

Informal network of the Chairs of compliance/implementation bodies under the ECE multilateral environmental agreements
Second meeting, Geneva, 24 March 2014
Palais des Nations, Salle V

Chair's Summary

The meeting was initiated and chaired by Jonas Ebbesson, Chair of the Compliance Committee under the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus).

The meeting was the second meeting of the informal network of the Chairs of the implementation/compliance bodies under the ECE multilateral environmental agreements (MEAs) which aimed to allow for exchange of information and of lessons learned through the Chairs and ultimately explore ways for improved implementation and effectiveness of the implementation/compliance mechanisms in the region.¹

All Chairs of the compliance/implementation bodies of the MEAs were present (the Chair of the Espoo Convention attended via audio-conference). The list of participating Chairs is attached, together with the names of participating staff of the ECE secretariat.

The meeting was held in closed session, save for the final hour which was held in open session.

1. Brief update on the work of each compliance/implementation body

Most of the Chairs reported an increase in the number of cases brought before the compliance/implementation bodies. Nevertheless, some of them (Water, Water and Health, PRTR) are still at the early stages of their operations.

Implementation Committee under the Convention on Long Range Transboundary Air Pollution and its eight protocols

The Chair of the Implementation Committee under the Convention on Long Range Transboundary Air Pollution (Air Convention) reported that the Implementation Committee had an increasing number of individual cases. Reducing pollution was the main focus of its caseload at the present time, mainly with respect to agriculture and transport-related activities. Parties under the review of the Committee included both EU and non-EU Member States. The Committee considered both cases of non-reporting of emission data and also substantive issues of non-compliance with emission reduction obligations. The Committee was increasing its cooperation with technical bodies under the Convention.

Implementation Committee under the Espoo Convention and the Protocol on Strategic Environmental Assessment

The Chair of the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and the Protocol on Strategic Environmental Assessment (Protocol on SEA) reported that the Implementation Committee was currently preparing for the upcoming sixth session of the Meeting of the Parties to the Espoo Convention and the second session of the Meeting of the Parties to its

¹ The first meeting was held on 24 March 2013, also at the Palais des Nations in Geneva.

Protocol (Geneva, 2-5 June 2014). A number of its cases concerned nuclear activities whilst the number of cases further to information received from the public had increased. There had to date been two Committee initiatives (Ukraine and the United Kingdom) resulting from information provided by members of the public. Thus far there had been one case regarding the Protocol on SEA, which had been initiated as a case under the Convention; further to correspondence with the Party concerned, the case had been closed.

Implementation Committee under the Water Convention

The Chair of the Water Convention Implementation Committee reported that the Implementation Committee had not dealt with any cases to date, though it had recently received a communication from an NGO. It had recently asked for information from the two Member States concerned in order to assist its determination at its next meeting whether the NGO's information should be considered. The Implementation Committee was also involved with the issue of reporting and had commissioned studies and analysis, due in summer 2014, on this point.

Compliance Committee under the Water and Health Protocol

The Chair of the Compliance Committee under the Water and Health Protocol reported that there had been no communications to date. It did however have the opportunity to assist Parties through the Protocol's consultative mechanism. Under this mechanism, it would consider to invite two to three Parties to meet with the Committee, possibly as a group, to see how the Committee might assist them. Financial resources were, however, a constraint to the Committee's work.

Working Group on Implementation under the Industrial Accidents Convention

The Chair of the Working Group on Implementation under the Industrial Accidents Convention reported that the Working Group was currently reviewing Parties' national reports in view of the preparation of the seventh report on the implementation of the Convention submitted to the eighth meeting of the Conference of the Parties (Geneva, 3-5 December 2014). In addition, the Chair reported that the Convention's Working Group on Development was discussing, inter alia, the introduction of remedies for non-reporting and the possible further development of the implementation mechanism.

Aarhus Convention Compliance Committee

The Chair of the Aarhus Convention Compliance Committee reported that the Compliance Committee was currently preparing its report to the fifth session of the Meeting of the Parties to the Convention (Maastricht, 30 June – 1 July 2014). To date the Committee had received approximately 100 cases brought by members of the public and NGOs and one case submitted by one Party concerning another Party's compliance. It had recently received a number of cases concerning public participation in a transboundary context, in particular with respect to nuclear activities. The high number of cases also meant that the Committee had an increasing number of MOP decisions concerning the compliance of individual Parties to follow-up upon (14 Parties after MOP5). The Committee had noted increasing awareness of its work by national courts in the past 2-3 years.

Compliance Committee under the Protocol on Pollutant Release and Transfer Registers

The Chair of the Compliance Committee under the Protocol on Pollutant Release and Transfer Registers (PRTR Protocol) reported that the Protocol's compliance mechanism was comparatively new and there were no cases as yet. It was largely based on the Aarhus Convention Compliance Committee. At its first meeting it had discussed its working methods, and its second meeting (which would take place the following week) would review the Parties' national implementation reports submitted for the second Meeting of the Parties to the Protocol (Maastricht, 3-4 July 2014) and prepare a synthesis of those reports. It would be seeking input from the second Meeting of the Parties as to the strategic approach to be taken by the Committee going forward.

2. Examining non-compliance and non-implementation

Examining compliance of EU Member States

The Espoo Chair reported that the EU Commission considered that EU Member States should not go before the Implementation Committee. In contrast, the Air and Aarhus Chairs reported that each had dealt with a number of cases concerning EU Member States. In the case of the Air Convention, these had been triggered by the secretariat and in the case of the Aarhus Convention, by members of the public. It was observed that the approach taken by the International Tribunal on the Law of the Sea on this point was an interesting one.

A rule of "de minimis"

The Chairs discussed applying a rule of "de minimis" as a way to prioritise cases in the face of a high workload. It was remarked that even where the provisions establishing the implementation/compliance mechanism did not expressly include such a rule, the introduction of such a rule was within each committee's discretion. In this vein, the Aarhus Chair reported that the Aarhus Compliance Committee had developed such a rule as part of its modus operandi and then reported upon this fact to the Meeting of the Parties. The Industrial Accidents Chair reported that the Working Group on Implementation took a similar approach when evaluating the level of implementation of the Convention in Assistance Programme countries (through their self-assessment reports), though the Working Group did not have a formalized rule on this point. None of the other committees had yet applied such a rule. The Espoo Chair reported that it had not considered the need for such a rule at that point, since its caseload was to date manageable. It was observed that if a de minimis rule was to be applied, it was important to be very certain that the allegations of non-compliance at issue might not on further investigation have revealed more systemic concerns. Some Chairs expressed the view that, in contrast to the clear requirements of the treaty, a de minimis rule may have the effect of lowering the standard to be reached under the Convention. Such a rule would also introduce uncertainty as to which cases should be assessed to be "de minimis". However, several other Chairs took the view that a de minimis rule was a useful tool to prevent a backlog of cases developing.

Non-reporting as an issue of non-compliance

The Chairs agreed that reporting was fundamental to any system to promote compliance. Non-reporting was a serious issue as it undermined enforcement and implementation. Reporting was a legal requirement under some of the ECE MEAs (Aarhus, PRTR Protocol, Protocol on SEA, Industrial Accidents Convention and Air Convention), but not others (Water Convention, Espoo Convention, pending the entry into force of its second

amendment). Some Chairs reported that a very high number of their Parties reported (e.g. Aarhus, Protocol on Water and Health).

The Chairs considered it was important to identify the reasons for non-reporting. It was observed that a failure to report may be due to a lack of funds or capacity, though it might also be due to lack of political will since reporting obligations can be perceived by Parties as tedious.

Under the Air Convention, two different types of reporting exist: reporting on strategies and policies on the one hand and reporting of emission data on the other. The Air Convention had endeavoured to make reporting of strategies and policies more interesting. Instead of the completion of a standard questionnaire Parties had been given the possibility to report at the session of the Working Group in form of a presentation focusing on certain aspects of a Party's implementation of a Protocol. The Air Chair reported that the reporting obligations under that instrument had recently been strengthened and were now to be given similar weight as to emission reduction obligations, and thus, any case of non-reporting was an issue of non-compliance. Regarding the reporting of emission data, the Air Convention secretariat informed that an analysis of reporting obligations had resulted in 33 referrals regarding reporting difficulties.

Some Chairs expressed the view that the ECE MEA secretariats should develop a uniform practice of referring cases of non-reporting to their implementation/compliance bodies. The referrals should include not only a Party's failure to submit its report but also concerns regarding the timeliness or quality (in particular whether they are misleading or incomplete) of the reports submitted.

3. Improving compliance and implementation

Resolving long-standing non-compliance

The Chairs discussed a number of techniques to address long-standing non-compliance by Parties, including:

Tailoring of recommendations to the Party concerned

It was observed that it was important to carefully design the language of recommendations to be as effective as possible. This included ensuring that the wording is clear and specific, so the Party understands exactly what it must do to comply. Recommendations may need to be worded differently depending on whether they are intended to address a problem of capacity or an absence of political will to comply. Recommendations should reflect the gravity of the non-compliance and be addressed to the governmental body (including for some MEAs, the judiciary), and the requisite level, needed to catalyse change in the Party concerned. For example, the recommendations of MEA implementation/compliance bodies are often addressed to environment ministries, but may need to be addressed to a higher political level in order to trigger the political will needed to bring about change.

Regular inter-sessional reporting by non-complying Parties

It was noted that any recommendations should include a request for the Party to undertake regular reporting (e.g. at six monthly or annual intervals) on the progress made in the implementation of those recommendations, inter alia, to prevent time being lost between sessions of the Meeting of the Parties and to make sure that the measures taken by the Party were indeed in line with what was expected from them.

Technical support by experts and country visits

Country visits were recommended as a useful way to improve dialogue between a Party

concerned's officials and the implementation/compliance body and to gain a better understanding of the efforts or progress made by the Party to address the recommendations so far. The Aarhus Chair reported that the Aarhus Compliance Committee had undertaken two country visits, to Turkmenistan (2011) and the United Kingdom (2013) and these had been useful for increasing dialogue and understanding between the Committee and the Parties concerned. It was noted that such visits might require funds to be allocated for this purpose in the Conventions' work programmes in advance, though for those implementation/compliance bodies whose members represent governments, those governments might be invited to finance such missions as contributions in kind.

Sanctions

None of the ECE MEAs' implementation/compliance bodies have the power to directly recommend economic sanctions. It was mentioned that in effect, some implementation/compliance bodies have the power to issue "recommendations" rather than "sanctions" under treaty law. Indeed, the decision establishing the Aarhus Convention Compliance Committee entitles the Meeting of the Parties to suspend the special rights and privileges accorded to a Party under the Convention, and this could conceivably include the withdrawal of funds previously envisaged for technical assistance, capacity building or expert travel for the Party concerned. However, it was noted that a delicate balance had to be found as it would be counterproductive to cause the Party to withdraw even further and risk losing its engagement entirely. Generally, sanctions should only be one part of a package including "carrots" (incentives) as well as "sticks" (sanctions).

Coordination with other international organizations

The Chairs discussed the merits of notifying other international organizations providing technical assistance to, or funding projects in, long-standing non-complying Parties about the outstanding issues of non-compliance. In a case concerning a project in Albania funded by a number of international financial institutions (IFIs), the Aarhus Convention Compliance Committee had found it helpful to be in contact with the IFIs involved. Such coordination might assist in several respects: firstly, the international organization might include the implementation/compliance body's recommendations in its own technical assistance; second, it may decrease duplication and the risk of conflicting international obligations for the Party concerned and lastly, it may increase the political pressure on the Party to comply.

Transboundary obligations between countries without diplomatic relations

The Espoo Chair reported on the challenge of dealing with compliance matters in transboundary cases between states with no diplomatic relations. With a view to making progress in such situations, the Parties had agreed to organize seminars for all Espoo Parties focusing on circumstances of similar nature as those that triggered the issue of compliance in question (rather than the specific case itself). Such general workshops could be a useful model for other instruments dealing with transboundary obligations.

4. Openness, transparency, and public participation in compliance and implementation reviews

Open/closed sessions

It was noted that the implementation/compliance bodies had different practices with respect to open or closed sessions. It was observed that this might be partly due to the institutional culture of each MEA, but there were other factors as well. For example, the Industrial Accidents Convention dealt with information on dangerous substances, and disclosure of such information could have implications for national security. Disclosure in some cases might also have impact on intellectual property rights. In that respect, the Aarhus Chair informed the meeting that while the Aarhus Convention recognized that

intellectual property rights were a possible ground for refusing to disclose environmental information, the Convention required the exception to be strictly interpreted and applied. Indeed, the Aarhus Convention Compliance Committee has held that when EIA studies are prepared for the purposes of the public file in the administrative procedure and are available to authorities when making decisions, copyright by no means justifies a general exclusion of such studies from public disclosure. Disclosure of the EIA in its entirety should be the general rule.

Some Chairs considered that Parties were more willing to share information in a closed environment and it was useful to be able to have a frank and open dialogue with the Party whose compliance was under review, which might not be possible in an open session. It was said that the key point should be what would be most effective in the circumstances of that particular body to incite a Party towards compliance.

5. Opportunities for future exchange between the implementation/compliance bodies

All Chairs present expressed the appreciation for the opportunities for exchange provided by the two meetings of the informal network held to date. The Chairs discussed possible formats of future exchanges as well as priority issues that might be discussed.

With respect to the format for future exchange, several Chairs favoured the continuation of the current approach of an annual meeting allowing for informal exchange in closed session. Whilst other types of events might be valuable in addition, it was important to continue with the current format in order to ensure sufficient opportunities for genuine exchange.

As well as an annual one-day meeting in the current format, it was proposed that next year's meeting would include a day or half-day workshop open to the public. For the future, it might also be possible between the annual meetings to have bilateral exchanges between two or more implementation/compliance bodies or online discussions open to observers on specific issues of relevance to several of the committees.

While it might be helpful to discuss broad policy issues, it was considered that care must be taken to respect the differences in the content and approach of the MEAs themselves and thus, the differences in their implementation/compliance bodies. In this regard, the Aarhus Chair observed that the idea of the informal network was to learn from each other's experiences and developments, and not necessarily to streamline the implementation/compliance mechanisms.

The Chairs noted the benefits of closed sessions to facilitate open exchange between the Chairs and also the value of open sessions to share information and enter into discussions with the public.

With respect to possible future issues to discuss, it was remarked that the text of a number of the ECE MEAs contained express provisions on intellectual property rights. It was suggested that before the next meeting the secretariat might prepare a compilation of the various ECE MEAs' provisions on intellectual property. At the next meeting, the Chairs might then discuss the extent to which those provisions impact upon the work of the implementation/compliance bodies.

It was also observed that as several of the bodies dealt with transboundary obligations, it would be useful to discuss the specific issues raised by non-compliance in the transboundary context further. It was suggested that such a discussion might look at systemic issues rather than individual cases, and might be held in open session, and even online, so as to benefit from the input of academia and civil society.

6. Open session

Observers had the opportunity to attend and participate in the last session of the meeting. In that session, the Aarhus Chair summarized the discussion that had taken place in closed session. He also expressed the Chairs' appreciation of the role of observers in those implementation/ compliance mechanisms where this is possible.

An Egyptian NGO representative made a statement about the environmental challenges faced in that country, in particular with respect to water, energy and pollution, the latter which threatened human health. He stated that local and governmental authorities only published reports and studies on the environment that were in conformity with official standards. The Water Chair noted that water is a transboundary matter that should be taken into account by governments as a human need. The representative of the Egyptian NGO asked the Water Convention to help them to raise the concern at a political level. The Aarhus Chair informed that some inspiration may be found in the Rio Declaration and in the decision about Nigeria held by the African Commission on Human and Peoples' Rights, which had recognized the right to public participation.

A representative of Earth Justice informed the meeting about the resolution adopted by the Human Rights Council, in the light of the report of the independent expert on human rights and the environment. He encouraged the informal network to link with the Annual Meeting of Chairpersons of the Human Rights Treaty Bodies, whose next meeting would be held in Geneva on 24-27 June 2014. The representative of Earth Justice also encouraged the ECE MEA bodies to bring their policies into coherence as much as possible in order to a greater impact outside the ECE region.

A law student observer asked how to bring non-complying parties into compliance. In replying, the Air Chair stressed the need to differentiate between lack of capacity and lack of political will. In case of lack of political will, it is important to raise political awareness among the relevant governmental institutions and to draft very accurate recommendations in order to exert political pressure. In cases of long-lasting non-compliance, messages may be sent to the Ministers in charge or even the Head of State, but where there is a significant lack of political will, progress may be difficult. The Aarhus Chair agreed, noting the importance of political pressure as an incentive for parties to make efforts to come into compliance. In this regard, sharing information with the public can also add political pressure. He also commended capacity-building as a helpful tool to improve compliance.

7. Conclusion

The Chairs were unanimous in their appreciation of the opportunities for exchange that the two meetings of the informal network held to date had provided. They expressed their strong support for the continuation of the network, and even its possible deepening, for example through organizing a workshop for the public in 2015 to be held back-to-back with the annual meeting in its current format.

List of participants



2nd meeting of the informal network of chairs of the ECE compliance and implementation bodies

Start Date: Monday, March 24, 2014

End Date: Monday, March 24, 2014

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