Review of Compliance**//Protocol on Water and Health MOP Decision I/2, ECE/MP.WH/2/Add.3- EUR/06/5069385/1/Add.3

<sup>57</sup> **Report of the 1<sup>st</sup> meeting of Compliance Committee**//Protocol on Water and Health, 2008, ECE/MP.WH/C.1/2008/2 EUR/08/5069385/6, 3 p.

recommendations, which will guide MOP in making focused decision and take an effective action. One of the most exceptional and innovative features of the Aarhus Convention's compliance mechanism is that it provides a possibility for members of the public to make communications to the Committee on cases of alleged non-compliance with the Convention, which the Committee is then required to address.

*Convention on Environmental Impact Assessment (EIA) in a Trans-Boundary Context* (Espoo Convention) was made in 25 February 1991 and entered into force 10 September 1997. Up to the current moment it has 43 Parties. Convention sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning in the territory of one Party that is likely to cause a significant environmental impact within a jurisdiction of another State Party. It lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries.

Article 14 bis of the Convention obliges MOP to adopt as a non-adversarial and assistance-oriented compliance procedure. And by the decision II/4 (revised by decision III/2) the Implementation committee with a mandate of reviewing compliance was established, its structure and compliance review procedure defined. The Committee's rules of operation are settled in the Annex to decision IV/2 of the Meeting of the Parties that have to be followed in the performance of its functions.

*The Convention on Long-Range Trans-Boundary Air Pollution* is one of the central means for protecting our environment. It was signed in 1979 and entered into force in 1983. Up to this moment it has 51 Parties. The Convention was the first international legally binding instrument to deal with problems of air pollution on a broad regional basis. As one of the first UNECE environmental Conventions, it served as model for compliance review to Espoo and other following Conventions. It has, over the years, served as a bridge between different political systems and as a factor of stability in years of political change. It has substantially contributed to the development of international environmental law and has created the essential framework for controlling and reducing the damage to human health and the environment caused by trans-boundary air pollution. It is a successful example of what can be achieved through intergovernmental cooperation.<sup>58</sup>

Convention does not have an express provision in its text referring to Compliance, however article 10 obliges Executive Body, the representatives of the contracting parties, to review implementation of the convention and establish appropriate working groups to facilitating implementation review process. The Implementation Committee was established in 1997 by a decision 1997/2<sup>59</sup> to review compliance by Parties with their obligations under the protocols to the

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<sup>58</sup> Convention on Long range Trans-boundary Air Pollution

<sup>59</sup> **Structure and functions of the Implementation Committee and procedures for review compliance//LRTAP**  
Convention, Executive Body/Decision 1997/2, Annex III,ECE/EB.AIR/53

Convention.<sup>60</sup> It reviews periodically compliance with Parties' reporting obligations, considers non-compliance submissions and carries out in-depth reviews of specified obligations in an individual protocol at the request of the Executive Body. It reports every year to the Executive Body which afterwards makes appropriate decisions.

*Convention on the Trans-boundary Effects of Industrial Accidents* (Industrial Accidents Convention) was adopted in 17 March 1992 and entered into force 19 April 2000. The aim of the Convention is to help its Parties to prevent industrial accidents that can have trans-boundary effects, to prepare for them and to respond to them. Convention has 37 Parties.

Article 18, paragraph 2 (a) stipulates that COP shall review Convention's implementation. At their first meeting Parties agreed on the format and procedures for reporting on implementation and COP established the Working Group on Implementation as a subsidiary body to monitor the implementation of the Convention in their Decision 2000/2 on the implementation of the Convention.<sup>61</sup>

There are two more documents to be mentioned here due to their close relation with Water Convention, although due to the fact that both of the documents are not yet into force and do not yet have working compliance mechanisms, they are not being involved into the comparative analysis.

*Protocol on Civil Liability and Compensation for Damage Caused by the Trans-Boundary Effects of Industrial Accidents on Trans-Boundary Waters* was formally adopted and signed by 22 states in Kiev on the 21<sup>st</sup> of May in 2003, but has not yet entered into force. This protocol is attached not only to the Water Convention, but also to the Convention on the Trans-Boundary Effects of Industrial Accidents (Geneva, 2-3 July 2001). It is aimed at "providing for a comprehensive regime for civil liability and for adequate and prompt compensation for damage caused by the trans-boundary effects of industrial accidents on trans-boundary waters".<sup>62</sup> The Protocol enshrines the provision on compliance, by obliging Meeting of the Parties to undertake compliance review procedure in the article 20: "The functions of the Meeting of the Parties shall be to review the implementation of and compliance with the Protocol including relevant case law provided by the Parties".<sup>63</sup>

*The UN Convention on the Law of the Non Navigational Uses of International Watercourses* (Water Convention '97) was signed in 1997. This global convention provides a framework for cooperation on shared water resources. According to Tanzi A. and her comparative analysis of New York Convention and Water Convention the two "bear the same subject matter" and "two instruments

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<sup>60</sup> LRTAP Convention has 8 protocols

<sup>61</sup> **On the Implementation of the Convention//** Industrial Accidents Convention, COP/ Decision 2000/2, Annex III, ECE/CP.TEIA/2

<sup>62</sup> Protocol on Civil Liability and Compensation for Damage Caused by the Trans-boundary Effects of Industrial Accidents on Trans-boundary Waters, art 1

<sup>63</sup> Convention on the Trans-boundary Effects of Industrial Accidents

under consideration in their complimentary mutual relationship provide an important contribution in the ongoing customary law process in the field of international water law”.<sup>64</sup> However, New York Convention does not have a developed compliance mechanism either and thus cannot serve as an example.

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<sup>64</sup> **Tanzi A.** The relationship between the 1992 UNECE Convention on the Protection and Use of the Trans-boundary Watercourses and International Lakes and the 1997 UN Convention on the Law of the Non Navigational Uses of International Watercourses//Report of UNECE Task Force on Legal and Administrative Aspects. - Geneva, 2000.



## **2. COMPARATIVE ANALYSIS OF THE COMPLIANCE MECHANISMS IN UNECE ENVIRONMENTAL MULTILATERAL AGREEMENTS**

In further comparison the biggest attention will be paid to the compliance mechanisms under the Protocol on Water and Health (it is the most directly attached agreement out of all analysed), Aarhus and Espoo Conventions (they are action-oriented agreements same as Water Convention). The rest two MEAs will be discussed in the scope that seems the most relevant for the subjective judgement of the author.

Considering close relations between Water Convention and its Protocol on Water and Health which has recently developed a mechanism of compliance it should be the centre of attention for our aim. However the analysis of compliance mechanism in the Protocol on Water and Health faces certain limitations due to its short existence. Some documents on compliance procedures are yet to be adopted, the reporting mechanism is being employed for the first time (no results yet) and the non-compliance procedures are still on the paper. Bearing in mind these limitations, the Draft Rules of the Compliance Procedure of the Compliance Committee under Protocol on Water and Health still gives us a good basis for a comparison, as they are detail and extensive. One has to take into account the fact that they are not yet finalised and might bring some changes, but presumably those changes will be minor.

All the rest of the Conventions have the compliance mechanism in action for some time and can provide with valuable experiences.

To begin with, the work will critically discuss certain procedural and institutional questions concerning reporting and verification obligations and procedures, public involvement, non-compliance procedure and its trigger subjects as well as available non-compliance response measures in order to reveal the challenges and lessons to be learned. These and other elements have a detrimental value towards effectiveness and functionality of the compliance mechanism. Furthermore, the other influential factors are worth mentioning in order to get the wider picture of the matter.

### **2.1. Procedural and institutional questions**

In every compliance mechanism, irrespective of their differences, certain procedural and institutional elements have to exist: the bodies responsible for the compliance monitoring with certain structure and functions, special compliance procedures and actors that are entitled to participate in those procedures.

It was decided to follow the four component approach found in UNEP report and comparative tables as a template for the comparative analysis. UNEP report<sup>65</sup> acknowledges four 'categories of components' (*or* - elements) that have to be assessed if one wants to have an extensive picture of what compliance mechanism looks like. First of them is '*performance review information obligations*' where parties have to report on their implementation together with all necessary statistical information to established body – Secretariat, COP or MOP. Second category is '*multilateral non-compliance procedures*' that are mechanisms specifically designed for controlling compliance. They analyse received reporting information from the Parties and determine whether they are in compliance with particular MEA. Third category is '*non-compliance response measures*' which appear in case when Party's non-compliance was determined and non-compliance procedure conducting body finds it necessary to apply relevant response measures. Lastly, the fourth category touches upon '*dispute resolution procedures*' that do not involve Secretariat or COP/MOP anymore, but is an important enforcement element established in many MEA's.

### **2.1.1. Performance review information obligations and related procedures**

Following UNEP used scheme of four categories of components revealing the functioning of the compliance mechanisms, the performance review information obligations is far the most common form of compliance control and monitoring used in MEA's. It includes two main stages: the reporting by the parties and assessment of those reports by the treaty bodies. Each party is obliged to review its own implementation and compliance with the treaty obligations and then to prepare a report, including information asked by the treaty bodies.

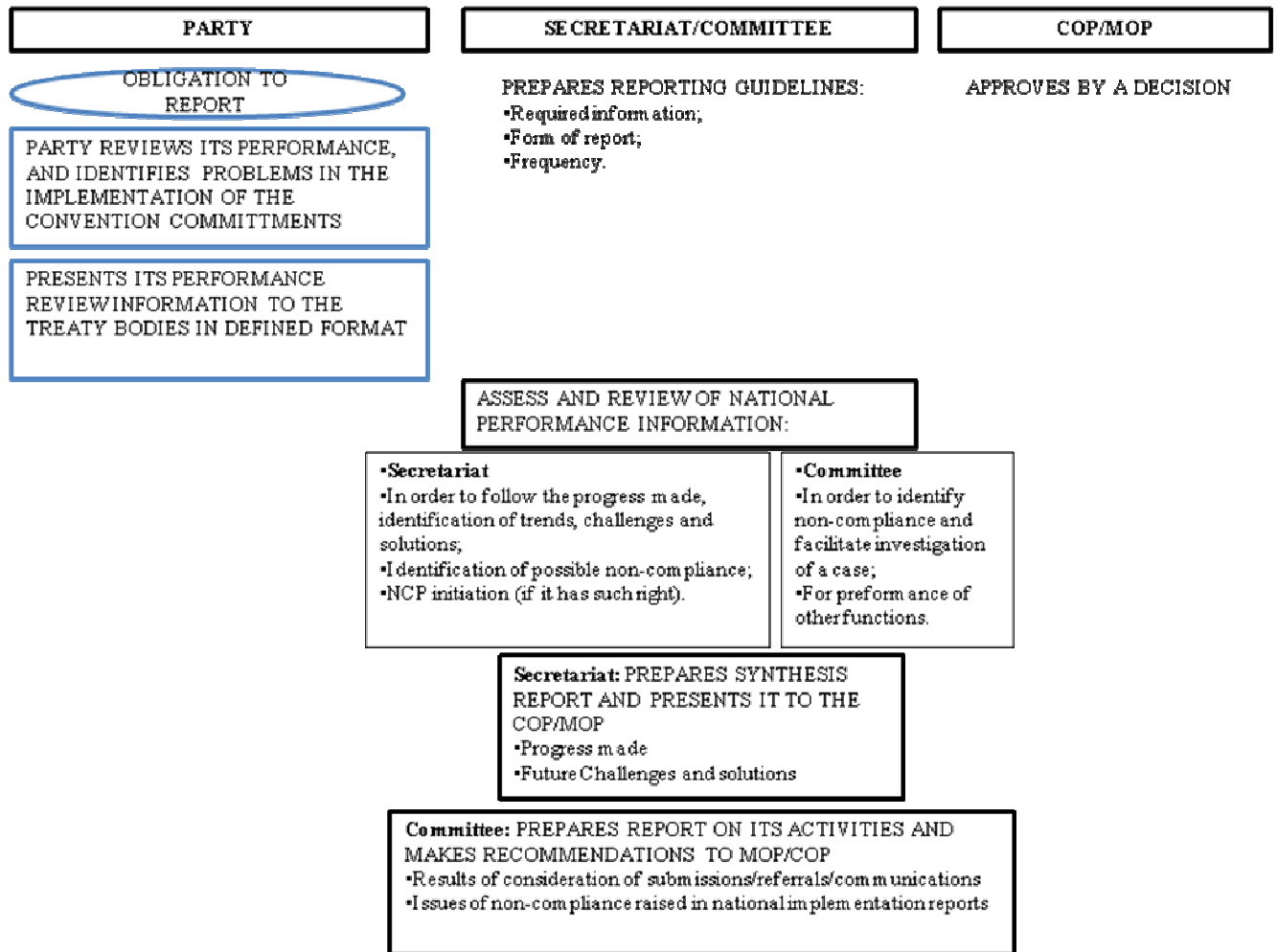
All five analyzed conventions have a reporting review procedure (*see* table 3), but the organisation and performance of it differs. National performance reviews in a form of reports are presented to the treaty governing body which makes an assessment and review of all the reports. This review is after summarised in the final report that the review performing treaty body presents to the MOP/COP. In figure 1 you can see the reporting mechanism of Aarhus and Espoo Conventions.

National reports that parties are obliged to submit to the compliance assessing bodies, as the central part of their progress review and evaluation, require particular scrutiny. The information quality, its type, format and reporting frequency as well as other reporting subtleties have an influence in the correct assessment and evaluation of the compliance with the party obligations. Central to the review of that report is also an institutional set up of the reviewing bodies and their objectiveness, which will afterwards influence the facilitation of compliance and choice of response measures.

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<sup>65</sup> **Compliance Mechanisms under Selected Multilateral Environmental Agreements//**UNEP Report. – Nairobi, 2005.

**Figure 1. Reporting mechanism of Aarhus and Espoo Conventions**



**Source:** Aarhus and Espoo Conventions' Party meeting documents, [www.unece.org](http://www.unece.org).

Beyerlin U. lists the main **functions** of reporting, that are important to mention: “reporting systems allow for a proper assessment of facts, including those relevant in view of compliance; reports form the basis for monitoring, and the latter may in turn produce data that can be used for verifying the reports; reporting procedures can bring about the dialogue between the regime body assessing reports and the reporting member states which may considerably facilitate further implementation and compliance; and reporting may have some direct effect of persuasion, because it can produce a “chain reaction” in the case that the report of a party reveals non-compliance and needs to be corrected after verification”.<sup>66</sup> As Brunnee J. states, “the extensive information gathering and reporting mechanisms established under most MEAs help shape states’ understanding of the environmental problem at hand,

<sup>66</sup> **Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia/** edited by Beyerlin U., Stoll P.T. and Wolfrum R. - Studies on the Law of Treaties ; v. 2; Leiden : Martinus Nijhoff, 2006. – 393 p. – ISBN 9004146172

and of the need for and feasibility of coordinated action“.<sup>67</sup> Therefore, reporting and its organisation under certain convention is very essential element in the whole compliance mechanism.

UNEP Guidelines approve that “reporting, monitoring, and verification measures can assist States in tracking their compliance under the respective MEAs”.<sup>68</sup> Due to the fact that each multilateral agreement managing bodies will shape and create its own reporting, monitoring and verification requirements, the requirements will vary in information type, format and methodologies.

The **type** and **content** of the information asked to submit differs according to the substantial requirements of the MEA. However, the requirement to report on the legislative measures and other implementation measures taken by the country to comply is a general one that all five reporting mechanisms include. The Protocol’s on Water and Health Parties are requested to concentrate on the information concerning legal, administrative, economic, financial, technical and other measures to comply with the Protocol’s provisions.<sup>69</sup> While preparing the report they should focus on the rationale and justification for establishing specific targets, outcomes and impacts of actions or measures taken to implement the Protocol, major obstacles encountered in implementation and actions needed to enhance implementation.<sup>70</sup> The parties also should refer to the success stories and case studies that could serve as examples for the other members.

Aarhus (Article 10 (2) of the Convention) and Espoo (Article 14bis of the Convention) reporting obligations detailed in the decision I/8 and decision IV/1 require parties to report on the necessary legislative, regulatory or other measures that it has been taken to implement the provisions of the Convention and their practical implementation. Industrial Accidents Convention has an obligation to report on the implementation of the Convention in Article 23. In addition to the general requirement on the implementation measures taken and data on specific Convention requirements it asks to report on problems and obstacles in implementation, scientific and technological cooperation and exchange and participation of the public. In accordance with Executive Body decision 1997/2 (Annex III) LRTAP Convention requires reporting on emission data, strategies and policies and specific convention requirements (such as abatement technologies and costs, depositions and concentrations, critical loads for pollutants and effects on human health and ecosystem).

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<sup>67</sup> **Brunnee J.** Enforcement Mechanisms in International Law and International Environmental Law, 11 p.

<sup>68</sup> **Guidelines on compliance and enforcement of multilateral environmental agreements**, United Nations Environmental Programme, 1-14 p.

<sup>69</sup> **Preliminary Guidelines for Review and Assessment of Progress under the Protocol**//Protocol on Water and Health 1st MoP, 2007, ECE/MP.WH/2007/4 - EUR/06/5069385/11

<sup>70</sup> **Summary Reports in Accordance with Article 7 of the Protocol on Water and Health**/Setting Targets and Reporting//Protocol on Water and Health 2nd meeting of the Working Group on Water and Health, 2009, ECE/MP.WH/WG.1/2009/5 - EUR/09/5086342/7

All conventions' reporting takes a **form** of a questionnaire, which is being revised constantly, after each reporting period. Thus, it is a living document and as a 'soft' law instrument has an advantage to be modified. At his third meeting LRTAP Implementation Committee stressed that: "the questionnaire was a crucial tool". Choice of the questionnaire format is very comfortable in terms of assessment. But the body designing questions has to be careful of precise and clear formulation of the questions and language used. This detail can considerably influence the quality and scope of the information received. This conclusion arises from the Industrial Accidents Convention Working Group assessment on the reporting problems of the parties in the first reporting period. It recognised that party members misunderstood a number of questions and did not elicit the information that was expected. It concluded that the wording of these questions needed to be improved for the next period of reporting to make sure that the relevant practical information was obtained. Industrial Accidents Convention's Working Group report on the performance review information states the conclusion that „a meaningful monitoring of the implementation is possible only on the basis of more specific information on national legislation”.<sup>71</sup> They noticed that country reports contain very much generalised information on the legislation and on the other aspects important for the implementation assessment.

Another challenge faced through reporting cycle was that” the problems in implementing the Industrial Accidents Convention are not systematically reported”.<sup>72</sup> It is extremely important that the parties themselves would understand the value and positive consequences from the proper and thorough self assessment. The regular and honest reporting enables to identify the main problems and search for solution in the cooperative manner. The Working Group stressed that the assessment of the implementation of the Convention should be based on information on how the provisions of the Convention were fulfilled in practice, because that was what mattered ultimately.

As UNEP Guidelines reiterate, „as technology has evolved, compliance-related information systems with computerised databases are increasingly used to collect, sort, and process this information that have the advantages of increased transparency, ease of data analysis and verification, and increased efficiency, organisation, and prompt compilation of data”.<sup>73</sup> It has to be noted that Aarhus, LRTAP, Industrial Accidents Convention conventions have a possibility to report online and urges parties to use the IT tools more often. Aarhus Convention has clearing house mechanism: “the clearing house will help the Convention's compliance mechanism by providing ready access to information on national implementing legislation and practices. Information gathered through the

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<sup>71</sup> **First Report on the Implementation of the Convention**//Industrial Accidents Convention, 2nd MOP, Working Group on Implementation, 2002, CP.TEIA/2002/9, 4 p.

<sup>72</sup> See footnote 74

<sup>73</sup> **Guidelines on compliance and enforcement of multilateral environmental agreements**. United Nations Environmental Programme, p. 1-14.

reporting requirements under the Aarhus Convention will be available through the clearing house.<sup>74</sup> Non-governmental organizations may also submit information to the clearing house. It is also important to mention that „standardised reporting formats makes it easier to identify potential compliance problems (or successes) for a particular nation, facilitates the use of electronic databases for analysing the data, and assists in trend analysis over time and across countries”.<sup>75</sup> As concerns Water Convention, the clearing house mechanism is also being planned. UNECE metadata database of the water sector in the countries in Eastern Europe, Caucasus and Central Asia (EECCA) is planned to be installed in order to collect, store and share the information on the status of trans-boundary waters.<sup>76</sup> This database could become one of the information sources if the treaty compliance assessing bodies would need additional factual information.

Taking into account that usually many countries undertake international obligations under a large number of agreements (i.e. Lithuania, Belgium, Ukraine etc. are parties to all UNECE MEAs not mentioning the rest international agreements), they are also burdened with regular reporting: „with the proliferation of MEA’s there has been a concern raised by parties of the many requirements for reporting, and attempts are made to streamline the reporting process which, hitherto, has not been successful because different MEA’s require different type of information”.<sup>77</sup> More and more often parties do not fulfil the reporting requirements or either miss the deadlines to submit the report and by doing this impede the whole process of the information performance review and compliance mechanism itself (during Espoo reporting period 2003-2005 five parties did not meet reporting requirements, during Industrial Accidents Convention first reporting period – seven parties failed to meet reporting requirements, in the second reporting period 6 parties). For that and other reasons, the reporting is widely discussed by legal scholars through different aspects and recent trend of the MEA governing bodies is to develop detailed and as extensive as possible guidelines and manuals on reporting requirements.

Within the framework of the Protocol on Water and Health Draft guidelines on target-setting, evaluation of progress and reporting and Draft guidelines for summary reports were prepared just

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<sup>74</sup> **Environmental democracy clearing house launched to highlight progress under the Aarhus Convention/**Grid-Arendal Press releases, Tuesday 13 Jul 2004.

<sup>75</sup> **Guidelines on compliance and enforcement of multilateral environmental agreements**, United Nations Environmental Programme

<sup>76</sup> **Project Proposal for Strengthening Capacity for Data Administration for Monitoring and Assessment of Transboundary Water Resources in Eastern Europe, Caucasus and Central Asia/Water Convention/10<sup>th</sup> meeting of WG on Monitoring and Assessment**, Information paper 6, 2009.

<sup>77</sup> **Training Manual on International Environmental Law/** edited by Kurukulasuriya L., Robinson A. N. - Nairobi, Kenya: Division of Policy Development and Law, United Nations Environment Programme, 2006. - 42 p. – ISBN 9280725548

recently by the Task Force on Indicators and Reporting and their adoption is foreseen only in October 2010. At the moment, the pilot project of reporting is being launched and all parties to the Protocol are obliged to submit their first implementation reports (summary reports) until April 2010. These reports then will be assessed and summarised into one report on implementation and progress in the UNECE/WHO region. The novelty in terms of assessment of the country reports – it will be done by an independent expert (with assistance of the secretariat and Compliance Committee) involving comments of the focal points<sup>78</sup> and key stakeholders. This is an idea worth taking into account for the review process in Water Convention. The final adoption of the guidelines on target setting, evaluation of progress and reporting, the guidelines for summary reports, including their format; and the report on implementation and progress in the UNECEWHO/Europe region is foreseen in mid-October 2010.<sup>79</sup> Thus, at the moment it is not possible to evaluate the success of the reporting system under Protocol on Water and Health and therefore not possible to draw any recommending conclusions for the Water Convention. However, preparation of the guidelines for reporting as well as the Compliance Committee rules of procedures of the Protocol on Water and Health were based on the Aarhus Convention compliance mechanism.<sup>80</sup> Therefore, the reporting system of Aarhus Convention can be scrutinised more.

Aarhus Convention has a Guidance on Reporting Requirements<sup>81</sup> that facilitates countries reporting, that is based on the decision I/8 further developed through decision II/10, which addressed, inter alia, the issue of how to deal with the preparation of second and subsequent reports (ECE/MP.PP/2005/2/Add.14). The objective of Aarhus reporting mechanism is to be simple, concise and not excessively burdensome.<sup>82</sup> Parties are required to prepare their reports through transparent and consultative process involving the public. Guidelines reiterate that an effective consultation process should involve two stages: (1) an early consultation on which issues should be reflected in the report (prior to the development of the first draft of the report), and (2) a follow-up consultation on the draft report. It further states that multi-stakeholder consultations, including in the form of multi-stakeholder working groups, provide one of the best ways of ensuring comprehensiveness of information. In order to solve a timeliness problem (which was addressed in decision II/10, para 2; ECE/MP.PP/2005/13, para 46), the guidelines suggests a timetable for the Parties to follow. It also provides a check list for the parties, which

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<sup>78</sup> Focal point is specific term used to describe the national contact in each State Party used for purposes of communication and coordination of activities.

<sup>79</sup> **Setting Targets and Reporting under the Protocol**//Protocol on Water and Health, 2nd meeting of Working Group on Water and Health, 2009, ECE/MP.WH/WG.1/2009/7, EUR/09/5086342/9, 2 p.

<sup>80</sup> **Report on the First Meeting of the Compliance Committee**//Protocol on Water and Health, 1<sup>st</sup> CC/Report, 2008, ECE/MP.WH/C.1/2008/2 EUR/08/5069385/6

<sup>81</sup> **Guidance on reporting requirements**//Aarhus Convention 7<sup>th</sup> MOP, 2007, ECE/MP.PP/WG.1/2007/L.4

<sup>82</sup> **Reporting Requirements**//Aarhus Convention, 1<sup>st</sup> MOP, Report Addendum, Decision I/8 ECE/MP.PP/2/Add.9

helps to identify new and important information to be presented in the report. Guidelines provide for the simple methodical advises for the parties to facilitate the report preparation.

Aarhus Convention has a very successful reporting experience that was declared in the ECE/MP.PP/WG.1/2007/L.4: „having analysed the reports, the Committee considers that the present system was overall successful. The fact that all of the States that were Parties at the time of the deadline for submission of reports for the second meeting of the Parties did in fact submit reports, albeit some of them after the meeting, was probably unprecedented in the history of reporting mechanisms under multilateral environmental agreements”.<sup>83</sup> After two reporting cycles since decision I/8, where the first cycle of 87% and second 85% of reporting activity, the positive developments in legislative frameworks and practical implementation as well as challenges to implementation were identified.<sup>84</sup>

In general, successful reporting is a function of two factors: (1) the precision and reliability of the reported information <...>, and (2) the degree to which information is presented in a transparent and standardized way that allows comparisons between reports and verification by others.<sup>85</sup> Following this line of through the success of Aarhus reporting process has to be directly linked with successfully implemented and designed standardised reporting system and with the public involvement, which is an exceptional and innovatory feature of this Convention. The participation of public in preparation of national reports as well as their assessment provides needed transparency and puts a big pressure for Parties. It increases the reliability and quality of information. Therefore, public involvement into reporting and compliance review system of Water Convention can make an essential difference in effective and successful reporting. The necessary legal and procedural arrangements have to be made to make it possible for the public to get involved.

Espoo Convention's documents do not provide for an extensive guidelines or manual on reporting. The short explanatory note is inserted in the blank questionnaire before each section on what information is asked. Maybe this could be one of the reasons for the lack of responses: “at their fourth meeting, in 2008, the Parties, while regretting that not all Parties had responded to the questionnaire, welcomed the reports of the Parties on their implementation <...>”.<sup>86</sup> Besides already mentioned difficulties, reporting mechanisms encounter a number of other challenges. Some of them are important to mention here. Aarhus Convention's reporting system suffers from late submission of

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<sup>83</sup> **Guidance on reporting requirements**//Aarhus Convention 7<sup>th</sup> MOP, ECE/MP.PP/WG.1/2007/L.4. - Geneva, 2007.

<sup>84</sup> **Aarhus Reporting Mechanism**//Presentation from the workshop.

<sup>85</sup> **Breidenich C.** Measurement, Reporting and Verification in the post – 2012 Climate Agreement//Daniel Bodansky Georgia University School of Law. – 2009, April. – 5 p.

<sup>86</sup> **Review of Implementation of Espoo Convention**/2<sup>nd</sup> review, ECE/MP.EIA/11. – Geneva, New York: United Nations Publications, 2008. - ISSN 1020-4563.



reports, difficulties in relation to processing reports through UN system, translations, resources and public consultation process.<sup>87</sup> Other conventions' reporting systems share similar challenges as Aarhus. It is of course easy to criticize, but where to find the best solutions?

The adequate and quality reporting is a twofold matter. On one hand, the will and capacity of the states, on other hand, the clear and understandable reporting requirements, simple and facilitative reporting format and the implications of the non-compliance with reporting obligations. The frequency of reporting also has its implications. Failure to comply with the reporting requirements may be one of the issues addressed by the Compliance Committee.

Comparison of the analysed documents let us reveal certain tendencies. Reporting mechanisms are a considerably new thing in all our analysed documents. Although all of them share similar formats and might be a cause of the non-compliance procedure, some have better reporting rates than others. The positive aspect of these reporting mechanisms lays in the fact that they are all being constantly revised and improved: assessing each cycle of reporting, the success and failures, parties modify, reorganise the faulting components of reporting mechanism. They reformulate the questionnaire; introduce new IT tools and their usage; those which haven't done so, try to involve the public; organise trainings and workshops etc. The reporting system has to undergo long process until the correct balance is reached. As concerns capacity problems, they are being dealt with in all conventions through the financial assistance, project and programme implementation, workshops and trainings.

Aarhus reporting success shows that high reporting rates can be achieved and Water Convention reporting mechanism perhaps should follow Aarhus approach. Aarhus reporting mechanism gives one exceptional lesson to be taken for Water Convention that is an adequate public involvement in the reporting process. The advice from the Espoo Implementation Committee should be considered and made sure that a „sufficient training for completing the questionnaire, the availability of relevant software, the adequate translation and the interpretation of certain terms“ exists under Water Convention reporting system.<sup>88</sup>

There is still a long way to go in all of them in terms of receiving high quality and exact information. Those Conventions that still lack easily accessible detailed reporting guidelines or criteria should prepare them as well as detailed and clear guidelines should be prepared for Water Convention reporting. As mentioned above, public involvement is a tool to achieve bigger transparency and quality information. Careful assessment of the received national reports and verification of the information in the reports by additional information gathering would contribute to the improvement of the quality of information as well.

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<sup>87</sup> **Aarhus Reporting Mechanism**//Presentation from the workshop.

<sup>88</sup> **Report of the Second Meeting of the Implementation Committee**/Espoo Convention, WG on Environmental Impact Assessment, 2003, 2 p. MP.EIA/WG.1/2003/3

When reports are submitted they have to be assessed and evaluated by the responsible treaty institutes. **Report assessment procedure** is a bridge between performance review information and non-compliance procedure. It involves number of questions. One of them, as notices Beyerlin U. in his *Conclusions Drawn from the Conference on Ensuring Compliance with MEAs*, is institutional aspect of organization of the bodies completing assessment. He purports that Human Right instruments commonly use independent expert bodies to set up assessment boards or entrust the Secretariat with the assessing reports that “can be considered institutions which are independent from any state influence and only responsible for international regime and its objectives”<sup>89</sup> However he also stresses that international environmental agreements tend not to give the assessment of the reports to the impartial bodies, but instead entrust the task to specific Compliance Control Committees or Conference of the Parties, composed of the representatives of the member states, as assessment of the reports is considered very highly political matter.<sup>90</sup> Another important aspect is the question how the assessment is done and what it results into.

Firstly, let us see who does the review procedure in our Conventions, what the organisation of these bodies is and whether Beyerlin U. is right. In UNECE MEAs report review procedure is usually shared by Secretariat and Committee, although they perform review with different purposes. Espoo and Aarhus Secretariats are required to prepare a synthesis report summarising the progress made by the parties and identifying main challenges and solutions for the proper achievement of the Convention purposes. All reports – the synthesis report and party performance review information reports – are presented to the MOP. Compliance/Implementation Committee reports to the MOP on its activities concerning compliance and for that purpose as well reviews national reports (*see* figure 1). LRTAP Secretariat performs national report review with the purpose to report to the Executive Body on the progress in core activities, while Implementation Committee periodically reviews national reports in order to report to Executive Body on its activities (reporting situation, cases of non-compliance etc.) and to make recommendations. In Industrial Accidents Convention the implementation review report based on information from national reports is prepared by the Working Group on Implementation. As concerns reporting mechanism in the Protocol on Water and Health it is not absolutely clear who does what. There is no direct reference pointing out whether national report review will be done by Secretariat and Committee, like in Aarhus and Espoo, or only by the Committee itself. Protocol on Water and Health is in a process of pilot reporting exercise and first review of national reports will be

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<sup>89</sup> **Conclusions drawn from the Conference on Ensuring Compliance with MEAs**//Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia/ edited by Beyerlin U., Stoll P.T. and Wolfrum R. - Studies on the Law of Treaties ; v. 2; Leiden : Martinus Nijhoff, 2006. – 360 p. – ISBN 9004146172

<sup>90</sup> Id

entrusted to an independent expert. To sum up, the bodies performing review in these Conventions is Secretariat, Compliance/Implementation Committee/ WG on Implementation and independent expert.

After identification of the bodies performing reporting review it is time to look at their *structure and functions*. The structure and membership of the committees differs slightly, but changes the situation substantially. Aarhus and Protocol's on Water and Health compliance committees have identical composition: consist of nine members, serving in their personal capacity, persons with high moral character and recognized competence in the fields to which the Convention relates. The members of the committees express their personal opinion and not of their governments. This is a very important independence and objectivity aspect because as Birnie P. *et al* confirms, “<...> compliance procedures and inspection regimes will not be successful if the subsidiary bodies that carry them out do not have a measure of independence from the political organs”.<sup>91</sup> The implementation committees of the Espoo and LRTAP conventions and Working Group on Implementation of the Industrial Accidents Convention have similar structures with the exception, that they elect Parties first and not the individual persons. The parties then appoint or nominate their members to serve the committee. The members of the Committee/WG represent the interests of the Parties. Each committee has different rotation procedures. The composition of the body reviewing compliance is essential to its impartial function performance. Just this composition aspect defines the nature of the body: either making it political, the smaller version of MOP/COP or an independent expert unit, with considerable freedom and powers conferred to it. Following Beyerlin U. critique task of reviewing and assessing reports should not be assigned to the political body like MOP/COP or Compliance Committee. However this argument is true only if the Compliance/Implementation Committee is composed of the Parties and it represents Parties' interests. Otherwise, given necessary independence and impartiality to the Committee, it is the most suitable body to perform this task.

One interesting detail is found as regards candidate election only in Aarhus and Protocol on Water and Health: both bodies share the formulation, involving an important public factor „they shall be elected by the MOP from among candidates nominated by the Parties, taking into consideration any proposal for candidates made by Signatories or by nongovernmental organizations (NGOs) qualified or having an interest in the fields to which the Protocol relates“. This provision is an indicator of existence of transparency and objectivity in election procedure. In the election procedure of compliance reviewing body under Water Convention compliance mechanism this provision has to exist as well. It has to be assured that upon election of the members of this body the public opinion as

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<sup>91</sup> **Birnie P.W et al.** International Law and the Environment/3rd ed. – Oxford: Oxford University Press, 2009. – 87 p. - ISBN 978-0-19-876422-9

well as their proposed candidatures would be carefully considered. What is more, the answer for not acceptance of the candidate should be presented with explanatory arguments.

As concerns structure of the Secretariat, it has a set of specialised divisions working with certain policy questions, its staff is chosen following the United Nations rules and procedures. So from the point of independence, Secretariat is not politically attached organ to the Treaty MOP/COP. As concerns its functions, it does all necessary organisational work for fluent functioning of the work under agreement governance. With regard to report review, in several analysed Conventions it does have a task to assess reports and gather missing information if deems necessary. But this review is done not for compliance purpose. Secretariat is preparing a report for MOP/COP as an overview, summary of the recent developments under the treaty. Through this exercise it might notice non-compliance possibilities and then (if/when it has a right) might make a referral to the Compliance/Implementation Committee.

Functions of the Compliance/Implementation Committees (WG on Implementation), as concerns information review, are almost the same: to monitor, assess and facilitate the implementation of and compliance with the *reporting requirements* or *with Convention requirements*; prepare, at the request of the MOP/COP, a report on compliance with or implementation of specific provisions of the treaty; examine compliance issues and make recommendations if and as appropriate. The main source used in performance of all of these functions is state reports. So the committee/WG needs to review regularly the national information.

Coming to the question of the assessment process itself, it is important to see how it is being done and what it results into.

The assessment of reports is not a merely technical matter as its aim is to identify compliance difficulties. Aarhus Compliance Committee is advised to take into account the following criteria upon assessment of reports: procedural aspects of the reporting process, including transparency and public involvement as well as timeliness in reporting, completeness of the reports in accordance with requirements set out in the decision I/8, and quality and accuracy of data in the reports. Briefly, the procedural and substantial requirements have to be assessed. As concerns procedural requirements, they are quite easily assessable. Committee has to evaluate the completeness of the reports, whether they are in accordance with decision 1/8 requirements. Timeliness of the reporting is essential as it guarantees fluent work of the Secretariat and Compliance Committee. When considering the quality and accuracy of information provided in the national implementation reports, the Committee may take into account: information provided by the Secretariat in the synthesis report, provided by other sources, received through referrals, submissions or communications in the normal way or gathered in

accordance with paragraph 25 of the annex to decision I/7.<sup>92</sup> When reports are not full or the data is not clear, the report assessing body has a right to ask the country for specifications or get information from other reliable sources. It also addresses the issue in the report to MOP/COP and might provide recommendations if deems necessary. The Working Group of the Industrial Accidents Convention stressed that the individual national implementation reports provided the most important indicator of the practical implementation of the Convention and that the overall assessment of the implementation depended critically on the quality of the answers in these reports.<sup>93</sup> In its second report on the implementation of the Industrial Accidents Convention, the Working Group considered that the reports submitted provided sufficient information to draw conclusions on the implementation of the Convention and to identify topics/areas where additional efforts seem to be necessary to improve it. As LRTAP experience shows, “the completeness of data reporting has improved significantly since the Implementation Committee began to review it as a matter of course each year”.<sup>94</sup> It implies the importance of reporting frequency factor. At the moment reporting frequency in all our conventions varies from annual to every three years. Perhaps Water Convention Legal Board should consider annual reporting option as it improves information completeness and accuracy.

However, quality and accuracy of data reports is the complicated part of the assessment. The evaluation of the quality of the information is a matter left for the competence and interpretation of the committees. What are the criteria on the assessment and evaluation of quality of data that the committee is supposed to follow? Besides general reference on the role and tasks of the Compliance Committee with regard to reporting regime, there are no clear procedures of criteria to assess the quality of information. Aarhus includes several questions in the questionnaire asking to report on the quality of the information circulating in the country. Although this will reveal certain aspects of presented information quality, it is far away from sufficient indicator that information is true and correct. It involves careful investigation in each particular case and those assessment criteria should be documented.

As concerns public involvement in the reporting mechanism the Industrial Accidents Convention’s WG report asserts: „Working Group also had the impression, based on some internal

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<sup>92</sup> **The Role and Tasks of the Compliance Committee in Relation to the Reporting Regime under the Convention**// Aarhus Convention, 3<sup>rd</sup> meeting CC, 22-23 January 2004.

<sup>93</sup> **Second Report on the Implementation of the Convention**//Industrial Accidents Convention, 3<sup>rd</sup> COP, 2004, CP.TEIA/2004/1

<sup>94</sup> **Kuokkanen T.** Practice of the Implementation Committee under the Convention on Long-range Transboundary Air Pollution// Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia/edited by Beyerlin U., Stoll P.T. and Wolfrum R. - Studies on the Law of Treaties ; v. 2; Leiden : Martinus Nijhoff, 2006. – 43 p. – ISBN 9004146172

contradictions in some of the reports, that the different stakeholders had not always been sufficiently involved in the preparation of the reports”.<sup>95</sup> It stressed the importance of involving all stakeholders at national, regional and local levels in the preparation of the report, as these same people also had to work together towards the practical implementation of the Convention“.<sup>96</sup> Public participation in compliance mechanism of Protocol on Water and Health is endowed in the article 15 ”multilateral arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance shall be established by the Parties at their first meeting“<sup>97</sup> and „these arrangements shall allow for appropriate public involvement“<sup>98</sup>. The Draft rules of procedure claims that all the meetings of the Parties and Compliance Committee will be open for the public, except for the sessions that have to be closed for the public.

After the examination of information received in the reports, it is being presented to the MOP/COP by the Secretariat as a summary report (Aarhus, Espoo) or by the Committee/WG as a report on its activities, pressing compliance and implementation issues, possible or ongoing cases. Committee recommends the COP/MOP on the further actions and decisions to be taken.

### 2.1.2. Multilateral non-compliance procedures (NCPs)

NCPs have the purpose to identify Parties’ compliance difficulties and to facilitate better compliance in a non-adversarial manner. Non-compliance can appear either when the party does not fulfil substantive obligations under certain MEA or when Party infringes the obligation to report. For example under Espoo Convention’s MOP decision: „a failure to report on implementation might be a compliance matter to be considered“ by the Implementation Committee“.<sup>99</sup>

The first non-compliance procedure as such was introduced in the *Montreal Protocol on Substances that Deplete the Ozone Layer* (the Montreal Protocol). Almost all currently developed MEAs follow Montreal Protocol approach and seek to establish non-compliance procedures in addition to existing national reporting. Interestingly enough from the five conventions that are being analysed all of them have more or less developed reporting mechanism, but only some actually have a non-compliance procedure as such (*see* table 2). In this respect, NCP of the Protocol on Water and Health,

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<sup>95</sup> **First Report on the Implementation of the Convention//**Industrial Accidents Convention, 2nd COP, WG on Implementation, para 59. CP.TEIA/2002/9

<sup>96</sup> **First Report on the Implementation of the Convention//**Industrial Accidents Convention, 2nd COP, WG on Implementation, 11 p. CP.TEIA/2002/9

<sup>97</sup>Protocol on Water and Health

<sup>98</sup> Id

<sup>99</sup> **Review of implementation//**Espoo Convention, MOP/Decision IV/1, 2008, 10 p. ECE/MP.EIA/10

the Espoo and the Aarhus conventions can be the best examples on how this procedure is constructed and functioning.

Non-compliance procedure involves the Compliance/Implementation Committee, Secretariat and MOP/COP. All of these bodies have different roles in the procedure. MOP/COP as the highest treaty body has a final decision discretion, which it usually exercises after receiving the report with recommendations and final findings from the Compliance Committee. Compliance Committees of Aarhus Convention and Protocol on Water and Health are entitled to consider any party submission, secretariat referral or public communication made in accordance with the submission requirements. Compliance Committee has no right to initiate procedure itself. Espoo Convention's Implementation Committee besides the right to consider submissions from the Parties, can initiate procedure itself. Secretariat in all three NCPs is responsible for the information circulation between the Parties and the treaty bodies.

Non-compliance procedure involves several stages: initiation of non-compliance and investigation of the case, including verification of received information (*see* figure 2 and 3).

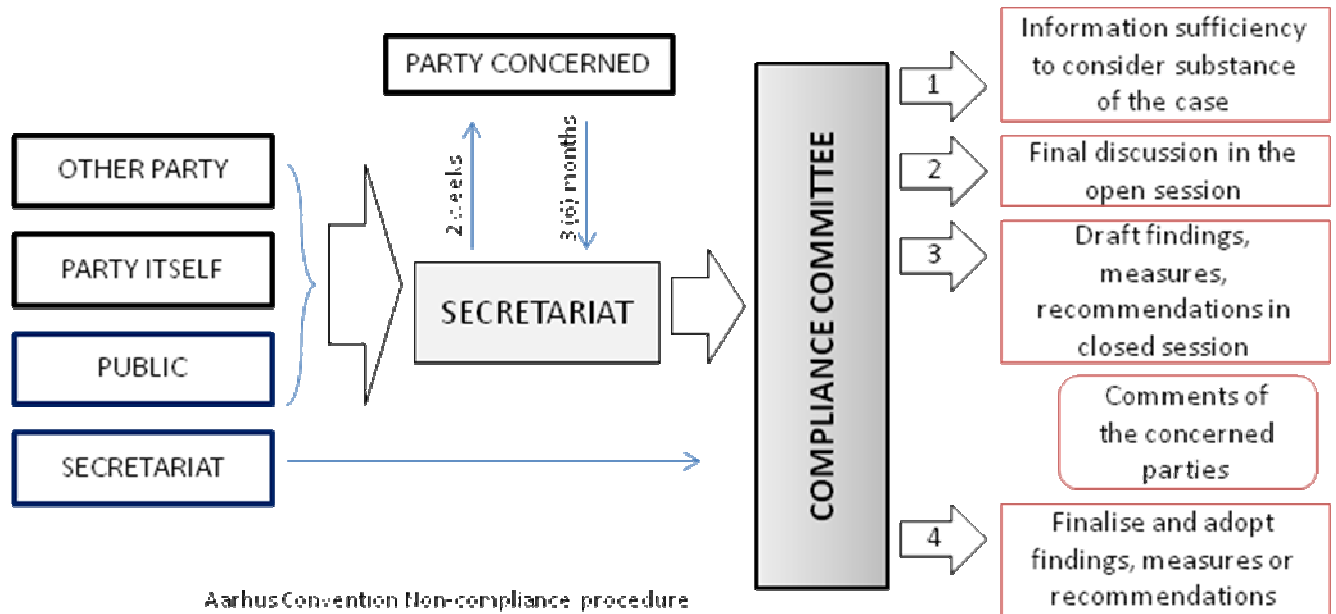
As concerns the **initiation of the procedure**, Aarhus non-compliance procedure as well as Protocol's on Water and Health one can be triggered in four ways: party that is in non-compliance can trigger procedure itself, one party can make a submission about other parties' non-compliance, the Secretariat can make a referral to the Committee or members of the public can make a communication about a case of non-compliance. Secretariat may become aware of possible non-compliance by a Party with its obligations through the reviewing of reports or other means of working with Parties. But to make a formal referral it is allowed only if it found out about the non-compliance through report review. Health and Water Protocol's draft rules of procedure of the Compliance Committee forbids to make referrals at all: „if joint secretariat becomes aware of possible non-compliance from a source other than the summary reports <...> it should transmit the information to the committee”<sup>100</sup> As soon as Compliance Committee receives a referral (or submission/communication) it starts the investigation of a case. Aarhus procedures state that „formal referrals by the secretariat should be based only upon information which is published or transmitted to it in written form”<sup>101</sup> and entails softer approach.

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<sup>100</sup> **Draft rules of procedure of the compliance committee**//Protocol on Water and Health, 2<sup>nd</sup> meeting WG on Water and Health/Information paper 7, Geneva, 2-3 July 2009.

<sup>101</sup> **Guidance Document on Aarhus Convention Compliance Mechanism**//Aarhus Convention, 2008, 12 p.

Figure 2. Aarhus Convention NCP



**Source:** Guidance Document on Aarhus Convention Compliance Mechanism, 2008. <http://www.unece.org/env/pp/compliance.htm#Documents> [retrieved at 01/09/2009]

Espoo Convention's trigger list is shorter as it excludes the public and Secretariat rights of initiation. Instead Espoo MOP's decision III/2 allows to trigger the NCP for the Party itself, other Parties and Implementation Committee itself (*see* figure 3). In accordance with paragraph 6 of the appendix to decision III/2, Committee's discretion of initiation depends upon certain criteria that it has to consider: the source of the information is known and not anonymous, the information relates to an activity listed in appendix I<sup>102</sup> to the Convention and likely to have a significant adverse trans-boundary impact, the information is the basis for a profound suspicion of non compliance, the information relates to the implementation of the Convention's provisions and Committee's time and resources are available.<sup>103</sup> The Committee can become aware of the possible non-compliance through different sources, including information from the public: „the Meeting of the Parties has recognized that the Committee may become aware by any source of information, not just coming from the Governments of Parties. The source of such information may therefore be a non-governmental organization, a local government body, a private company or a member of the public”.<sup>104</sup> So it seems

<sup>102</sup> Appendix I includes a long list of different development activities such as oil refineries, power stations, motorways, ports, major mining installations, etc.

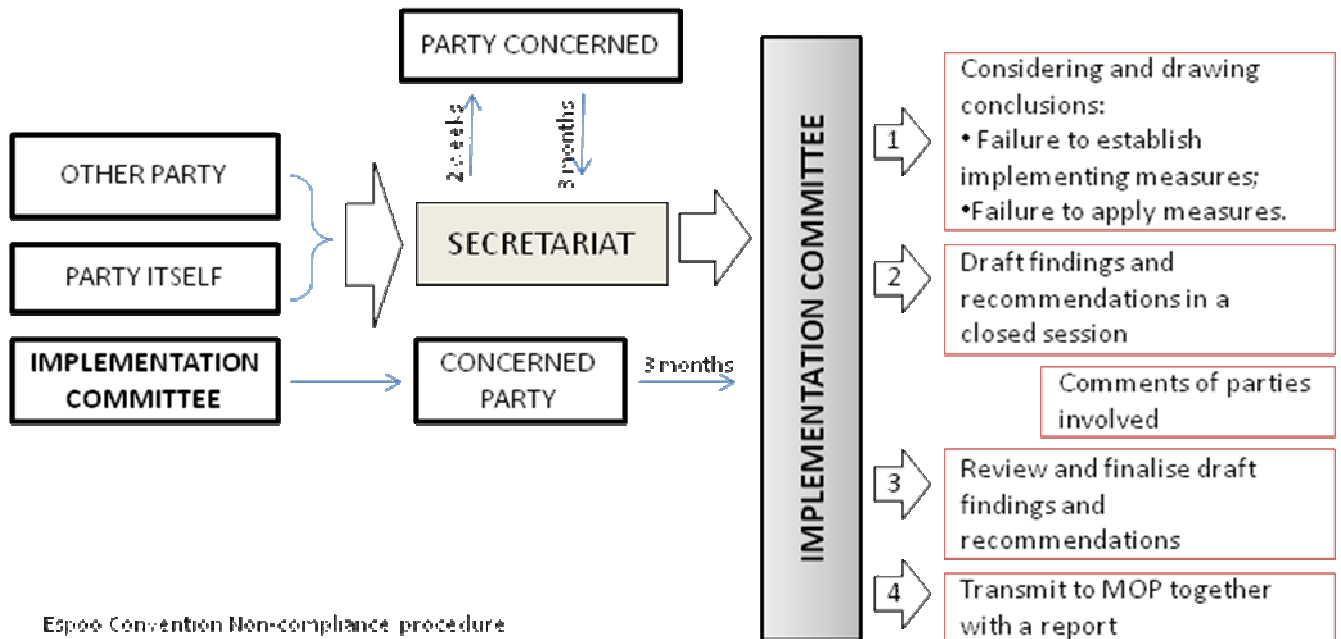
<sup>103</sup> **What UNECE does for you**//Brochure. Publishing Service, United Nations, Geneva, 2009. — GE.09-23749 — ECE/INF/NONE/2009/4

<sup>104</sup> **Operating rules of the Implementation Committee**// Espoo Convention Annex to MoP decision IV/2, ECE/MP.EIA/10, rule 15;



that Espoo Convention still gives indirect right for the public participation, although with completely different weight.

**Figure 3. Espoo Convention NCP**



**Source:** Operating rules of the Implementation Committee (ECE/MP.EIA/10) and decision III/2 Review of Compliance.

LRTAP Convention procedure allows initiation only for the party itself, other parties and Secretariat through making a referral. Since 1997 the Committee of LRTAP has considered 12 cases of possible non-compliance. The Industrial Accidents Convention does not have non-compliance procedure, but the Working Group on Implementation assess the national reports and summarises information in the review report presented to the COP. Reporting is treated as a tool to identify the bottlenecks in implementation rather than to police non-compliance.<sup>105</sup> The number of assistance programmes under Convention is facilitating implementation. Beyerlin U. still questions the right of the treaty bodies to initiate the procedure: “it is still an open question whether treaty bodies representing Member States, e.g. Conference of the Parties or Compliance Control Committees, may have a right to initiate such procedure, too”.<sup>106</sup> However taking into account the nature, character and purpose of compliance mechanism, the more actors have a right to initiate the process, the faster non-

<sup>105</sup> **Implementation of UNECE Multilateral Environmental Agreements//**Belgrade Preparatory Meetings Documents, 2006.

<sup>106</sup> **Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia/** edited by Beyerlin U., Stoll P.T. and Wolfrum R. - Studies on the Law of Treaties ; v. 2; Leiden : Martinus Nijhoff, 2006. – 365 p. – ISBN 9004146172

compliance problem solution can be expected. Of course all necessary procedural rights have to be balanced in order to ensure objectivity, efficiency and impartiality of the compliance review bodies.

From the perspective of entities that may trigger the procedure, the right of the public and individual persons to communicate non-compliance of the state is a very substantial moment. The Aarhus convention compliance mechanism giving such opportunity for the public to participate is naturally „biased” with the content of the convention itself: it intends to regulate public participation, access to justice and access to information. The inclusion of the same trigger option on the Protocol on Water and Health is a completely different matter. And here we can see the positive development in the newly developing compliance mechanisms that consider and accept public judgement. In accordance with the decision I/2 of the Protocol on Water and Health and decision I/7 of the Aarhus convention, „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.”<sup>107</sup> As of 30 of June 2009, no State has opted out from the members of the Protocol on Water and Health, but at same time there were no non-compliance cases yet under the Protocol.

With regard to public communications alleging country non-compliance, there is a special „rule of exhaustion of local remedies” which we find in the procedural documents of Protocol on Water and Health and Aarhus Convention. This rule addressed to communicants in order to encourage them to make the best possible use of domestic remedies before making a communication. „It was suggested that communicants should provide information on whether any local remedy had been applied and whether the communicant was aware of the availability of local remedies. However, the exhaustion of local remedies was not to be considered as a criterion for admissibility of a communication“.<sup>108</sup> 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.<sup>109</sup>

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<sup>107</sup> **Review of Compliance**//Protocol on Water and Health MoP Decision I/2, ECE/MP.WH/2/Add.3- EUR/06/5069385/1/Add.3; **Review of compliance**//Aarhus Convention Report of the 1<sup>st</sup> MOP, Decision 1/7, 2002, ECE/MP.PP/2/Add.8

<sup>108</sup> **Report on the First Meeting of the Compliance Committee**//Protocol on Water and Health, 1<sup>st</sup> CC/Report, 2008, 7 p. ECE/MP.WH/C.1/2008/2 EUR/08/5069385/6

<sup>109</sup> **Guidance Document on Aarhus Convention Compliance Mechanism**, 2008, p.29

Aarhus guidance document<sup>110</sup> is one of the most extensive and detailed explanatory documents out of all analyzed treaties, explaining procedural questions concerning submission and processing of the communications (receipt, circulation, admissibility and response), and additional information gathering. It is obvious that rules operating Aarhus non-compliance procedure and draft rules of Protocol on Water and Health intending to operate NCP are basically identical up to the smallest details (*see* Figure 2 for Aarhus NCP). Under both documents (decision 1/7 and 1/2), the party self-incriminating non-compliance should explain in writing the specific circumstances that it considers to be the cause of its non-compliance. In case of the party to party submission, it has to be submitted in writing with facts supporting information. For the public communications, the admissibility criteria are applied, which firstly, means that communications can be addressed only to the countries which are parties and have a legal obligations under the convention, and secondly, they have to be reasonable, in accordance with the decision 1/7 provisions concerning the compliance review, cannot be anonymous and shouldn't abuse the right to make a communication. After admission of the communication, the committee will contact the party concerned and start discussing the case. The public communications can address a general failure of the party to take necessary legislative, regulatory or other measures to implement the convention, or legislation, regulations or other implementing measures failing to meet specific requirements, or specific events, acts, omissions or situations that demonstrate failure of the state authorities to comply with or enforce the convention.<sup>111</sup> The NCP of the Aarhus is explained in the Figure 2, which also gives the idea of how the NCP looks like in the Protocol on Water and Health.

The procedures of handling the reported non-compliance in Aarhus, Espoo and Protocol on Water and Health are very alike (*see* figure 2 and 3). Procedure for handling submissions and referrals are slightly different from the one of public communication, discussed above, i.e. does not involve admissibility criteria. Aarhus and Protocol on Water and Health Secretariats receive the submission and send it to the Committees and Party Concerned within 2 weeks. The party concerned is required to reply within 3 months, or such longer period as the circumstances of the particular case require. The reply is then forwarded to the Committee which starts the investigation/consideration of the case. It can base itself only on the information received in the communication and reply, or may decide to gather additional information from other sources. The Committee then organises the formal meetings with parties concerned and draws its conclusions and comments to the COP/MOP. In case of self-incrimination of the non-compliance procedure is shorter: the Secretariat sends the submission to the committee which after additional information gathering (if decides it necessary) invites party to formally discuss the matter and decide upon solutions.

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<sup>110</sup> Id

<sup>111</sup> Id

According with the draft rules of procedure of the Compliance Committee of the Protocol on Water and Health the conclusions reached after the consideration of the case may take a form of findings on whether the Party concerned was or was not in non-compliance; measures, if any, decided upon in accordance with paragraph 34 of the annex to decision I/2 and (or) recommendation, if any, addressed to the Meeting of the Parties in accordance with paragraphs 33 and 35 of the annex to decision I/2. Findings of the Committee become a basis for recommendation to the MOP and its decision on application of the non-compliance response measures.

Secretariat that comes across a possible non-compliance issue of the Party has to send the request of the missing or additional information it needs to establish or deny the fact of non-compliance to the Party concerned. Within 3 months time the secretariat brings the matter to the attention of the Committee.

The Compliance Committee is not bound to confine its consideration of a case of non compliance to the legal or factual arguments presented by the Parties and will consider itself free to draw conclusions that go beyond the scope of those presented to it. It is also free to decide not to address all the arguments and assertions presented in the submissions, referrals or communications, and to focus upon those that it considers most relevant. This provision is found in the draft rules of procedure of the Compliance Committee of the Protocol on Water and Health. However, it is important to ensure that committee does not abuse its right. Therefore, in each case when it does not address certain arguments of assertions presented in submissions it should provide for motives and arguments.

When Secretariat and Implementation/Compliance Committee notice a possible non-compliance through revision of reported information or the non-compliance was reported by the other entities, it has to **verify** whether information is true and the non-compliance is a fact. It can thus, initiate additional information gathering. The committee's discretion to perform additional information gathering can take many forms: request information to the party concerned through the Government and its various public authorities, the NGO community, scientists and academia; or undertake, with the consent of any Party concerned, information gathering in the territory of that Party; or seek the services of experts and advisers as appropriate.

Certain principles apply for the additional information gathering that is pragmatism and cost-effectiveness. The priority is given to the easily accessible and free of cost means. It is possible that the Secretariat will be delegated to perform information gathering activities. Information gathering on the territory of the state concerned is performed only as a last resort measure and has to meet certain requirements: the alleged non-compliance case seems to be serious, the essential information is lacking or needs clarification, it is not possible to get information by any other means. The formulation of the rule in the Draft rules of procedure of the Compliance Committee of Protocol on Water and Health

indicates that conditions allowing to enter the sovereign territory of the state party have to be met all together.

UNEP report reiterates that “potential for inter-linkages between NCPs is slight as each is specific to the sensitive balance struck during its negotiation processes”.<sup>112</sup> Our observation argues for a contrary picture. Interestingly enough, although Protocol on Water and Health and Aarhus convention are different in the substantial requirements and contents of the agreement, the institutional organisation and compliance procedures are strikingly similar. Actually, even the formulation of the sentences is identical. This is a very controversial finding, taking into account the claim that there is no single compliance mechanism suitable for all MEA’s. The analysis made here comparing several different documents revealed that UNECE regional conventions share extremely similar mechanisms and rules concerning compliance, despite their different content.

### 2.1.3. Non-compliance response measures

Non-compliance response measures “can be classified into two categories: incentives – technical and financial assistance to support improved implementation; and disincentives - penalties such as stricter requirements for performance review information”, according to UNEP report.<sup>113</sup>

Comparing non-compliance response measures of the decision I/2 of the Protocol on Water and Health, Aarhus, Espoo and LRTAP conventions we see that all of them comprise a mixture of facilitative and slightly more coercive measures (*see* table 3). Usually the final decision on measures is made by COP/MOP/Executive Body on the basis of the recommendations from Compliance/Implementation Committee. LRTAP convention’s Executive Body’s decision 2006/2 states: „the Parties to the protocol concerned, meeting within the Executive Body, 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 protocol in question, including measures to assist a Party’s compliance”.<sup>114</sup> Implementation Committee on its behalf can „make such recommendations as it considers appropriate, taking into account the circumstances of the matter“ and present them in the annual report to the Executive Body. Thus the LRTAP Convention documents do

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<sup>112</sup> **Manual on Compliance with and Enforcement of Multilateral Environmental Agreements/** Bruch C., Mrema E. – UNEP Division of Environmental Conventions, 2006. – 666 p. - ISBN: 92-807-2703-6

<sup>113</sup> **Compliance Mechanisms under Selected Multilateral Environmental Agreements//**UNEP Report. – Nairobi, 2005. – 10 p.

<sup>114</sup> **Implementation Committee, its structure and functions and procedures for review//** LRTAP Convention, Executive Body/ Decision 2006/2, 3 p. ECE/EB.AIR/2006/2

not provide for more specific list of indicative measures. Contrary, Aarhus, Espoo and Protocol on Water and Health working documents provide for a whole list of measures (*see* table 3).

Aarhus Compliance Committee can apply measures without a decision of MOP only in case of pending consideration of the MOP and after consultation with the parties concerned: make recommendations to the Party concerned, or request to submit a strategy and to report on the implementation of it, or 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.<sup>115</sup> Protocol's on Water and Health Compliance Committee, according to the decision I/2, may decide on the wider spectrum of measures: provide advice and facilitate assistance to individual Parties regarding their compliance, request or assist the Party concerned to develop an action plan and invite the Party concerned to submit progress reports to the Committee on the efforts that it is making to comply with its obligations, issue cautions; and, 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.<sup>116</sup> From this comparison it seems that Compliance Committee of the Protocol has more decision making discretion than the Aarhus, as it can issue cautions, which is a prerogative only of the MOP in the Aarhus mechanism. Aarhus MOP taking into account the cause, degree and frequency of the non-compliance decides upon the measures (besides the same ones as Compliance Committee) such as issue declarations of non-compliance, cautions, suspension of the treaty operation, special rights and privileges accorded under Convention. MOP of the Protocol on Water and Health decides upon non-confrontational, non-judicial and consultative measures as to provide financial and technical assistance, training and other capacity-building measures, facilitate technology transfer, can also seek support from specialized agencies and other competent bodies, also issue declarations of non-compliance, give special publicity to cases of non-compliance, or even suspend the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Protocol.<sup>117</sup>

The assessment of the non-compliance response measures shows that some of the measures that either MOP or Compliance Committee may take are quite coercive such as suspension of the treaty operation and special rights and privileges. The mentioned measure can be effective only if the Party has what to loose, as e.g. the facilitation and financial assistance that it receives from the Treaty governing bodies, or other important benefits that it seeks to retain. However, in the publicly

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<sup>115</sup> **Guidance Document on Aarhus Convention Compliance Mechanism**//Aarhus Convention, 2008, 29 p.

<sup>116</sup> **Review of Compliance**//Protocol on Water and Health, MOP/Decision I/2, ECE/MP.WH/2/Add.3-  
EUR/06/5069385/1/Add.3

<sup>117</sup> **Review of Compliance**//Protocol on Water and Health MOP Decision I/2, ECE/MP.WH/2/Add.3-  
EUR/06/5069385/1/Add.3

accessible documents, there is no real indication of what exactly the application of rights and privileges suspension measure entails for the non-compliant party.

Slightly softer ones are the declaration of non-compliance and public pressure. Nevertheless, they might be the powerful tool in bringing country back to compliance. This idea is reflected in the survey paper of Wisner G. M.: „by identifying, publicizing, and making recommendations for those cases in which state parties are failing to comply with their obligations, treaty institutions help maximize transparency, permitting other states, NGOs and the public to bring pressure upon governments, while deterring some states from violating their obligations in the first place”.<sup>118</sup>

Analysis shows that lists of measures are open ended, which implies that any possible new measure can be applied if there is a will of Parties, they decide and there are adequate financial, technical means to facilitate the compliance. The main decision for application of non-compliance measures in the conventions is consensus (3/4 majority or simple majority in cases when agreement by consensus is not reached). State Party is not supposed to vote on its own case. It does not have a veto or any other blocking tool for collective decision of other Parties.

Taking into account facilitative purposes of compliance mechanism it is logical and useful to have as bigger variety of measures as possible. This variety enables to address individual needs of the Party. The measures will be effective only when the reasons for non-compliance are identified, established and correct measure applied. As concerns measures of punitive character, those which imply financial losses of other heavy burden to a Party should be used in exceptional cases. The severity of the case has to be very well assessed taking into account frequency, degree and cause of non-compliance.

#### **2.1.4. Dispute settlement mechanisms**

According to guidance of the UNEP report, “they may be conceived of as varying across a range of sophistication, from simple provisions that require Parties to voluntarily negotiate bilaterally in good faith to compulsory binding third-party dispute resolution procedures.”<sup>119</sup> All of the five MEAs that have been analysed in this work have an express provision in the text of the treaty referring to dispute settlement (see table 4. Dispute Settlement). However, at the same time they have developed or are still in the process of developing the compliance mechanisms that function in parallel of classical dispute settlement. The relationship between dispute settlement and compliance procedures was already discussed in previous sections of the paper and thus, there is no reason for repetition.

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<sup>118</sup> Wisner G. M. Compliance Systems under Multilateral Agreements/A Survey for the benefit of Kyoto Protocol Policy Makers. – Centre of International Environmental Law, 1999.

<sup>119</sup> Compliance Mechanisms under Selected Multilateral Environmental Agreements//UNEP Report. – Nairobi, 2005.

The only aspect that is worth mentioning is the types of dispute resolution allowed under the agreements analyzed.

All, without an exception, agreements claim the right to set disputes between the parties by negotiation or any other means of dispute settlement acceptable in case of a dispute on interpretation or application of the treaty. To be able to use services of the ICJ or arbitration institute, Party has to declare acceptance of the jurisdiction of the aforementioned institutions while signing, ratifying, accepting, approving or acceding to the agreement, or at any time thereafter. This declaration means that Party may seek a legal solution with regard to the Parties who have accepted the same compulsory dispute resolution means. All MEAs, except LRTAP Convention have a detailed arbitration procedure in their annexes. Nevertheless, the amount of countries which have accepted compulsory jurisdiction under all Conventions is very small, not exceeding 5 parties. (*see* table 4) This means that enforcement mechanism in all those conventions will not be used and effective.

As mentioned in the previous paragraphs all agreements state that compliance procedures will be without prejudice to the dispute settlement procedures. It is interesting to face possible legal problems here with regard to the future cases in both mechanisms. Both dispute resolution and compliance mechanisms are very different in their essence as presented in the chapter „Roles of the enforcement and dispute settlement in the compliance mechanism“, however they share a certain amount of similar procedures, especially in the investigation/information gathering phases. Legal scholars have questioned the practical meaning of “without prejudice”. Sands P. asks the question whether ICJ or arbitration would be entitled to have regard to or apply or be bound by any findings or fact of law that are revealed upon non-compliance procedures. He points out that “no one has fully thought through what words “without prejudice” actually mean”.<sup>120</sup> However only the future cases can show us how these two mechanisms work in practice.

## 2.2. Other compliance influencing factors

Geneva Strategy<sup>121</sup> outlines several non-compliance influencing factors. One of them is state's willingness and ability to meet specific treaty obligations. Reasons may also include ambiguity and indeterminacy in treaty language, limitations on the capacity of Parties to carry out their undertakings

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<sup>120</sup> Sands P. Non-compliance and Dispute settlement//Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia/ edited by Beyerlin U., Stoll P.T. and Wolfrum R. - Studies on the Law of Treaties; v. 2; Leiden: Martinus Nijhoff, 2006. – 354 p. – ISBN 9004146172

<sup>121</sup> Kakebeeke W. et al. Geneva strategy and framework for monitoring compliance with agreements on transboundary waters: elements of a proposed compliance review procedure, // ECE-UNEP Network of Expert on Public Participation and compliance. – Geneva, 2000. – 40 p.



and the temporal dimension of the social, economic and political changes contemplated by regulatory treaties. As we see, it is a mixture of compliance defining factors, some of which are the structure and design of the document itself, its textual interpretations; others are external, like social, economic capacity of the state. To summarise, Geneva Strategy underlines one old truth – the answer to state non-compliance is hidden in the ‘intention to comply v. capacity to comply’ battle.

The empirical study<sup>122</sup> done by Jacobson H.K., Weiss E.B. was aimed to ‘discover factors leading to improved implementation of and compliance with treaties covering environmental issues’ and lists a set of factors and criteria influencing compliance. They introduce three categories: parameters, fundamental factors and proximate factors that are intersecting among themselves in a variety of forms. Authors outline five *parameters*: previous behaviour concerning the subject of the treaty, history and culture, physical size, physical variation, number of neighbours. Economy, political institutions and attitudes and values are being tractate as *fundamental factors*. And the group of *proximate factors* list administrative capacity, leadership, non-governmental organisations, knowledge and information. As we see these three groups of factors are much more exhaustive and detailed than the ones mentioned in Geneva strategy. Perhaps it is worth to be more specific while considering these factors as a foundation elements influencing compliance of a UNECE Water Convention. Careful and extensive analysis of the state parties to the convention perhaps would constitute a huge advantage in designing effective and outreaching compliance mechanism, capable to give responses to the ‘capacity’ problem.

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<sup>122</sup> **Weiss E.B.** Engaging Countries: Strengthening Compliance with International Environmental Accords//A Framework for Analysis. - Cambridge, Mass: MIT Press, 1998. – 615 p. – ISBN13 9780585078618.

### 3. CONSIDERATIONS FOR THE COMPLIANCE MECHANISM IN THE UNECE WATER CONVENTION

#### 3.1. Current framework of the Water Convention

Water Convention is a regional multilateral environmental agreement signed in Helsinki on the 17<sup>th</sup> of March in 1992 and entered into force on the 6<sup>th</sup> of October in 1996. This convention has 36 parties, among which Russian Federation (possessing world's oldest and the most voluminous fresh water reservoir – Lake Baikal) is a party. So far this convention is open to the participation only of the UNECE countries. However one extremely important amendment is waiting to enter into force<sup>123</sup> that will give the possibility to accede to this accord to any other state<sup>124</sup>: “any other State not referred to in paragraph 2 that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties”.<sup>125</sup>

Water Convention is an agreement of fundamental importance of the cooperation in fresh water resources management in the region. Its principles and provisions are now enshrined in EU Water Framework Directive and several sub-regional agreements: the Danube River Protection Convention, Rhine Convention, agreements on the rivers Bug, Meuse, Rhine and Scheldt, Lake Peipsi, as well as on Kazakh-Russian and Russian-Ukrainian trans-boundary waters.

The Water Convention is formed of three main parts. Part I contains provisions relating to all Parties, whereas Part II sets out provisions relating to Parties that are riparian to a given trans-boundary watercourse. Part III sets out institutional arrangements such as Meeting of the Parties (Article 17), Right to Vote (Article 18), Secretariat (Article 19), Settlement of Disputes (Article 22) etc.

Water Convention up to date does not have a compliance mechanism yet. However after 17 years of being into force, the Parties to the agreement feel the strong need to have one. As recommended in the UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements paragraph 6: “compliance mechanisms or procedures could be introduced

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<sup>123</sup> 16 ratifications are required in order for it to enter into force; for the time being only Hungary has ratified the convention.

<sup>124</sup> On 28 November 2003, the Parties to the Water Convention adopted amendments to articles 25 and 26 of the Convention by decision III/1, following a proposal by the Government of Switzerland, to allow States situated outside the UNECE region to become Parties to the Convention.

<sup>125</sup> **Amendment to articles 25 and 26 of the Convention**//Water Convention, MOP, Decision III/1, Annex, 12 January 2004, ECE/MP.WAT/14

or enhanced after a multilateral environmental agreement has come into effect, provided such mechanisms or procedures have been authorised by the multilateral environmental agreement, subsequent amendment, or conference of the parties decision, as appropriate, and consistent with applicable international law”.<sup>126</sup>

The Working Group on Integrated Water Resources Management of Water Convention in their fourth meeting on the 8-9 July 2009 indicated very concrete problems<sup>127</sup>: first, „a growing number of countries are approaching the Legal Board with requests for information and advice concerning means to prevent or manage existing or potential conflicts of interests as well as cases of non-compliance“, second, „parties do not have a clear and permanent place to look for advice and support in the case of a potential or on-going problems of a procedural, legal and technical nature“, third, „lack of third-party assistance available for prompt assessment of difficulties encountered by Parties with respect to implementation, as well as for the promotion of the appropriate actions to address such difficulties“. And most importantly for our work is the acknowledgement, that behind all of these issues is the absence of specific compliance mechanism, a specific platform for assessment of the problems, discussion and adoption of constructive solutions: „while the draft guide to implementing the Convention provides general preventive support, the Convention does not have any specific mechanism for addressing these issues – which must be managed on a case-by-case basis – apart from the *optional means* of dispute settlement under the Convention’s article 22”.<sup>128</sup>

### **3.1.1. Preconditions for a compliance mechanism under Water Convention**

The preconditions for a compliance mechanism could be found in the Convention itself, the will of the parties expressed in the meeting documents, institutional organisation of the treaty bodies and existing procedures.

Firstly, the text of the Convention, Article 17 articulates the imperative obligation of the MOP – “shall keep under continuous review the implementation of this Convention”. The same Article 17 (2)f lays down the clause allowing to “consider and undertake any additional action that may be required for the achievement of the purposes of this Convention“.

Second precondition lays down in the proposed decision by the MOP (ECE/MP.WAT/2009/3). Up to date there is no decision of the MOP on establishment of the institutional and procedural

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<sup>126</sup> **Guidelines on compliance and enforcement of multilateral environmental agreements**, United Nations Environmental Programme, 1-14 p.

<sup>127</sup> **Reviewing and promoting implementation and compliance: a needed step in the Convention’s evolution**//Water Convention, 4<sup>th</sup> Meeting WG on Integrated Water Resource Management, 8-9 July 2009.

<sup>128</sup> Id

mechanism (compliance mechanism) to facilitate review of implementation of the Convention. However, documents for the 5<sup>th</sup> meeting on the 12<sup>th</sup> November 2009 contain the draft decision by the MOP on future activities paving the way to establish such mechanism.<sup>129</sup> This draft decision is a direct expression of the will of the parties which now needs only an official adoption of the parties. When adopted, this decision will prove a commitment of the states to the convention to monitor their compliance through a specific compliance mechanism. Draft decision<sup>130</sup> refers to the commitment to pursue implementation of and compliance with the Convention and entrusts the Legal Board with a task to study possible options for assisting Parties in solving implementation problems and on the basis of such 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. While conducting the study, the Legal Board should take into account countries' needs and the distinctive cooperative spirit of the Convention.

Thirdly, the assessment of the institutional organisation, functions and activities of the present Water Convention bodies shows the existence of certain elements essential to the compliance system.

### **3.1.2. Purpose and objective of the compliance mechanism**

After clear determination of the need for a compliance mechanism and existing preconditions for its establishment, it's time to discuss all necessary means and components for its existence and functioning.

To begin with, it is necessary to define the purpose and objective of the future mechanism. One of the Parties to the Convention, Czech Republic has stated that “a compliance mechanism should be of a facilitative character and to this end it should provide advice, assistance and recommendations to Parties to address their problems with compliance”.<sup>131</sup> In the draft Work Plan for the 2010-2012 and beyond we find the reference to the future work of Legal Board and our analysis that “the mechanism should be simple, facilitative, non-adversarial and cooperative in nature, with its operation guided by the principles of transparency, fairness, expediency and predictability (see also ECE/MP.WAT/2009/3)

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<sup>129</sup> The decision of the MOP is not yet accessible through the website, but the highlights of the fifth meeting note that mandate to create a mechanism was given to the Legal Board. Proposals will be considered by the sixth session of the Meeting of the Parties in 2012. –URL: <http://www.unece.org/env/water/mop5.htm> [retrieved at 25/11/2009]

<sup>130</sup> **Facilitating and Supporting Implementation and Compliance: a Needed Step in Convention's Evolution//** Water Convention, 5<sup>th</sup> MOP, 2010, ECE/MP.WAT/2009/3.

<sup>131</sup> **Statement by the Czech Republic on Implementation and Compliance/** Water Convention

(formulation identical to one of the Protocol on Water and Health). It is worth to clarify what could be meant by these categories.

“Non-adversarial” means that the procedure should not be seen as a confrontation between the entities and not a trial.<sup>132</sup> Dispute settlement is left to be performed through the means of Article 22: negotiation, arbitration or International Court’s of Justice services. The compliance mechanism should be a certain institutionalised platform for discussion between the parties on their compliance difficulties with a view to identify the problems and facilitate their solution. Therefore appropriate means and measures have to be developed. The procedures of the established mechanism should be designed and conducted in such way as to ensure transparency – “the quality or state of being clear and transparent”<sup>133</sup>, fairness – “conformity with rules or standards”, “ability to make judgments free from discrimination or dishonesty”<sup>134</sup>, expediency – “the quality of being suited to the end in view”<sup>135</sup>, the use of methods that are beneficial rather than fair or just and predictability – „a quality of being predictable, possible to foretell”.<sup>136</sup>

The first thing to be established by the Legal Board in designing the compliance mechanism is the objective of the compliance mechanism. Taking into account the convention character, the experience of other UNECE MEAs and the above presented views, the **objective** of compliance mechanism should be to review and to facilitate the implementation *and compliance* with the Convention obligations. It is important that the review would not be limited to the formal assessment of the implementation of the convention. It has to be noted, that there are possible situations when the formal implementation of the convention requirements (legislation) exists in a country, but the national enforcement or other administrative, technical arrangements do not work. The factual failure to fulfil Convention’s object and purpose is what matters the most. It is essential to ensure the real, actual implementation (understood in a broad sense: formal legislative implementation as well as all necessary means employed to secure adherence to the rules and functionality) which could enable identification of practical problems, cases of non-compliance and response to them.

The previous analysis showed and proved the essential elements for the functioning of the mechanism: reporting mechanism, non-compliance procedure and indicative list of non-compliance response measures. It is argued that Water Convention’s mechanism should have these elements but

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<sup>132</sup> **Guidelines on communications from the public/** Protocol on Water and Health, WG on Water and Health, 2nd meeting, Geneva, 2-3 July 2009, information paper 6.

<sup>133</sup> Online Language Dictionary – URL: <http://www.wordreference.com/definition> [retrieved at 07/07/2009]

<sup>134</sup> Id

<sup>135</sup> Id

<sup>136</sup> Id

modified in a most relevant and facilitative manner according to specific needs and character of the convention.

### 3.1.3. Institutional organisation

Firstly, to be able to draw the preliminary formula for the Water Convention, it is necessary to assess the institutional organisation of the treaty bodies. As it was mentioned before, the functionality of the compliance mechanism highly depends on the institutions that are “ruling” the mechanism, performing non-compliance procedure. The knowledge of who is responsible for what under present structure will let us evaluate possibilities for the institutional arrangements for the compliance mechanism.

As far as the institutional set up is concerned, the Convention doesn't differ a lot from our analysed ones. UNECE Water Convention at present has the following organisational scheme: the Meeting of the Parties, Secretariat, Bureau, Working Groups (WG on Integrated Water Resources Management, WG on Monitoring and Assessment, WG on Legal and Administrative Aspects, WG on Water and Health, WG on Civil Liability), Task Forces on specific questions and a Legal Board.

The **Meeting of the Parties** (MOP) is a highest treaty institution that comprises all member parties to the convention and is enabled to keep under continuous review their implementation of the convention<sup>137</sup>. MOP also forms the primary policy making body of the treaty which meets every three years to assess progress made by the treaty regime. **Secretariat** functions of the Water Convention are undertaken by Executive Secretary of the Economic Commission for Europe which under article 19 of the Convention is responsible for preparation of the party meetings, party communication through different means, including report transmission and other relevant functions. The **Bureau** of the MOP consists of the Chairperson and the two Vice-Chairpersons elected at the end of a meeting of the Parties to the Convention. It carries out the consultations with the Working Group on Water Management and other bodies and takes initiatives to strengthen the application of the Convention. It is also responsible for maintaining liaison with the bureaus of other environmental conventions, international organisations and non-governmental organisations in order to enhance the implementation of the convention.<sup>138</sup> The terms of reference of Bureau are being constantly adapted to the current work plan under Convention. **Working groups** are established to implement the work plans and **task forces** are established to carry out certain elements of the work plan. Depending of the activities planned in relation to the Convention's implementation, the terms of reference of these

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<sup>137</sup> Art 17 of the Water Convention

<sup>138</sup> **Composition and Terms of Reference of the Bureau**//Water Convention, 1st MOP/Report, Annex IV, 38 p. ECE/MP.WAT/2

bodies vary and have to be updated. The mandates of the working groups will be presented in more detail in this and also subsequent parts of the thesis as they contain very interesting aspects concerning compliance review.

### 3.1.4. Performance information review

Reviewing existing structures of the Water Convention and their functions, WG on [Integrated] Water Management and WG on Monitoring and Assessment call for special attention. The WG on Integrated Water Management held its first meeting in 2004. Before that, since 1998 until 2003 there was a WG on Water Management. Present WG on Integrated Water Management continues the previous work of the WG on Water Management, but with a broader mandate regarding integrated water resources management.<sup>139</sup> Depending on the Work Plan of the period, adopted by the MOP, the terms of reference of the working groups are updated.<sup>140</sup> For our assessment we will use the initial terms of reference of the WG on Water Management.

In the first meeting of the Parties we find the terms of reference of the WG on Water Management, which contain the obligations to examine experience in inter-sectoral issues of water management and draft recommendations and other soft law instruments as well as *review policies and certain methodological approaches*, examine implications, assist MOP in developing response measures and promote harmonisation of national rules and regulations. The WG shall seek the services of relevant international bodies and specific committees to implement the Convention<sup>141</sup>. As mentioned above, MOP under the Convention Article 17 (2) is obliged to keep under continuous review the implementation of the Convention and with this purpose it *shall review the policies for and methodological approaches* to the protection and use of trans-boundary waters of the Parties. WG is

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<sup>139</sup> **Report of the Third Meeting of the Parties to the Convention//Water Convention**, 3<sup>rd</sup> MOP, 2004, 5 p. ECE/MP.WAT/15.

<sup>140</sup> The subsequent work plans (2000 – 2003; 2004-2006; 2007 – 2009) state the terms of reference of all the working groups without separately specifying each of their functions which are identical to the ones of the WG on Water Management: the Working Groups [on Legal and Administrative Aspects, on Water Management, on Monitoring and Assessment, and on Water and Health] shall be responsible for the implementation of the relevant program areas of the work plan. They shall examine experience and draw up draft recommendations, codes of practice and other soft-law instruments; *shall review policies, strategies and methodologies* of relevance; *examine the implications of such policies, strategies and methodologies*; *assist the Meeting of the Parties in developing response measures*; and promote the harmonization of rules and regulations on specific areas (ECE/MP.WAT/19/Add.1; ECE/MP.WAT/15/Add.1; ECE/MP.WAT/5).

<sup>141</sup> **Terms of Reference of the Working Group on Water Management//Water Convention**, 1st MOP/Report, Annex V, 39 p. ECE/MP.WAT/2

entitled to perform the task of the MOP and thus, becomes an extremely important unit with regard to review of the implementation of the Convention.

It is obvious that without being a compliance committee WG on Water Management has certain similar functions to ones we assessed in the comparative analysis. It coordinates/monitors certain aspects of implementation progress made in parties to the convention.

As concerns reporting, there are no legally binding provisions to report in the Water Convention. While parties are not obliged to report, WG assesses the situation by other means, supposedly information gathering through different sources in countries. In the documents of the meeting of the parties we find references towards the format of this information gathering. The form of questionnaire is being used to collect and evaluate certain required information for the WG function performance. In the report of the first meeting of the WG on Water Management we find that a questionnaire prepared by the WG was sent out to the delegations of the parties on the „issues linked to the implementation of the Convention“. Questionnaire on policies and strategies on the protection and use of trans-boundary waters had to be returned by 1 March 1999. The purpose was to review an implementation of certain provisions of the Part II of the Convention.<sup>142</sup> This review was assigned by the MOP in its first meeting: „this review will also facilitate the selection of priority issues for policy discussion at its meetings and form a basis for identifying areas of specific cooperation“. <sup>143</sup> MOP also acknowledged that this activity is an important component of the compliance monitoring scheme under the Convention. The secretariat on its behalf had to prepare a draft review of the achievements under the Convention for consideration at the second MOP. Only from this one example we can acknowledge that this was a very first circle of the reporting under Water Convention without actually calling it reporting. Although the purposes of this information gathering are identification of the further activities rather than assessing compliance, it shows that the certain reporting system exists and thus, it would not be absolute novelty in Convention's governance.

The WG has to report to the MOP on its activities under the terms of reference of the WG on Water Management. One also has to admit, that there exist large similarities between summary reports, that Compliance/Implementation Committees have to prepare on the basis of national country reports in our analysed conventions, and the review of policies and methodologies as well as national rules that WG has to conduct and provide MOP with recommendations for a response measures. Of course the two mentioned procedures are different in many ways (e.g. the purpose), but considering certain

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<sup>142</sup> **Report of the First Meeting of the Working Group on Water Management**//Water Convention, WG on Water Management, 23 November 1998, MP.WAT/WG.1/1998/2.

<sup>143</sup> **Report of the First Meeting of the Parties to the Convention** //Water Convention, 1<sup>st</sup> MOP, 12 August 1997, 22 p. ECE/MP.WAT/2



elements and functions of existing bodies with a view to establish other compliance bodies, it is very important to avoid duplication in functions of the bodies and requirements for the Parties.

Continuing discussion on reporting, Article 11 of the Water Convention requests parties to carry out regular joint or coordinated assessments of the conditions of the trans-boundary waters and effectiveness of measures taken for prevention, control and reduction of trans-boundary impact. This requirement is to assess *the state* of environment, it is focused on certain substantial requirements of the Convention and it is not the same as national performance review information in regular reporting mechanism. However, one has to admit that to a certain degree this assessment obliges the parties to review the progress and implementation of their obligations.

Leading role in the preparation of periodic assessments of the status of trans-boundary waters and international lakes, which allow for measuring progress in the implementation of the Convention, has a WG on Monitoring and Assessment. First assessment that was carried out under auspices of MOP on Trans-boundary Rivers, Lakes and Groundwater contributes to some extent upon compliance and enforcement questions: „underlines the challenges that countries face in implementing further measures to counteract still-existing pressures and to improve the ecological and chemical status of trans-boundary waters“.<sup>144</sup> Taking into account the facilitative character and purpose of the compliance mechanism to be established in Water Convention, it seems logical to use this kind of assessment for indicating compliance problems and challenges in addition to the regular reports. Perhaps for the performance review information assessment it would be exceptionally useful for the Water Convention to develop a system of obtaining regular information from the joint bodies established under subsequent agreement's following the same founding principles and provisions.

The meeting documents also talk about the Environmental Performance Reviews, which are a voluntary exercises undertaken by a group of experts only under the request of the party itself. This team of experts meets with national experts to discuss the problems encountered in the areas of environmental management and integration of environmental considerations in related economic sectors in their country. The team's final report contains recommendations for further improvement, taking into consideration the country's progress in the current transition period. EPRs under Water convention are discussed in the report of the First Meeting of the Parties paragraph 25 whereas the MOP invited countries where EPRs had been undertaken to report on the outcome of the review. They are also asked to report on activities undertaken in response to it, particularly in an effort to prevent, control and reduce trans-boundary impact. MOP also obliged WG to take the information provided through the EPR process into account when making the necessary arrangements for implementing the various programme elements and requested Secretariat to circulate the water-related parts of EPRs, once they had been finalized, to delegations attending the meetings of the Working Group and the

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<sup>144</sup> UNECE Region overview

second meeting of the Parties, respectively.<sup>145</sup> Although, EPRs cannot change national reporting on the performance review and they are not obligatory, they are an important source of information that could facilitate assessment of party compliance.

Elaborating on the information to be reported, the cooperative nature of the Convention and its action oriented approach has to be taken into account. In comparison with Protocol on Water and Health and LRTAP which establish measurable requirements (i.e. emission targets), Water Convention stands in line with Espoo and Aarhus – action (process) oriented agreements. In this sense it would be important to have the following information reported by the states: formal implementation - existence of adequate legislative framework (set of laws with detailed explanation of implementing provisions); practical implementation (administrative, institutional arrangements and their functioning, national enforcement), success and problematic aspects; reporting on the facts, whether required cooperation and joint bodies exist (its forms, methodologies and problems faced).

To sum up, as concerns reporting, for the moment obligation to report does not exist. Although *no* reporting is required Parties at their meetings share information on their implementation of the Convention and soft law instruments (recommendations, guidelines) adopted under the framework of the Convention.<sup>146</sup>

Moreover, present functions of the WG are very similar to those that a Compliance Committee would be assigned. Thus, the functions of the present bodies have to be carefully thought over and organised in a transparent manner, without leaving uncertainties and duplications. The solution for this would be construction of clear functions for the Compliance Committee, giving him the compliance assessment, monitoring and facilitation powers and accordingly, terminating those functions in other bodies. Rule 21 of the Procedure for Meetings of the Parties allows MOP to terminate the function of the bodies it has established.

One extremely important aspect has to be well considered before establishing compliance mechanism. The reporting mechanism is one of the essential components in the compliance mechanism and thus, should fully operate in the Water Convention as well. However, the fact that Convention does not entail legally binding obligation to report complicates the situation. The MOP decision would be not sufficient to oblige parties to report regularly on their compliance as well as to enforce it. The parties should consider amending the Water Convention by introducing a provision on the compliance review procedure as well as reporting obligations.

While we found certain components on reporting, obviously, Water Convention does not have a **non-compliance procedure**. Subsequently, it does not have **non-compliance response measures**. So,

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<sup>145</sup> **Report of the First Meeting of the Parties to the Convention** //Water Convention, 1<sup>st</sup> MOP, 12 August 1997, ECE/MP.WAT/2

<sup>146</sup> EIONET Reporting Obligation Database – URL: <http://rod.eionet.europa.eu/instruments/184> [retrieved at 23/08/2009]

after reviewing of the present institutional organisation of the Water Conventions bodies and reporting aspects that were addressed, we can further elaborate on the other compliance mechanism components that need to be established.

### 3.1.5. Non-compliance procedure

Elaborating on the **non-compliance procedure** for the Water Convention we have to take into account several fundamental components: composition and mandate of the compliance reviewing body, initiation rights and procedural safeguards.

As concerns non-compliance procedure, we have to rely on the experience gained through the UNECE Conventions' analysis. All of these conventions have established the separate bodies to perform the NCP. Learning from the experiences of the analysed conventions, it would be most appropriate to establish the Compliance Committee, which would have discretion to review compliance and decide upon preliminary measures to be taken towards party in non-compliance. MOP is the body legally obliged by the Water Convention to keep under continuous review the implementation of the Convention but it is purely political structure. However, in order to fulfil the principle of transparency and fairness (which are noted in the statement of the Legal Board) compliance reviewing body should be as impartial as possible. Previous analysis of UNECE mechanisms shows that this impartiality can be achieved through the composition of the compliance reviewing body. Compliance committee, therefore, should be composed from the independent, acting in personal capacity members, elected according to the fair geographical distribution and diversity of experience. Furthermore, MOP meets only every three years and is not capable to be an efficiently and promptly acting compliance mechanism body. Thus, it would be most wise to use its power to establish units for the performance of certain functions, and establish a compliance committee. The MOP as the main political decision making body should retain the right to decide upon the final measures of the non-complying party and be constantly informed of all the developments with regard to compliance.

The **mandate, functions** and institutional organisation of the compliance reviewing body are extremely important for the success and efficiency of the whole mechanism. From our analysed conventions it became clear that the mandate of the compliance/implementation committees differ accordingly to the provisions of the Conventions. The committees of Aarhus, Protocol on Water and Health are entitled to 'monitor, assess and facilitate the implementation of and compliance with the *reporting requirements*', while committee of Espoo 'review periodically compliance by the Parties with *their obligations* under the Convention'. The reporting obligation under Espoo was introduced through the amendment of the Convention and now failure to report can be considered as a case of

non-compliance. LRTAP committee is entitled to ,review periodically compliance by the Parties with the *reporting requirements of the Protocols* as Convention itself does not oblige Parties to report. As we see, the mandate of the committee is either review compliance with reporting requirements or in general, with Convention obligations. The reason of this distinction is the fact that if there is no legal obligation enshrined in the Convention to report, the committee cannot review the compliance with reporting requirements. In this sense Water Convention does not prescribe reporting obligation to the parties, thus following the logic of the analysed conventions, the mandate of the Compliance Committee should be ,review compliance with obligations under Convention'. Even if the Water Convention will be amended (by obliging Parties to report), it would be wiser and more useful to have mentioned formulation rather than limit Compliance Committee's functions to the review compliance with reporting requirements. As concerns other functions of the committees, they are all obliged to consider submissions (communications/referrals), prepare a report to the MOP/COP under its request on the specific compliance or implementation issue and examine compliance issues and make recommendations, apply measures if and as appropriate.

Discussing **initiation**, Parties have to be primary entities participating and making use of the compliance mechanism. At the end, international law deals with relations between states, not private individuals. Moreover, self incrimination plays an essential role, showing the facilitative nature of the compliance mechanism. To assess and admit its own non-compliance is a matter of maturity and responsibility. The State understanding the value and importance of the objectives and aims of the environmental agreement and respecting the obligations undertaken is being provided with qualified and multifaceted assistance to improve deficiencies and capacity problems. Self incrimination should be the most used NCP trigger if Parties understand the benefits of that.

When deciding the trigger entities it is important to examine the level of public involvement and ability of treaty bodies be allowed to start the procedure on their own initiative. As concerns public involvement, it is one of the guarantees of transparency. Transparency can be achieved by establishing the facts that are relevant for the implementation of treaty in an objective way. As points out Epiney A. in the framework of performance information review mechanisms the role of NGO's is an informal in a sense that they contribute to informing the international bodies in an independent way about the facts and problems. She also repeats Beyerlin/Marauhn saying that information given by NGO's can also contribute to verifying and completing the reports of the states. The public as a trigger entity is an extremely new aspect that is primarily found in Aarhus Convention and also included in the Protocol on Water and Health. Espoo Convention does not give the direct right to make a formal assertion of non-compliance, but it includes the public as a source of information, that can be used and verified by the Implementation Committee. While Industrial Accidents Convention does not provide for the NCP, LRTAP excludes public from the trigger subjects list. Having in mind the formulation found in the 5<sup>th</sup>

MOP documents of the Water Convention, stating that compliance mechanism should be transparent, and considering tight connection between Water Convention and its protocol on Water and Health, it is plausible to give the NCP initiation to the public members. The Compliance Mechanism has to be as efficient as possible and all the external elements, such as NGO's, have to be considered and allowed to participate. The external components also make a good balance within the institutional configuration of the compliance mechanism serving as a kind of "checks and balance" in report's assessment, evaluation and decision making. Thus the public involvement into all components of the compliance mechanism has to be done. Even if the Compliance Committee is an independent and members serving in their personal capacity, the MOP/COP which is a political organ has the decision making power. The pressure and strong arguments provided by the NGO's can work as too obvious fact to be denied. Epiney A. concludes with a statement that "in a framework of NCP, participation of NGO's seems to be insufficient since there is no guarantee that their positions are really taken into consideration by Secretariat and Implementation Committee".<sup>147</sup> She as well notes that "strengthening the role of NGO's is useful and possible through involving them into the procedures without conferring the power to judge over a situation in an exclusive way, so that they don't have a coercive competences."<sup>148</sup>

The initiation right given to Implementation Committee in Espoo and to Secretariats in the LRTAP, Aarhus and Protocol on Water and Health is being questioned with regard to their independency. Answering the question whether the treaty bodies should be given NCP initiation right, it is important to go back to the essence and purpose of the compliance mechanism. Its primary purpose is to facilitate and be a non-adversarial structure. This means, that it is not sought to design a mechanism as another dispute settlement institution and punish a party, but to have an institutionalised platform for cooperative achievement of the overall treaty purpose. In this sense, it is useful, logical and facilitative to give a right for the bodies performing report review to identify the non-compliance fact, initiate the procedure and provide faulting party with needed assistance. Nevertheless, one has to take into account a question of non-compliance measures. If the committee is accorded with powers to apply non-compliance response measures and they are coercive, implying losses and disadvantageous to the Party, it would not be correct to let it be an initiator of a procedure as well. Reflecting the cons and pros, the author of this work sticks to the opinion, that compliance reviewing bodies should be given right to initiate the procedure with preconditions: that the committee is composed of independent persons, the procedural guarantees (to be informed, to answer etc.) are accorded to the non-compliant

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<sup>147</sup> **Epiney A.** *The Role of NGOs//Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia/* edited by Beyerlin U., Stoll P.T. and Wolfrum R. - *Studies on the Law of Treaties* ; v. 2; Leiden: Martinus Nijhoff, 2006. – 334 p. – ISBN 9004146172

<sup>148</sup> Id

party, the committee has a right to apply only facilitative non-compliance measures himself, and application of coercive character measures is left for the MOP.

It is necessary to make sure that the **composition** of the Compliance Committee does not impede its impartiality and thus does not give the manipulation power in terms of NCP initiation. Firstly, the Compliance Committee should be independent with its members acting strictly in their personal capacity, elected in a transparent and fair procedure. The objectivity and impartiality also refers to the Secretariat actions. Secondly, certain procedural guarantees have to be employed: the party concerned has to be always contacted, consulted with and informed. The assessment and evaluation of the performance review information has to be done according to clearly defined criteria, followed by *obligatory* verification procedure, ensuring that the non-compliance is based on the real and objective information. Up to date Compliance/Implementation Committees are free to decide whether to base themselves only of the report information or conduct additional information gathering and verification. In the opinion of the author, the capacity and financial resources sometimes can impede the objectivity of the investigation and influence the decision by the body. Public should be involved in all stages of the compliance review and work of the committee. The certain appeal procedure for reviewing the committee's actions could be also considered.

With regard to NCP, Secretariat, which is the same to all mentioned conventions, has important role to play as well. It performs the information transmitter and coordinator functions, it receives the submissions from the parties and communications from the public. In addition, in some conventions it has a right to initiate the NCP. Secretariat also conducts review of the reports in order to prepare a synthesis report to be presented to the MOP.

The UNECE conventions share the same Secretariat. At the moment Secretariat faces certain serious problems. One of the main present challenges of the Convention that was identified in a MOP draft documents was the limited capacity of the Secretariat. According to the document<sup>149</sup> of the upcoming 5th MOP, it did not match the workload, resulting in delays in documents and publications, inadequate preparation of events, and personal difficulties with servicing the Convention in the best possible way. It is a worrying line that has to be taken into account. Secretariat is an important body in the compliance mechanism, especially in the reporting process. It receives and reviews the national reports of the parties. Taking into account that at the moment Water Convention does not have a compliance mechanism, thus no regular reporting procedure and no NCP (where Secretariat is receiving submissions and communications) yet, the structure and its functions perhaps need to be reorganised or at least carefully assessed and functional. The capacities of the Secretariat may be increased by hiring additional staff, better organisation or delegation certain functions (such as report

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<sup>149</sup> **Report on the Implementation of the Work Plan 2007-2009**//Water Convention, 5<sup>th</sup> MOP, ECE/MP.WAT/2009/2, p.6

review) to the Compliance Committee, for example. It would be logical that the Compliance Committee would perform full review of the national reports with its specialised expertise and knowledge. Instead of two separate reports: Secretariat's synthesis report and Committee's compliance report, all that is connected with compliance and implementation would be in one extensive report. It is the right time now while designing efficiently functioning compliance mechanism to decide of the mandate and functions of its bodies. Perhaps one interesting example could be taken into account from the experience of the Protocol on Water and Health where the assessment of first cycle of national reports was entrusted to an independent expert.<sup>150</sup>

### 3.1.6. Non-compliance response measures

As concerns **non-compliance response measures**, the Czech Republic presented a view that measures should be facilitative although "in case of repeated compliance difficulties of a Party, while specific circumstances of an individual case are to be taken into account (e.g. cause, type, degree or frequency of non compliance), the mechanism should enable to apply additional measures such as issuance of caution to the Party concerned, requirement to develop a compliance action plan, etc".<sup>151</sup> This statement presents important measure distribution criteria - the repetition. The repetition could/should be the indicator for the more coercive measure application. As comparative analysis revealed, the list of the measures that MOP/COP or Compliance Committee can apply exists, but without any explanatory note of when and which measures should/could be applied. The only distribution of the indicative measure list is between competences of MOP/COP and Compliance/Implementation committees. It seems logical that the bodies have discretion to decide themselves on the most appropriate measures. Nevertheless, when it comes to the measures implying losses and big disadvantages to the Party concerned, certain criteria should apply. This is one of the procedural guarantees for the party. Taking into account, that this is not a court and the idea of a Compliance Committee is to facilitate compliance, it seems odd to have an option for severe measures at all. Moreover, referring to the Legal Board's opinion that "withdrawal of some privileges under the Treaty is a little use"<sup>152</sup> and held to be a counterproductive measure, we assume that such a measure would not appear on the indicative list. Certain disincentive measures can be an option, but their application has to be regulated. In the case of Water Convention it would be facilitative to construct an

<sup>150</sup> **Information Notice on Pilot Reporting under Protocol on Water and Health**// Protocol on Water and Health, Task Force on Indicators and Reporting, WH/TFIR 02-05.

<sup>151</sup> **Reviewing and promoting implementation of and compliance with the Convention on Protection and Use of Transboundary Watercourses and International Lakes**//Water Convention, 5th MOP/Draft document

<sup>152</sup> **Reviewing and promoting implementation and compliance: a needed step in the Convention's evolution**// UNECE Working Group on Integrated Water Resource Management, 4<sup>th</sup> Meeting, 8-9 July 2009

indicative list of non-compliance response measures. Firstly, it has to be decided what measures could be in the list. Secondly, which measures in this particular Water Convention's case we consider disincentives (more coercive). There would appear two lists, whereas the one of the disincentives should have a certain criteria for its application (could be repetition also taking into account cause, type, degree or frequency of non compliance). Thirdly, there has to be clearly defined list of measures that the Compliance Committee is allowed to take and the ones which have to be taken by the MOP. It is very important for the efficiency and effectiveness of the Compliance Committee work that it would have discretion to apply a set of response measures. Otherwise, the procedures would prolong and would lose their flexibility.

As it was mentioned before, calling one or another measure coercive is a matter of interpretation. Nevertheless, it is even more important to define them for this Water Convention compliance mechanism and to avoid any ambiguities. Brunnee J. points out that “the emphasis on facilitation of compliance does not mean that even those compliance regimes that are cast as primarily cooperative are devoid of sanction-oriented features, at least in a wider sense of creation of costs or removal of benefits”<sup>153</sup>. According to her these sanction-oriented features are found in the publication of parties' compliance records, issuance of ‘cautions’ to non-complying parties, suspension of certain privileges. She ascertains: “in providing for the suspension of privileges, these MEAs come close to deploying what has remained rare in general international law – actual penalties for non-compliance”.<sup>154</sup>

At present the recommendations are used in the relations between MOP and WG, whereas the WG is supposed to advise to the MOP on the measures to be taken to facilitate the right direction of the policies and methodologies and promote harmonisation of the national rules and regulations. Thus the recommendations are not used as a response to non-compliance but merely as the tool for further development of policies and actions. At the moment support for the implementation of the Convention is done through „soft law“: guidance documents, reports, pilot projects and publications. However the soft law itself is not capable to ensure compliance with it. It needs institutionalised mechanism with balanced procedures and non-compliance response measures to give a constant support for Parties and provide for an adequate response in cases on non-compliance.

### **3.1.7. Public participation**

The first mentioning of the public participation as such is found in the documents of the first Meeting of the Parties, whereas it is being stated that “broad public participation is essential for

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<sup>153</sup> **Brunnee J.** *Enforcement In International Law and International Environmental Law*// edited by Beyerlin U., Stoll P.T. and Wolfrum R. - *Studies on the Law of Treaties* ; v. 2; Leiden : Martinus Nijhoff, 2006. – 19 p. – ISBN 9004146172

<sup>154</sup> Id



implementing and developing further the Convention“. The same article reiterates that public involvement can take place through the participation of representatives of major groups in activities under the Convention.<sup>155</sup> Does this statement imply that the public participation will be one of the important elements of the future compliance mechanism of the Water Convention? Considering the fact that Protocol on Water and Health to Water Convention largely involves public as well as mentioned indication in the Water Convention’s Party meeting documents and Article 16 on Public Information in a Convention we presume and feel it to be decisive that public would be involved in the compliance processes as much as possible. From the experience of Espoo convention (MP.EIA/WG.1/2003/3) there are several ways of involving the public.<sup>156</sup> Public could be informed of cases which are before the Committee. Public should be able to provide information to the Compliance Committee in relation to cases already before the Committee as well as on new cases. Meetings of the Committee could be open to the public in a passive manner. What is more, public should have the possibility to initiate a compliance procedure before the Compliance Committee and participate in its work.

### **3.1.8. Dispute resolution**

As concerns dispute settlement Water Convention article 22 says: If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this article, it accepts (a) Submission of the dispute to the International Court of Justice; or (b) Arbitration in accordance with the procedure set out in annex IV. However under Water Convention up to date only *four* states have accepted the ICJ jurisdiction, which shows that countries really need a complementary compliance mechanism.

### **3.2. Other influential factors**

As already assessed before, there are number of influential factors to the country compliance in general with international law, as well as with international environmental law. Not to mention them all, the UNECE region has its own characteristics.

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<sup>155</sup> **The Helsinki Declaration**//Water Convention, 1<sup>st</sup> MOP/Report, Annex I, 12 August 1997, ECE/MP.WAT/2

<sup>156</sup> **Report of the Second Meeting of the Implementation Committee**/Espoo Convention, WG on Environmental Impact Assessment, 2003, 3 p. MP.EIA/WG.1/2003/3

As reiterated in the Geneva strategy,<sup>157</sup> “compliance system must anticipate the likely sources or motivations for Parties’ non-compliance, and design responses that are likely to overcome resistant behaviour”. In order to assess what are the main influences to the compliance with this particular convention the profile of the state parties has to be analysed – in other words their capacities to comply. “We need to understand why nations comply to know how to design international accords to ensure future compliance”.<sup>158</sup>

Water Convention belongs to the UNECE region, and therefore it probably will be correct to look at the 2003 ECE Committee’s on Environmental Policy drafted the Guidelines for Strengthening compliance with and implementation of multilateral environmental agreements in the ECE region. It listed extremely important and useful obstacles to national implementation of and compliance with an MEA. So far from the ECE regions’ experience have been extinguished the following: a lack of sufficient political attention to implementation; a lack of awareness of the obligations arising under the MEA by the implementing authorities; a lack of technical, administrative and financial capacity; a lack of coordination among relevant national authorities; a lack of understanding of implementation issues; insufficient preparation (as regards, for example, laws, regulations, training); uncertain or inaccurate data; a lack or total absence of monitoring and/or review of implementation; unclear implementing rules/tools/ regulations (for example, related to the translation and interpretation of legal terms and provisions); a failure to mobilize public support; insufficient budget allocations, changes in economic circumstances or unforeseen costs of implementation.<sup>159</sup> Inadequate legislative frameworks combined with the lack of institutional capacity and financial resources are the main barriers to compliance with provisions.<sup>160</sup>

Because of the limited scope of this work, it is not possible to make deeper analysis of the mentioned reasons with regard to compliance mechanism, however the expert group designing the mechanism should make an extensive analysis of the Party countries’ specifics in order to be able to address the problems.

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<sup>157</sup> **Kakebeeke W. et al.** Geneva strategy and framework for monitoring compliance with agreements on trans-boundary waters: elements of a proposed compliance review procedure // ECE-UNEP Network of Expert on Public Participation and compliance. - Geneva 2000. – 40 p. URL: <http://www.unece.org/env/water/publications/documents/guidance.pdf> [retrieved at 02/07/2009]

<sup>158</sup> **Alvarez J. E.**, Why Nations Behave // Michigan Journal of International Law 1998, vol. 19, no. 2, 303-317 p.

<sup>159</sup> **Guidelines for Strengthening compliance with and implementation of multilateral environmental agreements in the ECE region**// ECE Committee on Environmental Policy, 20 March 2003, ECE/CEP/107 - URL: <http://www.unece.org/env/documents/2003/ece/cep/ece.cep.107.e.pdf> [retrieved at 10/07/2009]

<sup>160</sup> **From intentions to actions: overcoming bottlenecks.** Critical issues in implementation of environmental policies. UNECE Environmental Performance Review Programme, p.5  
[http://www.unece.org/env/documents/2008/15CEP/Critical\\_Issues\\_e.pdf](http://www.unece.org/env/documents/2008/15CEP/Critical_Issues_e.pdf)

## CONCLUSIONS AND RECOMMENDATIONS

The absence of the compliance mechanism in the Water Convention is unjustifiable situation that has to be changed. Although the process of designing the compliance mechanism is starting it has to be developed with all possible efforts and in the shortest timeframe possible. The right balance between the functions of the bodies involved in compliance review process has to be found.

The comparison of the five UNECE environmental agreements' compliance systems with a purpose to identify crucial components and aspects of the compliance mechanism proved to be very facilitative and valuable in drawing recommendations for the Legal Board of the Water Convention. Chosen agreements proved to have significant similarities in the construction and functioning of their compliance mechanisms. All of the analysed agreements have a reporting mechanism and four possess a fully developed compliance mechanisms.

Legal theory of the international environmental law overviewed in the first part of the thesis let to understand the nature and value of the compliance mechanisms in MEAs and their difference from other international enforcement mechanisms. The theory and comparative analysis of the UNECE MEAs lets us conclude that overall system of compliance has two different tools: a compliance mechanism and dispute settlement procedures. All compliance mechanisms claimed to be without prejudice to the dispute settlement, but legal uncertainties exist towards the practical correlation between both tools. Enforcement of treaty obligations of the reciprocal character can be achieved through the classical dispute settlement procedures, however up to date they were not used. Analysis showed that only a few states have accepted the jurisdiction of ICJ. Contrary to that, the compliance mechanisms were used under Aarhus, LRTAP and Espoo Conventions. These facts are indicators that current enforcement mechanisms are not sufficient to ensure compliance with Treaty obligations and complementary compliance mechanisms need to be established.

The compliance mechanisms of the analysed conventions are facilitative, non-adversarial, non-confrontational and cooperative character although some enforcement features can be found in certain components of the mechanism. Enforcement in the compliance mechanisms takes a form of non-compliance response measures having more coercive character, such as issuing cautions, suspension of the treaty operation and certain privileges. In general, such category as 'enforcement' was not found in any of the analyzed treaty texts and working documents.

Assessment and analysis of the current institutional and organisational framework of the Water Convention shows existence of necessary preconditions and potential to establish a compliance mechanism similar to other UNECE compliance mechanisms.

Based on the extensive analysis and comparison of the 5 compliance mechanisms of the relevant UNECE Environmental Agreements and Water Convention's institutional and legal characteristics the

following recommendations can be made to facilitate work of the Legal Board entitled to draw the compliance mechanism of the Water Convention.

To begin with, the Parties should consider amending the Water Convention by introducing a provision on the compliance review procedure as well as reporting obligations. Following the amendment, MOP of the Water Convention should adopt (a) a decision on establishment of the compliance mechanism to review compliance and implementation; (b) a decision on detail reporting requirements on the Parties; (b) a decision to establish a Compliance Committee.

Compliance Mechanism of the Water Convention should possess the following features/characteristics:

- The legal ground for a compliance mechanism should be the article 17(2) of the Water Convention;
- The objective of the Compliance Mechanism should be to review and to facilitate the implementation of and compliance with the Convention obligations.

Compliance mechanism should be comprised of the following components:

- National performance (implementation and compliance) information review through regular national reporting;
- NCP enabling to assess and establish problems in implementation and compliance with the Treaty obligations as well as reporting requirements;
- Indicative non-compliance response measures lists that MOP and Compliance Committee can utilise as to respond to non-compliance and facilitate problem solution in the best possible way.

Institutional framework of the Compliance Mechanism:

- MOP should have a decision making right, should act upon the principles of the compliance mechanism and recommendations of the Compliance Committee. The Compliance Committee should be entitled to manoeuvre the compliance mechanism. It performs national reporting review, deals with NCP case, performs verification and control, decides upon non-compliance response measures that are assigned to its discretion (at the MOP Committee's decisions have to be reviewed and approved, MOP can overrule Compliance Committee's decision if it finds it necessary) and makes recommendations to the MOP. Secretariat should assist Compliance Committee in performance information review and be responsible for information circulation between Parties and Convention bodies;
- Present capacity related difficulties of the Secretariat have to be resolved by careful assessment of its functions and delegation of some tasks to other Treaty bodies, hiring additional staff or better internal work organisation.
- Compliance Committee should be comprised of the independent members, acting in their personal capacity. They could be elected following Aarhus example from the candidates

nominated by the parties/signatories *and* non-governmental organisations and elected by a consensus (or secret ballot). The circle of the candidates should not be limited only to State Parties, but might as well include persons from other countries. There should be no more than one national from the same country in the Committee. The choice should be non-discriminatory paying all attention to the qualifications of the candidate.

The performance information review should be based on:

- Regular (preferably annual) reporting of the Parties on their implementation of the Convention obligations. Experience of LRTAP Convention showed that completeness of data significantly improved since they started to report each year;
- Compliance Committee together with MOP should develop and adopt the format of the reports and prepare detailed guidelines on reporting requirements. For the development of guidelines, Aarhus Convention would serve as a very good example. The reporting format could be a questionnaire covering all substantial provisions of the Convention which after each cycle of reporting should be revised and improved. Experience of Industrial Accidents Convention shows that answer quality depends a lot on the formulation of the question. Therefore, in order to avoid the same problems it is suggested to prepare clear, unambiguous, formulated in a straightforward language questions. Taking into account Espoo convention's experience, workshops and trainings have to be organised on reporting, filling the questionnaire, on IT tools utilisation with interest groups, quality translation and interpretation of certain terms has to be provided;
- Learning from the experience of UNECE conventions, the reporting mechanism should not be too burdensome. Therefore it is suggested to make gradual reporting and to divide it according to grouped and categorised set of questions. This reporting through several steps, at one time asking only limited number but very detailed questions would help to achieve more detailed, exact and focused information. Successful Aarhus reporting experience could serve as a good model of reporting organisation providing for one of the most important lessons – public involvement in the national report preparation. It was proved that adequate public and stakeholder involvement influences bigger transparency, fairness and information quality. Public involvement at different stages of report preparation as well as in information verification processes afterwards has to be implemented in Water Convention reporting mechanism;
- Information should be detailed and focus on: formal implementation - existence of adequate legislative framework (set of laws with detailed explanation of implementing provisions) and institutions; practical implementation (functioning of the administrative, institutional arrangements, including national enforcement system compelling compliance), success and

problematic aspects; reporting on the facts, e.g. whether required cooperation and joint bodies exist (its forms, methodologies and problems faced); legal and other practical arrangements allowing public involvement in the decision making concerning water management; and other information deemed necessary to assess the compliance with the Treaty.

Non-compliance Procedure should include:

- Trigger subjects: Party to Party initiation, Party itself initiates on its own non-compliance, members of the public (any natural or legal person) and treaty bodies – Compliance Committee/Secretariat or even Working Groups (when they become aware of non-compliance through the assessment embedded in Article 11 of the Convention). As concerns subtleties of public communications, Aarhus Convention is the best working example and should be taken as a reference;
- Review of the implementation and compliance should be based on the assessment of the national reports as a primary source. Other sources of information should be taken into consideration upon alleged non-compliance investigation: information from the NGOs and other public representatives, the information from the joint bodies established under sub-regional Treaties in accordance with Convention art. 9(2) (i.e. Danube Commission, Rhine Commission etc.), other convention bodies etc;
- NCP and especially formal discussion on findings (conclusions) of the Compliance Committee has to contain all necessary procedural guarantees: concerned Party as well as other interested participants have to be adequately informed of all ongoing and future procedures, given right to comment and express their opinion, provide additional information at any stage, make requests;
- Public has to be involved and allowed to participate in NCP. If necessary, rules of procedure can foresee conduct requirements asked from the public, when and how they could intervene, etc.

Non-compliance response measures should be defined in a way as to best facilitate fast and effective response to non-compliance:

- Analysis showed that a number of uncertainties exist in relation to application of non-compliance response measures. Although conventions provide for a list of possible measures, they do not specify the criteria upon which the measures are applied. Therefore, we recommend constructing two lists of indicative non-compliance response measures: the incentives (should contain a variety of facilitative measures) and disincentives (measures with enforcement elements). Disincentives list (i.e. caution, public “name and shame”, financial measures) should have a clear criteria indicating in what circumstances it will be applied (i.e. could be repetition criteria also taking into account cause, type, degree or frequency of non compliance) as these

measures imply a kind of punitive actions (i.e. financial losses, damaged international/political image etc.);

- There has to be clearly defined list of measures that the Compliance Committee is allowed to take as a prompt and adequate response and the ones which have to be taken by the MOP. Non-compliance response measures that Committee could take on its own initiative should contain only facilitative measures such as: provide advice and facilitate assistance to individual Parties regarding their compliance through workshops, trainings, specified information; request or assist the Party concerned to develop an action plan and submit a progress reports to the Committee on the efforts that it is making to comply with its obligations; assist with planning and organisation of the information review process in a country.
- MOP should be the approving instance of the Committee's decided non-compliance response measures. As the highest Treaty body it should monitor the decisions taken by the Committee.
- Taking as a reference Aarhus, Espoo Conventions and Protocol on Water and Health, indicative list of non-compliance response measures that MOP can decide upon should include: non-confrontational, non-judicial and consultative measures as to provide financial and technical assistance, training and other capacity-building measures, facilitate technology transfer, seek support from specialized agencies and other competent bodies, issue cautions and declarations of non-compliance, give special publicity to cases of non-compliance, deny access/use of financial or other granted benefits to the Party concerned under the agreement.
- Party concerned has to have a right to express its opinion with regard to measures to be applied.

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### ANOTATION

This master thesis researches, compares, analyses and critically evaluates compliance and enforcement mechanisms in UNECE environmental agreements in order to facilitate creation of the compliance mechanism under Water Convention. First part of the paper presents theoretical aspects of compliance and enforcement in the international environmental law. After introducing to general concepts and main definitions, it examines reasons for emergence of compliance mechanisms and role of enforcement and classical dispute resolution in compliance system. The second part analyses in detail and compares four categories of components present in UNECE compliance mechanisms: national performance information review, non-compliance procedures, response measures and dispute settlement procedures. Analysis revealed a set of important institutional and organisational aspects for successful functioning of the compliance mechanisms and let to identify problems and challenges. On a basis of comparative analysis and experiences of other UNECE Conventions, thesis discusses the most suitable configuration of crucial elements for effective mechanism. Third part analyses institutional set up and organisation of the Water Convention, assesses preconditions for establishing a compliance mechanism and examines suitable options for compliance review following the same four categories approach. Furthermore the attempt is made to establish missing and needed institutional, legal and procedural elements in order to draw the most suitable configuration of the compliance and enforcement mechanism to facilitate implementation and compliance of the Water Convention. Thesis provides for recommendations and emphasis is put on challenging aspects in order to draw attention of the working group that will construct the compliance mechanism.

**Key Words:** compliance mechanism, Water Convention, enforcement, environmental law, reporting, non-compliance procedure, non-compliance response measures, dispute settlement.

**Adomėlytė E.** JT/EET Aplinkos apsaugos sutarčių įgyvendinimo užtikrinimo mechanizmai: Tarpvalstybinių vandentakių ir tarptautinių ežerų apsaugos ir naudojimo konvencijos atvejis / Tarptautinės teisės magistro baigiamasis darbas. Vadovė dr. S. Klumbytė. – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2009. – 94 p.

### ANOTACIJA

Magistro baigiamajame darbe išanalizuoti, palyginti ir kritiškai įvertinti Jungtinių Tautų Europos Ekonomikos Komisijos aplinkos apsaugos sutarčių įgyvendinimo užtikrinimo mechanizmai, siekiant palengvinti tokio mechanizmo kūrimą Vandens konvencijai. Pirmoje darbo dalyje aptariami teoriniai darbo aspektai: pagrindinės koncepcijos bei sąvokos, mechanizmų atsiradimo pagrindai, tarptautinio teismo vykdymo bei ginčų sprendimo institutų vieta įgyvendinimo užtikrinimo mechanizme. Antroje dalyje detaliai analizuojamos ir lyginamos JT/EET konvencijų įgyvendinimo užtikrinimo mechanizmų keturios esminės pakopos: ataskaitinis mechanizmas (ataskaitų pateikimas, jų peržiūra bei vertinimas), įsipareigojimų nevykdymo procedūra, įsipareigojimų nevykdymo atsakomosios priemonės bei ginčų sprendimas. Lyginamosios analizės metu atskleisti įgyvendinimo užtikrinimo mechanizmų instituciniai bei funkcionavimo ypatumai ir identifikuoti probleminiai aspektai. Trečioji dalis skiriama Vandens konvencijos institucinei analizei bei vertinimui bei esamų įgyvendinimo užtikrinimo mechanizmo įdiegimui reikalingų priedų tyrimui. Įvertinus bei palyginus esamų mechanizmų struktūrą bei jų veiklos pagrindus, siekiama apibrėžti trūkstamus institucinius, teisinius bei procedūrinius elementus, būtinus Vandens konvencijos įgyvendinimo užtikrinimo mechanizmo funkcionavimui. Aptariami tinkamiausi elementai, jų struktūra bei organizavimas. Magistro darbe pateikiami siūlymai mechanizmą konstruosiančiai ekspertų darbo grupei.

**Pagrindiniai žodžiai:** įgyvendinimo užtikrinimo mechanizmas, Vandens konvencija, vykdymas, gamtos apsaugos teisė, ataskaitinis mechanizmas, įsipareigojimų nevykdymo procedūra, įsipareigojimų nevykdymo atsakomosios priemonės, ginčų sprendimas.

## SUMMARY

This master thesis researches, compares, analyses and critically evaluates compliance and enforcement mechanisms in UNECE environmental agreements in order to facilitate creation of the compliance mechanism under Water Convention. Absence of compliance mechanism starts impeding fluent functioning of Water Convention and has to be urgently established. Necessity for the compliance mechanism arises from the set of important factors: need to ensure full implementation and compliance with the Water Convention – an agreement of exceptional value and significance to our society because it governs fresh water resources; the problems of implementation and compliance arising under Convention and absence of an institute/third party able to search for solutions and give adequate and prompt responses. To begin with, up to date Water Convention is the only one functioning fresh water agreement of this kind in the world and full compliance with its requirements is the highest priority. It establishes a framework for cooperation and action in the field of trans-boundary fresh water resource management affecting area of more than 150 major rivers and 50 large lakes and their populations and has a potential to become global. Recently Parties to the Convention acknowledged the fact that they are facing certain problems related to implementation and compliance of the Convention: problems of implementation and their settlement; prevention or management of existing or potential differences in interpretation and application of the Convention, including in cases of non-compliance. Parties acknowledged that they do not have a clear and permanent forum to resort the problems, to approach for advice and support in the case of a specific potential or ongoing problem of a procedural, legal and/or technical nature and expressed the need to have a compliance mechanism. Therefore, group of experts (Legal Board) will be assigned with a task to define procedures and institutional mechanisms for compliance and implementation review.

The aim of this work is to assist to the Legal Board in creation of a compliance mechanism by making preliminary considerations on the most suitable model and provide for recommendations/proposals through comparison and analysis of existing compliance mechanisms in other UNECE environmental regional agreements. Existing compliance mechanisms are scrutinised through a set of qualitative research methods such as collective case and document study, description, conceptual analysis, legal comparative analysis, critical evaluation. Comparative analysis of UNECE environmental compliance mechanisms resulting in extensive examination and discussion about the future compliance mechanism model of Water Convention is original and scientifically useful. It was not yet performed by any other academic legal writers. Thesis emphasises crucial and problematic issues that might arise in construction process of the mechanism, critically evaluates them and gives recommendations to Legal Board. Legal texts of the six treaties, large number of the working

documents as well as decisions of the treaty parties are analysed in order to compare main components of the compliance mechanisms, their functioning, interdependence and challenges. Legal literature is reviewed with an aim of supporting author's critical evaluation, ideas and arguments with the opinions of scholars and legal experts.

First part of the paper presents theoretical aspects of compliance and enforcement in the international environmental law. After introducing to general concepts and main definitions, it examines reasons for emergence of compliance mechanisms and role of enforcement and classical dispute resolution in compliance system. The second part analyses in detail and compares four categories of components present in UNECE compliance mechanisms: national performance information review, non-compliance procedures, response measures and dispute settlement procedures. Analysis revealed a set of important institutional and organisational aspects for successful functioning of the compliance mechanisms and let to identify problems and challenges. On a basis of comparative analysis and experiences of other UNECE Conventions, thesis discusses the most suitable configuration of crucial elements for effective mechanism. Third part analyses institutional set up and organisation of the Water Convention, assesses preconditions for establishing a compliance mechanism and examines suitable options for compliance review following the same four categories approach. Furthermore the attempt is made to establish missing and needed institutional, legal and procedural elements in order to draw the most suitable configuration of the compliance and enforcement mechanism to facilitate implementation and compliance of the Water Convention.

The comparison of the five UNECE environmental agreements' compliance systems with a purpose to identify crucial components and aspects of the compliance mechanism proved to be very facilitative and valuable in drawing recommendations for Legal Board of the Water Convention. Chosen agreements operating in the same region with synergies in their scope of substantial requirements and obligations, with the similar composition of the Parties, institutional organisation of the treaty bodies proved to have significant similarities in the construction and functioning of their compliance mechanisms. All of the analysed agreements have a reporting mechanism and four possess a fully developed compliance mechanisms. Essential experiences and problematic aspects were identified and evaluated. Furthermore, it was discussed how to learn from good practices and how to avoid similar mistakes. The results of the work will be a valuable contribution to compliance mechanism development process as well as for wider audiences interested in the subject.

## SANTRAUKA

Magistro baigiamajame darbe išanalizuoti, palyginti ir kritiškai įvertinti Jungtinių Tautų Europos Ekonomikos Komisijos aplinkos apsaugos sutarčių įgyvendinimo užtikrinimo mechanizmai, siekiant palengvinti tokio mechanizmo kūrimą Vandens konvencijai. Sutarties įgyvendinimo užtikrinimo mechanizmo nebuvimas pradeda trukdyti efektyviam konvencijos funkcionavimui ir turi būti skubiai įdiegtas. Toks mechanizmas reikalingas dėl šių pagrindinių priežasčių: būtinybės užtikrinti visišką Vandens konvencijos (kuri yra ypatingai svarbi gamtai ir visuomenei, nes reguliuoja vandens resursus) reikalavimų įgyvendinimą, vykdymą ir laikymąsi, daugėjančių problemų, kylančių dėl konvencijos įgyvendinimo ir laikymosi, bei nebuvimo jokio instituto, galinčio adekvačiai ir greitai reaguoti bei pateikti tinkamą atsaką ir efektyvų sprendimą. Vandens konvencija yra vienintelis pasaulyje funkcionuojantis tokio pobūdžio susitarimas ir dėl to visiškai jos reikalavimų įgyvendinimo užtikrinimas yra aukščiausias prioritetas. Konvencija reguliuoja tarptautinių vandens resursų apsaugą bei naudojimą, šalių veiklą ir bendradarbiavimą teritorijoje, apimančioje daugiau kaip 150 didžiausių upių bei 50 didelių ežerų. Ji stipriai veikia šių teritorijų gyventojus bei ateityje gali tapti pasauline konvencija. Konvencijos šalys pripažino faktą, jog pastaruoju metu jos susiduria su šiomis problemomis, susijusiomis su įgyvendinimu bei laikymusi: konvencijos įgyvendinimo problemos bei jų sprendimas, konfliktai dėl egzistuojančių interpretavimo bei konvencijos taikymo skirtumų bei jų prevencija, taip pat neįgyvendinimo bei nesilaikymo atvejai. Šalys pripažino, jog šiuo metu neturi nuolatinio instituto/forumo, į kurį galėtų kreiptis pagalbos ar patarimo dėl iškilančių teisinių/procedūrinių ar techninių problemų bei išreiškė norą sukurti ir įdiegti sutarties įgyvendinimą užtikrinantį mechanizmą. Šiai užduočiai bus sudaryta specialistų teisininkų grupė, kuri suformuluos procedūras bei institucinį mechanizmą sutarties reikalavimų įgyvendinimo užtikrinimo mechanizmui.

Šio magistrinio darbo tikslas yra prisidėti prie mechanizmo kūrimo proceso teisine diskusija/svarstymais apie labiausiai tinkantį galimą modelį bei atlikus lyginamąją panašių mechanizmų analizę pateikti rekomendacijas darbo grupei. JT/EET sutartyse egzistuojantys įgyvendinimo užtikrinimo mechanizmai analizuojami pasitelkus kokybinio tyrimo metodus: dokumentų bei atvejų analizę, aprašymą, koncepcinę analizę, teisinę lyginamąją analizę bei kritinį vertinimą. Lyginamoji egzistuojančių sutarties įgyvendinimo užtikrinimo mechanizmų analizė, kuri yra pagrindas išsamiam būsimo Vandens konvencijos mechanizmo tyrimui bei diskusijai, yra originali ir moksliskai vertinga. Tokia specifinė analizė nėra aptikta kitų mokslininkų darbuose. Magistro darbas atkreipia dėmesį bei pabrėžia esminius bei problematinius aspektus, kurie gali iškilti mechanizmo kūrimo proceso eigoje, kritiškai juos vertina bei pateikia siūlymus darbo grupei. Pagrindinių mechanizmo komponentų (jų funkcionavimo bei probleminių aspektų) palyginimui išanalizuota šešių konvencijų tekstai, didelis kiekis konvencijų šalių darbo dokumentų bei sprendimų. Teoriniams

kritiniams autoriaus svarstymams bei idėjoms pagrįsti remtasi kitų mokslininkų darbais bei nuomonėmis.

Pirmoje darbo dalyje aptariami teoriniai darbo aspektai: pagrindinės koncepcijos bei sąvokos, mechanizmų atsiradimo pagrindai, tarptautinio teisinio vykdymo bei ginčų sprendimo institutų vieta įgyvendinimo užtikrinimo mechanizme. Antroje dalyje detalai analizuojamos ir lyginamos JT/EET konvencijų įgyvendinimo užtikrinimo mechanizmų keturios esminės pakopos: ataskaitinis mechanizmas (ataskaitų pateikimas, jų peržiūra bei vertinimas), įsipareigojimų nevykdymo procedūra, įsipareigojimų nevykdymo atsakomosios priemonės bei ginčų sprendimas. Lyginamosios analizės metu atskleisti įgyvendinimo užtikrinimo mechanizmų instituciniai bei funkcionavimo ypatumai ir identifikuoti probleminiai aspektai. Trečioji dalis skiriama Vandens konvencijos institucinei analizei bei vertinimui bei esamų įgyvendinimo užtikrinimo mechanizmo įdiegimui reikalingų prielaidų tyrimui. Įvertinus bei palyginus esamų mechanizmų struktūrą bei jų veiklos pagrindus, siekiama apibrėžti trūkstamus institucinius, teisinius bei procedūrinius elementus, būtinus Vandens konvencijos įgyvendinimo užtikrinimo mechanizmo funkcionavimui. Aptariami tinkamiausi elementai, jų struktūra bei organizavimas.

Penkių JT/EET konvencijų įgyvendinimo užtikrinimo mechanizmų analizė, siekiant identifikuoti esminius mechanizmų komponentus bei įvairius probleminius aspektus, įrodė esanti labai naudinga bei vertinga, leidžianti pateikti darbo grupei svarius patarimus bei pasiūlymus. Visi susitarimai, funkcionuojantys tame pačiame regione, būdami panašūs savo pobūdžiu bei reikalavimais, panašia šalių kompozicija, konvencijos institucine sandara, įrodė turintys be galo panašius įgyvendinimo užtikrinimo mechanizmus (institucine bei funkcionavimo prasmėmis). Buvo identifikuotos ir įvertintos esminės su šių mechanizmų egzistavimu susijusios patirtys bei problemos. Diskutuota, kurie pozityvūs pavyzdžiai turėtų būti panaudoti Vandens konvencijos mechanizme, ir kurių problematinių aspektų turėtų būti išvengta. Šio darbo rezultatai bus vertingi darbo grupei, kuriančiai Vandens konvencijos įgyvendinimo užtikrinimo mechanizmą bei visai plačiajai visuomenei, kuri domisi šia tema.



**ANNEX 1**  
**Table 1. Performance Information Review**

<b>Performance information review</b>	<b>Protocol on Water and Health</b>	<b>Aarhus Convention</b>	<b>Espoo Convention</b>	<b>Industrial Accidents Convention</b>	<b>LRTAP Convention</b>
Objective	Assess the progress, exchange experiences, demonstrate challenges/obstacles in implementation.  ECE/MP.WH/WG.1/2009/5 EUR/09/5086342/7	Review the implementation and facilitate compliance, be informed about activities of the Parties pursuant to the Convention.  ECE/MP.PP/2/Add.9	Enhance implementation of and compliance with the Convention  Decision III/9, in ECE/MP.EIA/6, annex IX	Assessment of the current status of implementation of the Convention and identification of difficulties encountered in implementation  CP.TEIA/2000/11	Create an overview of air pollution abatement in the region, obtain a comprehensive description of national and international strategies and policies, legislation in force, emission levels and future priorities; provide a basis to review compliance with convention and protocols obligations.
Legal reference	Art 7 paragraph 5, Art. 16..3 (b) of the Protocol	Article 10, paragraph 2 of the Convention MOP Decision I/8	Article 14bis of the Convention (amendment) MOP Decision III/7 MOP Decision IV/1	Article 23 of the Convention Decision 2000/2	Decision 1997/2, Annex III art. 3, 5 Decision 2006/2
Responsible authority/ functions	<b>Compliance Committee</b> <u>Functions:</u> Prepare a report on compliance with or implementation of specific provisions of the Protocol at the request of MOP; Monitor, assess and facilitate the implementation of and compliance with the reporting requirements  <b>Secretariat</b> <u>Functions:</u> considers reports in accordance with reporting requirements  ECE/MP.WH/2/Add.3 EUR/06/5069385/1/Add.3	<b>Compliance Committee</b> <u>Functions:</u> Prepares a report on compliance with or implementation of the provisions of the Convention at the request of MOP. Monitor, evaluate and facilitate implementation of and compliance with the reporting requirements;  <b>Secretariat</b> <u>Functions:</u> Review national reports in order to prepare a synthesis report for each meeting of the Parties summarizing the progress made and identifying significant trends, challenges and solutions  ECE/MP.PP/2/Add.8	<b>Implementation Committee</b> <u>Functions:</u> Review periodically compliance with party obligations under the Convention on the basis of the information in their reports; Prepare the reports with a view to providing any appropriate assistance to the Parties; Prepare a report on compliance with or implementation of specified obligations in the convention provisions at the request of MOP.  <b>Secretariat</b> <u>Functions:</u> prepares a draft implementation review based on the information provided by Parties and non-Parties pursuant to the reporting system  ECE/MP.EIA/6 Appendix	<b>Working Group on Implementation</b> <u>Functions:</u> Monitor the implementation of the Convention; Prepare the report on implementation on the basis of the individual country reports; Draw conclusions and recommendations to strengthen the implementation of the Convention on the basis of the above report; Submit conclusions and draft recommendations to the COP for adoption; Facilitate the assistance to UN/ECE member countries facing difficulties in implementing the Convention  <b>Secretariat</b> <u>Functions:</u> coordinates the reporting procedure  ECE/CP.TEIA/2	<b>The Implementation Committee</b> <u>Functions:</u> reviews periodically compliance with Parties' reporting obligations carries out in-depth reviews of specified obligations in an individual protocol at the request of the Executive Body  <b>Secretariat</b> <u>Functions:</u> Reviews reports submitted in accordance with reporting requirements  ECE/EB.AIR/2006/2
Reporting guidelines	Guidelines on the setting of targets, evaluation of progress and reporting;  Guidelines for summary reports	Guiding documents on reporting: decision I/8 and decision II/10	No	Reporting requirements CP.TEIA/2000/11	Guidelines for Reporting Emission Data under the Convention on Long-range Trans-boundary Air Pollution (parts of guidelines have legally binding effect) (ECE/EB.AIR/97)
Required information (type, format)	<u>Format:</u> Questionnaire	<u>Format:</u> Questionnaire	<u>Format:</u> Questionnaire	<u>Format:</u> Questionnaire	<u>Format:</u> Questionnaire

	<p><u>Information:</u> legal, administrative, economic, financial, technical and other measures to comply with the Protocol's provisions</p> <p>Justification for establishing specific targets; Outcomes and impacts of actions or measures taken to implement the Protocol; success stories and case studies Major obstacles in implementation; Actions needed to enhance implementation.</p>	<p><u>Information:</u> legislative, regulatory or other measures on implementation; practical implementation</p>	<p><u>Information:</u> Legal, administrative and other measures taken to implement provisions of the Convention Practical experiences of applying the convention</p>	<p><u>Information:</u> legislation adopted or other measures taken to implement the Convention; Problems and obstacles in implementation; Data and information on specific Convention requirements; Scientific and Technological Cooperation and Exchange; Participation of the Public.</p>	<p><u>Information:</u> Emission data Strategies and policies</p>
Reporting frequency	Every three years	Every two years	Every three years	Every second year	<p>Annually on emission data Every 2 years compliance problems on strategies and policies Every 4 years general strategies and policies review.</p> <p>(ECE/EB.AIR/97)</p>

**Source:** Party meeting documents of the UNECE Conventions, [www.unece.org](http://www.unece.org) [retrieved 2009 07 – 2009 11]

## ANNEX 2

Table 2. Multilateral Non-compliance Procedures

Multilateral non-compliance procedures (NCP)	Protocol on Water and Health	Aarhus Convention	Espoo Convention	LRTAP Convention
Objective	Establish non-compliance, draw the findings/conclusions and propose recommendations to MOP/COP			
Legal reference	Decision I/2 ECE/MP.WH/2/Add.3 EUR/06/5069385/1/Add.3;	Decision I/7; ECE/MP.PP/2/Add.8	Decision III/2 ECE/MP.EIA/6 Annex to decision IV/2 ECE/MP.EIA/10	Decision 2006/2 ECE/EB.AIR/2006/2
Responsible authority and its mandate/functions	<b>Compliance Committee</b> <b>Functions:</b> Consider any submission, referral or communication relating to specific issues of compliance made in accordance with the decision 1/2;	<b>Compliance committee</b> <b>Functions:</b> Considers any submission, referral or communication made in accordance with paragraphs 15 to 24 of decision I/7;	<b>Implementation Committee</b> <b>Functions:</b> 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>Implementation committee</b> <b>Functions:</b> IC considers any submission or referral of possible non-compliance by an individual Party with any of its obligations under a given protocol
Right to initiate the procedure	Party to Party submission Self-submission Secretariat referral Public communication	Party to party submission Self-submission Secretariat referral Public communication	Party to party Self-submission Implementation Committee initiative	Party to party submission Self-submission Secretariat referral
Cases of non-compliance	No cases yet	1 Submission Party to Party 0 self submissions 0 referrals by the secretariat 43 communications from public  <a href="http://www.unece.org/env/pp/Submissions.htm">http://www.unece.org/env/pp/Submissions.htm</a>	As of 2008 1 Party to Party submission 0 self submissions 1 committee initiative  ECE/MP.EIA/2008/5	Since 1997 Implementation Committee considered 12 non-compliance cases.  <a href="http://www.unece.org/env/lrtap/ic/cases.htm">http://www.unece.org/env/lrtap/ic/cases.htm</a>

**Source:** Decisions of the MOP/COP of UNECE Conventions: ECE/MP.WH/2/Add.3 EUR/06/5069385/1/Add.3; ECE/MP.PP/2/Add.8; ECE/MP.EIA/10; ECE/MP.EIA/6; ECE/EB.AIR/2006/2 [www.unece.org](http://www.unece.org) [retrieved 2009 07 – 2009 11]

## ANNEX 3

Table 3. Non-compliance Response Measures

Non-compliance response measures	Protocol on Water and Health	Aarhus Convention	Espoo Convention	LRTAP Convention
Objective	Facilitate implementation and compliance	Facilitate implementation and compliance	To bring about compliance with the Convention and to assist an individual Party's compliance.	To bring about full compliance with the Protocol in question and assist Party's compliance
Legal reference	Decision I/2 ECE/MP.WH/2/Add.3 EUR/06/5069385/1/Add.3	Decision I/7 ECE/MP.PP/2/Add.8	Annex to decision IV/2 ECE/MP.EIA/10 Annex to decision III/2 ECE/MP.EIA/6	Decision 2006/2 ECE/EB.AIR/2006/2
Responsible authority, decision making procedure	<b>Compliance Committee MOP</b>  <b>MOP Decisions:</b> Consensus or majority of Parties present and voting	<b>Compliance Committee MOP</b>  <b>MOP Decisions:</b> Consensus or ¾ majority present in the meeting and voting on substantial matters Simple majority present in the meeting and voting in procedural matters	<b>Implementation committee MOP</b>  <b>MOP Decisions:</b> Consensus or 3/4 majority vote of the Parties present and voting at the meeting.	<b>Executive Body and The Parties to the Protocol concerned</b>  <b>EB Decisions:</b> Consensus.
Measures	<b>Compliance Committee</b>  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; 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; 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; Issue cautions; and Make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public. <b>MOP</b> In addition to those of Committee  Facilitate financial assistance and provide technical assistance, training and other capacity-building	<b>Compliance Committee</b>  Make recommendations to the Party concerned; Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; 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; <b>MOP</b>  Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;  Make recommendations to the Party concerned;  Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;  In cases of communications	<b>Implementation Committee</b>  Provide advice and facilitate assistance to a Party whose compliance is in question regarding its implementation of the Convention, in consultation with that Party;  Make recommendations to a Party whose compliance is in question, subject to agreement with that Party.  <b>MOP</b>  Recommendations to the Party on what legislation, procedures or institutions require strengthening and how;  A recommendation to the Party to submit to the Committee a strategy, with time schedule, for action to bring about compliance, and to report to the Committee on its implementation of the strategy;  A recommendation to the MOP and to potential donors, to provide assistance to the Party concerned through national or sub-regional workshops, training, seminars or technical assistance;  A recommendation to the	<b>Executive Body together with Parties to the Protocol concerned</b>  measures of a non-discriminatory nature  measures to assist a Party's compliance

	<p>measures, subject to financial approval, seeking support from specialized agencies and other competent bodies; Issue declarations of non-compliance; Give special publicity to cases of non-compliance; the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Protocol; or Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.</p>	<p>from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;  Issue declarations of non-compliance;  Issue cautions;  Suspend the operation of a treaty, the special rights and privileges accorded under the Convention;  Other non-confrontational, non-judicial and consultative measures as may be appropriate.</p>	<p>Meeting of the Parties to issue a declaration of non-compliance or a caution;  In exceptional circumstances, a recommendation to the Meeting of the Parties to 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 Convention.</p>	
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**Source:** Decisions of the MOP/COP of UNECE Conventions: ECE/MP.WH/2/Add.3  
EUR/06/5069385/1/Add.3; ECE/MP.PP/2/Add.8; ECE/MP.EIA/10; ECE/MP.EIA/6;  
ECE/EB.AIR/2006/2 www.unece.com [retrieved 2009 07 – 2009 11]

## ANNEX 4

Table 4. Dispute Settlement

Dispute settlement mechanism	Water and Health Protocol	Aarhus Convention	Espoo convention	Industrial Accidents Convention	LRTAP
Objective	Solve the dispute				
Provision establishing the procedure	Article 20 of the Convention (26 of the consolidated version)	Article 16	Article 15	Article 21	Article 13
Dispute resolution measures available	Negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.  International Court of Justice;  Arbitration in accordance with the procedure set out in annex III	Negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.  International Court of Justice;  Arbitration in accordance with the procedure set out in annex	Negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.  International Court of Justice; Arbitration in accordance with the procedure set out in Appendix VII.	Negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.  International Court of Justice; Arbitration in accordance with the procedure set out in Annex XIII hereto.	Negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.
Cases received	no	no	no	no	no
Number of Parties that accepted ICJ jurisdiction	0 Parties	1 Party	3 Parties	5 Parties	0 Parties

**Source:** UNECE Conventions, [www.unece.org](http://www.unece.org) [retrieved 2009 07 – 2009 11]; UN Treaty database <http://treaties.un.org/Pages/Treaties.aspx?id=27&subid=A&lang=en> [retrieved 2009 11 12]