



EANET WG 2/4/1

Legal Note on Reviewing the Scope of Instrument for Strengthening the Acid Deposition Monitoring Network in East Asia (EANET)

The Working Group Meeting on Reviewing the Scope of Instrument for the EANET

Acid Deposition Monitoring Network in East Asia

1-2 July 2020, Online Platform

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I. Introduction (1)

1. As of 1 May 2020, there are thirteen (13) Participating Countries to the Instrument for Strengthening the Acid Deposition Monitoring Network in East Asia (EANET), namely: Cambodia, China, Indonesia, Japan, Lao PDR, Malaysia, Mongolia, Myanmar, Philippines, Republic of Korea, Russia, Thailand and Viet Nam.
2. Item 2 defines the objectives of the Instrument, which is to “create a common understanding of the state of acid deposition problems in East Asia”; “to provide useful inputs for decision-making at local, national and regional levels aimed at preventing or reducing adverse impacts on the environment caused by acid deposition” and “to contribute to cooperation on the issues related to acid deposition among the Participating Countries.”

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I. Introduction (2)

3. The EANET provides for the monitoring of acid deposition, and participating countries are encouraged to promote bilateral and multilateral cooperation for the effective implementation of the activities under the Instrument (Item 3). Some provisions relating to monitoring and reporting (Item 4); assessment (Item 5); research (Item 6); and the exchange of information between participating countries (Item 9).
4. Item 2 also provides that the scope of this Instrument may be extended by the Meeting of the Participating Countries, which is known under the Instrument as the “Inter-governmental Meeting” or “IG.”
5. The question that has been posed is whether and how this Instrument can be changed to cover other areas of environmental concern, should the 13 Participating Countries be agreeable to do so.

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II. Intergovernmental Meetings and Bodies

6. Item 10 provides that the Intergovernmental Meeting (“IG”) is composed of the representatives of all Participating Countries and is the decision-making body of the EANET. Under Item 10, its functions include, inter alia, the review, and approval of the work programme and budget of EANET, the establishment of subsidiary bodies and the adoption of rules of procedure.
7. Item 12 provides for the Scientific Advisory Committee that is a subsidiary body of the IG that is composed of scientific and technical experts from the Participating Countries who, “will advise and assist the IG with various scientific and technical matters related to the EANET activities as mandated to it by the IG.” In addition, Item 12, paragraph 2 provides that, “if the Committee considers it necessary for fulfilling its objectives, experts from countries other than the Participating Countries may be invited to assist the Committee.” Item 12 requires Participating Countries to provide scientific and technical experts to the Scientific Advisory Committee.

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III. Participation of Non-Members

8. Item 17 of the Instrument provides for the Participation of “Other Countries” to the Instrument. This is defined as follows: “Countries in East Asia, which includes Northeast Asia and Southeast Asia, not participating in the EANET, may subsequently submit to the Secretariat an application for participation, which is subject to approval by the IG.”

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IV. Revision and Modification

9. Item 15 of the Instrument entitled “Revisions or Modifications” provides as follows:
1. “Any revisions or modifications to any part of this Instrument may be proposed in writing by any Participating Country to be considered and adopted by the IG in consensus.”
 2. “Subject to the official written consent by all Participating Countries, the revision or modification adopted by the IG will form part of this Instrument.”

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V. Status of EANET (1)

10. The EANET has established a network supported by the Participating Countries who signed the Instrument. While the Instrument does contain provisions for monitoring and reporting (Item 4) it is not a treaty under international law that creates binding obligations upon States that are Parties. This is evident for the following reasons:
- The Instrument systematically uses the word “will” throughout the text instead of the more customary “shall” for treaties. Use of the word “shall” is more customary as it indicates the creation of binding legal obligations for Parties;
 - There is no other indication that the provisions of this Instrument create legally binding obligations under international law.
 - There are no standard provisions that are usual in multilateral treaties concerning the method by which States would express their consent to be bound by the Instrument, ratification, the method of entry into force of the Instrument and the depositary;
 - Treaties generally specify in their final clauses the categories of States, organizations or other entities that may become a party thereto. This is absent;
 - The document uses the word “Instrument” in its title which is unusual if this were to be a treaty; and
 - The text uses the phrase “Participating Countries” which is also unusual if this were to be a treaty; usually, the phrase “States Parties” or “Parties” is used.

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V. Status of EANET (2)

11. Consequently, the EANET can be seen as having created a network or framework of cooperation amongst those countries who have signed the Instrument. However, there are certain elements that indicate that this form of cooperation is more structured than other networks in the sense that the Instrument has created inter-governmental and subsidiary bodies with rules of procedure as well as a Secretariat. Independent Secretariats can only be separate legal entities under international law where they have been created by a treaty.

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VI. Amendment, Modification, and Revision under International Law (1)

12. While the EANET is not a treaty there are nevertheless certain elements under treaty law that may prove useful for the purpose of considering revisions or modifications to the Instrument.

Amendment

13. The Glossary of terms relating to Treaty actions under The United Nations Treaty Collection (UNTC) defines an Amendment as follows: "The term "amendment" refers to the formal alteration of treaty provisions affecting all the parties to the particular agreement. Such alterations must be effected with the same formalities that attended the original formation of the treaty. Many multilateral treaties lay down specific requirements to be satisfied for amendments to be adopted. In the absence of such provisions, amendments require the consent of all the parties."

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VI. Amendment, Modification, and Revision under International Law (2)

14. Articles 39 and 40 of the Vienna Convention sets out the rules for the amendments that are applicable, to amendments, except in so far as the multilateral treaty provides otherwise. These include the following:
- Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in: (a) the decision as to the action to be taken in regard to such proposal; and (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
 - Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
 - The amending agreement does not bind any State already a party to the treaty, which does not become a party to the amending agreement.
 - Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State be considered as a party to the treaty as amended.

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VI. Amendment, Modification, and Revision under International Law (3)

Modification

15. The Glossary of terms relating to Treaty actions under the UNTC defines a "Modification" as follows: "The term "modification" refers to the variation of certain treaty provisions only as between particular parties of a treaty, while in their relation to the other parties the original treaty provisions remain applicable. If the treaty is silent on modifications, they are allowed only if the modifications do not affect the rights or obligations of the other parties to the treaty and do not contravene the object and the purpose of the treaty."
16. The Vienna Convention, 1969, distinguishes between "amendment of multilateral treaties" and "modification between certain parties only." Modifications are addressed under Article 41 of the Vienna Convention. This Article enables two or more parties to a multilateral treaty to "conclude an agreement to modify the treaty between themselves alone if (a) the possibility of such a modification is provided for by the treaty".

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VI. Amendment, Modification, and Revision under International Law (4)

Revision

17. The Glossary of terms relating to Treaty actions under the UNTC defines a Revision as follows: "Revision has basically the same meaning as an amendment. However, some treaties provide for a revision additional to an amendment (i.e., Article 109 of the Charter of the United Nations). In that case, the term "revision" refers to an overriding adoption of the treaty to changed circumstances, whereas the term "amendment" refers only to a change of singular provisions."
18. The term "revision" often refers (but not always) to a general alteration affecting the treaty as a whole, as opposed to an amendment that partially alters some of the treaty provisions.

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VI. Amendment, Modification, and Revision under International Law (5)

Protocol

19. The Treaty Handbook describes a Protocol as "a protocol, in the context of treaty law and practice, has the same legal characteristics as a treaty. The term protocol is often used to describe agreements of a less formal nature than those entitled treaty or convention. Generally, a protocol amends, supplements or clarifies a multilateral treaty. A protocol is normally open to participation by the parties to the parent agreement. However, in recent times States have negotiated a number of protocols that do not follow this principle. The advantage of a protocol is that, while it is linked to the parent agreement, it can focus on a specific aspect of that agreement in greater detail".

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VII. Conclusion (1)

20. Item 2(2) allows for the scope of the Instrument to be extended as decided by the IG. This can be achieved through Item 15 that makes reference to “any revision or modification to any part of this Instrument” provided that it is (a) in writing, (b) proposed by a Participating Country, (c) is subject to the consideration and adoption of the IG in consensus; and (d) subject to the official written consent by all Participating Countries.
21. Pursuant to 7.2 of the Rules of Procedure of the EANET Meetings and Dissemination of Data, “decisions of the IG will be made by consensus among the participating countries present at the Session”. Non-Participating Countries as non-Members would not be able to block consensus.
22. In this connection, it seems that there are at least five ways forward for the Participating Countries of the IG to consider:

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VII. Conclusion (2)

OPTION 1

23. The IG may, pursuant to its rules of procedure wish to establish a subsidiary body in order to consider revisions or modifications to the Instrument, pursuant to proposals from Participating Countries. Alternatively, the IG may refer to the question of the revision of the Instrument to the Scientific Advisory Committee as an existing subsidiary body. The Committee, in turn can under its rules of procedure, recommend the establishment of a task force or expert group. Proposals from Participating Countries would then be made in the subsidiary body.
24. However, Item 15 (1) provides that the proposal to be considered in the IG should come from a Participating Country, not from a subsidiary body.
25. In this connection, the following example may be instructive: In June 2019, the Economic Commission for Europe (ECE) serviced a Conference of the Parties to the European Agreement concerning the International Carriage of Dangerous Goods by Road in order to consider a proposal to amend the agreement to remove the word “European” from the title. In this case, the Working Party on the Transportation of Dangerous Goods (an ECE subsidiary body) discussed the matter and agreed with that amendment proposal, but the formal amendment proposal was submitted to the Conference, not by the Working Party but by Portugal, which was the Chair of the Working Party.
26. Following that example, it may be possible for the Chair of the subsidiary body that is also a Participating Country to make a proposal to the IG for consideration. Ideally, this proposal would have been agreed to in the subsidiary body/process.

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VII. Conclusion (3)

OPTION 2

27.A Participating Country can in the plenary of the IG submit a proposal in writing and also indicate whether it falls within Item 15, i.e., whether it is a “revision or modification to any part of this Instrument”. The proposal should ideally be submitted in advance of any IG meeting and circulated to all Participating Countries.

28.The IG would then in plenary have to decide whether (i) to discuss the proposal in plenary; or (ii) to create a subsidiary body for the purpose of this discussion; or (iii) to refer it to an existing subsidiary body such as the Scientific Advisory Committee or to an expert group or task force created under its auspices. Once considered in a subsidiary body it would have to be re-introduced in Plenary (IG) by a Participating Country.

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VII. Conclusion (4)

OPTION 3

29. Another option, in order to avoid any process of official written consent by Participating Countries of any amendments or modifications is for the IG to adopt a separate decision outside the framework of Item 15. This decision would not have the effect of formally revising or modifying the Instrument. However, the Instrument would be read in conjunction with the decision and could be seen as an interpretation of the Instrument by the participating Countries of its provisions.

30. However, there seems to be a limit to this approach. If it is clear that the subject matter of the decision goes clearly beyond the scope of the Instrument, to the extent that even the broadest interpretation of the Instrument would not allow such subject matter to be considered as falling within the scope of the Instrument, the approach in option 3 here may not work.

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VII. Conclusion (5)

OPTION 4

31. Another option would be for the Participating Countries to negotiate an Annex (like a Protocol) that supplements the existing Instrument. Even if such an Annex was agreed by consensus, it would be up to each Participating Country to decide whether to sign up to that Annex.

OPTION 5

32. Finally, the Participating Countries could negotiate a completely new text that could lead to the adoption of a legally binding treaty. This could also allow for an independent Secretariat, created under international law. A decision from EANET could create the inter-governmental framework/process for the negotiation of a text.

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References:

- Vienna Convention on the Law of Treaties, 1155 UNTS 331.
- Glossary of terms relating to Treaty actions, United Nations Treaty Collection (UNTC),
https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml.
- Treaty Handbook, Office of Legal Affairs,
<http://treaties.un.org/doc/source/publications/THB/English.pdf>

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Action required

The Working Group Meeting on Reviewing the Scope of Instrument for Strengthening the Acid Deposition Monitoring Network in East Asia (EANET) is invited to review, discuss, make comments, and provide recommendations, as appropriate.

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Thank you

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