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GLOBAL ADMINISTRATIVE LAW COMPLIANCE: THE AARHUS CONVENTION COMPLIANCE REVIEW SYSTEM*

MARCO MACCHIA**

I. INTRODUCTION

ASSURING full compliance with an international rule within national legal systems is intrinsically difficult. In fact, even though the global legal system is the sum of many regulatory regimes[1], it has not yet acquired an autonomous standing, but it has developed in addition to States' legal systems. Hence, there is not such thing as a consistent international legal culture. New international measures have not gained ground in public debate, and institutions are unresponsive to change, which makes it difficult to adjust to new measures, especially for public bodies performing their administrative functions.

To this effect, the Community system has rapidly developed appropriate instruments aimed at putting right non-compliance with European laws, caused by Member States' inertia or lack of "good will". In particular, two mechanisms have been designed to tackle the possible lack of effectiveness of international rules: the infringement procedure handled by the European Commission, and the government accountability review, in case of infringement of Community provisions granting rights to individuals[2].

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[1] On global regulatory systems see SABINO CASSESE, Administrative Law Without the State? The Challenge of Global Regulation, 37 *N.Y.U. J. Int'l L. & Pol.* 663, 670 (2005).

[2] The synergy produced by administrative remedies in conjunction with judicial remedies ensures a "high level of compliance", to use a common phrase in the

The same dangers exist in global administrative law, which, in this paper, refers to ultra-national regulations aimed at national public powers, with international organisations working upstream - the rationale being the transborder dimension of the public interests they protect[3]. In this legal arena, public authorities are very rarely held accountable for a legal obligation arising from an international rule. There seems to prevail a logic of cooperation with and mutual support of national governments, rather than a logic of opposition and accountability[4].

When international provisions have a mandatory and binding nature, the task of monitoring that public entities abide by international requirements is usually entrusted to national judicial authorities. However, this remedy is not always enforced and some of the reasons are mentioned. Therefore, it is crucial that the parties concerned are assured a further remedy if the rule is infringed. These remedies consist of compliance systems, or more accurately, systems aimed at realising compliance, meaning the full and

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Anglo-Saxon literature. The literature on this topic is broad. For an initial understanding, see MARIO P. CHITI, *Diritto amministrativo europeo* 38 (3rd ed. 2008).

[3] On global administrative law in general, see BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, The Emergence of Global Administrative Law, 68 *L. & Contemp. Probs.* 15 (2005); SABINO CASSESE, Global standards for National Administrative Procedure, 68 *L. & Contemp. Probs.* 109 (2005); SABINO CASSESE, Global Administrative Law: An Introduction, Paper for the NYU Law School "*Global Administrative Law Conference*", April 22-23 2005, available at http://www.iilj.org/global_adlaw/documents/Cassesepaper.pdf; STEFANO BATTINI, International Organizations and Private Subjects: A Move Toward a Global Administrative Law?, *IILJ Working Papers*, No. 2005/3, available at http://www.iilj.org/publications/wp_globadminlaw.htm; STEFANO BATTINI, The Globalisation of Public Law, 18 *European Review of Public Law ERPL/REDP* 27 (2006); NICO KRISCH, The Pluralism of Global Administrative Law, 17 *Eur. J. Int. L.* 278 (2006); GIACINTO DELLA CANANEA, Beyond the State: The Europeanization and Globalization of Procedural Administrative Law, 9 *Eur. Pub. L.* 563 (2003); ALFRED C. AMAN JR., Administrative Law in a Global Era, 54 *Admin. L. Rev.* 409 (2002); ALFRED C. AMAN JR., Globalization, Democracy, and the Need for a New Administrative Law, 10 *Ind. J. Global Legal Stud.* 125 (2003). For an attempt to analyse global administrative law through the elaboration and examination of a number of different cases and case studies, see *Global Administrative Law. Cases, Materials, Issues*, 2nd ed. (SABINO CASSESE / BRUNO CAROTTI / LORENZO CASINI / MARCO MACCHIA / EUAN MACDONALD / MARIO SAVINO eds., 2008).

[4] In the international legal system, negotiations replace hierarchy in the relations between public authorities, as observed by SABINO CASSESE, Legal Imperialism and "Raison d'Etat" in the Global Administrative Law, paper for the NYU Law School "*Global Administrative Law Conference*" (22-23 April 2005).

right execution of obligations arising from international rules. Compliance systems find their rationale in the insufficiency or lack of effectiveness of traditional dispute resolution mechanisms[5].

From this perspective, interesting developments come from environmental law, in which Multilateral Environmental Agreements (hereinafter MEAs)[6] have strengthened monitoring mechanisms, aimed at inducing States to comply with global rules in the name of a common interest[7].

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[5] For an introduction to the topic of international rule compliance, see KAL RAUSTIALA / ANNE-MARIE SLAUGHTER, International Law, International Relations and Compliance, *in*: *Handbook of International Relations* 538 (WALTER CARLSNAES / THOMAS RISSE / BETH A. SIMMONS eds., 2002); DINAH SHELTON (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000). See also CHRISTIAN JOERGES, Compliance research in legal perspectives, *in*: *Law and Governance in Postnational Europe. Compliance beyond the Nation-State* 261 (MICHAEL ZÜRN / CHRISTIAN JOERGES eds., 2005).

[6] Multilateral Environmental Agreements are not simple treaties, but real international regimes supported by a law-making activity at different levels. They are adjusted and expand, thus implying major deviations from domestic regulatory standards, through the meetings of the Conference of the Parties (COP) and its subsidiary bodies. In brief, "in these ongoing multilateral processes, it is more difficult for individual parties to determine agendas, to resist regime development, and to extricate themselves from regime dynamics", wrote JUTTA BRUNNÉE, The United States and International Environmental Law: Living with an Elephant, 15 *Eur. J. Int. L.* 637 (2004). On the topic, see GÜNTHER HANDL, International "Lawmaking" by Conferences of the Parties and Other Politically Mandated Bodies, *in*: *Developments of International Law in Treaty Making* 135 (RÜDIGER WOLFRUM / VOLKER RÖBEN eds., 2005).

[7] The following monitoring mechanisms have been set up within the Multilateral Environmental Agreements. In 1990, in application of Art. 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer, the Meeting of the Parties set up an Implementation Committee. In 1997, although in the absence of a specific indication, *the Executive* Body of the UNECE Convention on Long-range Transboundary Air Pollution provided for the creation of a Committee, in order to ensure the respect of the obligations arising from the Convention and the Annexed Protocols. In 2001, following other examples, an Implementation Committee was set up in the framework of the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). Also in 2001, the seventh session of the Conference of the Parties of the Kyoto Protocol provided the operational basis for a compliance procedure according to the provision of Art. 18 of the Treaty. In 2002, two additional compliance procedures were adopted: one by the Conference of the Parties of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, and a second within the framework of the Convention on the Protection of the Alps. In 2004, the

In particular, the Aarhus Convention (hereinafter AC)[8] introduced an innovative review of compliance, which deserves attention for two closely related reasons. On the one hand, the AC concerns obligations that directly rest on public administrations, aiming at environmental protection. These obligations touch the heart of administrative regulations, just like document access and participation in the proceedings. On the other hand, this procedure allows any individual to ask an international independent body to review that the national public authority has correctly applied the global regulation.

From this perspective, after a short overview of the AC features, a separate analysis is made of how this compliance review system functions and is regulated, using a case-study as introduction. Afterwards, similarities and differences are identified with respect to similar proceedings that are found in the international legal system. Finally, the implications on the behaviour of public powers and the emerging accountability of governments are investigated. The nature and character of this review system seem to give life to an interesting experience: traditional domestic dispute remedies exist side by side with a procedure entrusted to a special global body, which aims at ensuring national legitimacy to the national administrative action.

II. The Aarhus Convention, States and Private Actors

The protection of global goods, such as water, air, soil and nature, seems currently entrusted to two different international arrangements. One is intended for States and imposes legally binding obligations, and the other is intended for civil society and recognises rights. The Kyoto Protocol and the relevant commitment to reducing greenhouse effect gases fall within

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same procedure became operational for the Cartagena Protocol on Biosafety, pursuant to Art. 34. Likewise, compliance procedures are in the making within the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998); the Stockholm Convention on Persistent Organic Pollutants (2001); and the International Maritime Organization, pursuant to Art. 11 of the London Protocol (1996).

[8] *Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 25 June 1998, which came into force on 30 October 2001, *in*: *International Legal Materials*, 517 (1998). The text of the Convention and all materials mentioned in the following notes can be found on the site www.unece.org/env/pp/

the first category. The AC and the grant of procedural right to private actors belong to the second one[9].

The AC that was signed under the aegis of the *United Nations Economic Commission for Europe* (hereinafter UN/ECE)[10], harmonises environmental quality and human rights[11], thus strengthening Principle 10 of the Rio Declaration[12], under which "environmental issues are best handled with the participation of all concerned citizens, at the relevant level". The rationale for this Convention is clear. Even though environmental protection is a primary obligation for good governance, it is often neglected. This can be remedied by assigning citizens, especially in Non-Governmental Organizations (NGOs), the responsibility of contributing to safeguarding the environment[13]. The public is required to make up for the role that pub-

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[9] See also UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland, 25 Feb. 1991), *in*: *International Legal Materials*, 802 (1991), which is another example of an agreement following a similar approach.

[10] There are 55 Member States in the United Nations European Economic Commission (UNECE). The geographical areas involved are: Western Europe, Central-Eastern Europe, Central Asia, and North America (Unites States of America and Canada are also members). This body was created in 1947 to encourage cooperation between Western countries; a special Section deals with the environment and social policies.

[11] The Convention "through its clear connection between environment and human rights, has extended the general recognition of NGOs as international legal persons in the field of international human rights law to the environment as well", as stated in STEPHEN STEC, "Aarhus Environmental Rights" in Eastern Europe, *in*: 5 *Yearbook of European Environmental Law* 9 (2005). On the affirmation process, in the area of environmental human rights, see LAVINIA MONTI, I diritti umani ambientali nella Convenzione di Aarhus, *in*: *Profili di diritto ambientale da Rio a Johannesburg, Saggi di diritto internazionale, pubblico comparato, penale ed amministrativo* 71 (EDUARDO ROZO ACUÑA ed., 2004).

[12] The commitment to strengthen the involvement of citizens and interested parties in environmental issues was also renewed in the Johannesburg world summit on sustainable development (26 August-4 September 2002). On the need to plan a strategy for environmental participation, see Department of the Environment, Transport and the Regions, *Public Participation in Making Local Environmental Decisions - The Aarhus Convention Newcastle Workshop - Good Practice Handbook*, London (2000).

[13] On the strengthening of the role of NGOs in environmental regulation and on the relevant input from governments, see STEVE CHARNOVITZ, Two Centuries of Participation: NGOs and International Governance, 18 *Mich. J. Int'L L.* 183, 268 (1997).

lic bodies should have performed. This is the procedural approach of US environmental law[14].

Therefore, the AC is an international norm that grants individuals a set of rights. These rights can be summarised in the three famous "pillars": *a)* the right to access information, which affects the activities of public and private entities horizontally; *b)* the right to participate in environmental choices; *c)* the right to judicial review[15]. At the same time, institutions have a duty to take citizens' remarks into consideration, an obligation to disclose their decisions and provide the grounds for those decisions, and are not allowed to make discriminations. Moreover, authorities are required to "assist the public" and "provide guidance" for a full implementation of these rights. This is an advanced model of dealings between the administration and the citizen, informed by the most recent achievements of the State of law.

These rights are entrusted to the traditional mechanism of an international treaty that has been currently ratified in the national systems of thirty-nine countries[16]. The European Community transposed the first pillar on access to information with Directive 2003/4/EC, and the second pillar on public participation with Directive 2003/35/EC. There are no doubts about the mandatory and binding nature of the AC provisions, strengthened in EU Member States by the Community instrument.

However, the content of the AC is unique. The international provision is intended for private individuals and, through domestic legislation, establishes procedural rights for citizens concerning not so much *what* a government can do in its territory, but *how* it should operate. These rights are not supposed to be weakened by later regulations, considering that there is a minimum common denominator guaranteed by the AC[17]. They are

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[14] Notwithstanding, the United States have not signed the Convention. On this point, see BRUNNÉE, *supra* note 6, at 628.

[15] On the relationship between access to justice in environmental matters, as guaranteed by the AC, and the legal right to challenge Community acts made by environmental NGOs, see FEMKE DE LANGE, Beyond Greenpeace, Courtesy of the Aarhus Convention, *in*: 3 *Yearbook of European Environmental Law* 227 (2003).

[16] The last country to deposit a ratification at the UN General Secretariat was Greece, on 27 January 2006. In Italy, the Aarhus Convention was ratified with Law no. 108 of 16 March 2001.

[17] According to Doc. ECE/MP.PP/2005/13/Add.4, the Compliance Committee "recommends the Meeting of the Parties [...] to urge Parties to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision-making and access to justice in environmental matters,

applicable in a rather consistent way in all States that are parties to the Convention, since the AC is rather detailed and leaves little room for the discretionary power of domestic law-makers.

In any case, this is not enough to guarantee that public authorities comply with the letter and the spirit of the Convention in their administrative practice or when interpreting international requirements. This task is entrusted to the national judiciary, and in the case in point, also to the European Court of Justice, either directly because of the activities carried out by Community institutions, or indirectly when a national court requests a preliminary ruling[18]. However, in order to ensure the enforcement of the international rule, it is vital that the parties concerned are assured a further remedy.

The issue is not just a theoretical one. Let us prove it with a concrete case concerning the protection of the right to access environmental information.

III. A Case-Study: To Whom Are Governments Accountable?

"How can you oppose your own government? Shame on you!" - said a national officer from the Espoo Convention's Implementation Committee to a representative of an NGO[19]. This statement highlights, in its apparent contradiction, a new feature of the international system: citizens have tools to ask governments to be accountable for the commitments they have made at international level. The adoption of these tools, aimed at assuring the compliance of public powers, is an increasingly widespread phenomenon in international organisations, both regional and universal. In fact, the more these provisions are complied with, the more an international agreement is effective.

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even if such measures would not necessarily involve any breach of the Convention, and to recommend to Parties having already reduced existing rights to keep the matter closely under review".

[18] This reveals the complexity of relations that can be established vertically among the global, European and national levels, as already demonstrated by Cassese, *supra* note 4.

[19] Occurrence reported by Svitlana Kravchenko, Strengthening Implementation of MEAS: The Innovative Aarhus Compliance Mechanism, *in*: *Seventh International Conference on Environmental Compliance and Enforcement*, 9-15 April 2005, Morocco, 257, available at http://www.inece.org/conference/7/vol1/Kravchenko.pdf.

In 2002, Green Salvation - an NGO working in the field of environmental protection - was denied access to a feasibility study requested by the National Atomic Company (Kazatomprom) of the Republic of Kazakhstan. The President of the Company intended to use the feasibility study to submit a bill to Parliament to allow the import and disposal on domestic territory of radioactive waste from foreign countries. After a number of attempts, the NGO decided to take the controversy to court and went through different instances of judgement. In the end, the Court did not recognise Green Salvation the right and sufficient interest to file a suit in its own name.

The NGO, in a communication[20], brought the issue to the Compliance Committee, a subsidiary body of the AC's Meeting of the Parties (MOP). The Compliance Committee was called to decide, as a last resort, if a private company, the National Atomic Company, that performs public functions under public control and is fully owned by the State, falls within the definition of "public authority", as set out in Article 2, para. 2, AC[21]; *i.e.*, if the access to environmental information should also be allowed when information does not concern a decision-making process under way, but only proposals; or, in other words, if an NGO is entitled to such information.

The Committee determined that the communication was admissible[22], and then, in the Findings and Recommendations, it affirmed that an obligation to guarantee access to environmental information is applicable also to private companies that perform administrative functions (and operate under the control of public authorities), and that these entities are required to meet requests for access, even if they do not include the detailed reason for which such information is requested. Moreover, under the AC, any procedure for appealing failure to access information must be expeditious, whereas in this specific case the number of procedures in domestic courts demonstrates a lack of clear guidance as regards jurisdiction.

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[20] Communication ACCC/C/2004/01 by Green Salvation (Kazakhstan).

[21] According to Art. 2, para. 2, "Public authority means: a) Government at national, regional and other level; b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above; [...]".

[22] Fourth Meeting Compliance Committee, Doc. MP.PP/C.1/2004/4, para. 18.

Thus, by having failed to guarantee access to an expeditious procedure and having denied standing to a lawsuit, Kazakhstan is considered to be not in compliance with the obligations established in the Convention. The Committee recommended the MOP to request the Government of Kazakhstan to develop a strategy "including a time schedule" to adjust its administrative practice to the provisions of the Convention. This measure was accompanied by other recommendations, namely to provide the judiciary and public officials involved in environmental matters[23] with training and capacity-building activities. The MOP implemented what was indicated by the Compliance Committee with Decision II/5a[24]. At a later stage (March 2006), as a follow-up to the recommendation, Kazakhstan's Ministry of Environment sent the Compliance Committee a draft report implementing the measures required in the MOP Decision[25].

In the case described, a national government was held accountable for the non-conformity of its law with commitments taken at international level before a global body. This took place through a compliance procedure that can be started upon the initiative of a private person under an international treaty.

This cooperation system involves different players globally. States and private persons can raise non-compliance issues; the Committee is entrusted with matters in the bottom-up stage and reviews the compliance of domestic actions with the international rule; the MOP is responsible for the final decision on the Committees' findings; and again the Committee verifies the national implementation plan in the top-down stage, "for transposing the Convention's provisions into national law and developing practical mechanisms and implementing legislation that sets out clear procedures for their implementation"[26].

This mechanism raises a number of questions. What are the criteria informing this compliance procedure? Are there risks of overlapping with other dispute resolution remedies? Can this procedure impose the national authority to comply with the international rule? Are the Committee's deci-

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[23] See *Report on the Seventh Meeting*, Compliance Committee, Findings and Recommendations, 11 March 2005, Doc. ECE/MP.PP/C.1/2005/2/Add.1.

[24] See *Report of the Second Meeting of the Parties*, Decision II/5a, *Compliance by Kazakhstan with its obligations under the Aarhus Convention*, 13 June 2005, Doc. ECE/MP.PP/2005/2/Add.7.

[25] The information is contained in the comments on the Draft Findings and Recommendations concerning Communication ACCC/C/2004/06 on Kazakhstan sent by the Government of Kazakhstan.

[26] See Doc. ECE/MP.PP/2005/13/Add.3.

sions substantially, though not formally, binding? Lastly, does this procedure contribute to extend national governments' accountability?

IV. Compliance Review in the Aarhus Convention

The Compliance Committee, a subsidiary body of the MOP, was established under the provisions of Art. 15 AC. This article sets out that the MOP can establish, on a "consensus basis", arrangements of a "non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention". In further describing the character of these arrangements, it is added that appropriate public involvement is allowed which "may include the option of considering communications from members of the public on matters related to this Convention"[27].

The review of compliance, as designed in Decision I/7[28], is meant to implement these lines, and it even strengthens, to some extent, the role on non-State players. The structure and function of compliance procedures will be analysed below, together with the legal nature of decisions, with a particular focus on the role played by the Compliance Committee and the position of private actors in the procedure. Moreover, this system has just become operational and is therefore still at an experimental stage.

The Committee is made up of nine members [29] - eight when it was set up - who work independently and impartially[30] and are selected on the basis of their specific expertise in environmental, legal and non-legal issues, taking into consideration the geographical area they come from. The mem-

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[27] See AC, Art. 15, Review of Compliance. The review of compliance system does not replace but is an alternative to the settlement of disputes, which provides the remission before the International Court of Justice or an arbitration panel of conflicts between two or more States concerning the interpretation or application of the Convention. The *Report of the First Meeting of the Parties*, 17 December 2002, Doc. ECE/MP.PP/2, para. 47, specifies that "[t]he Meeting adopted the Decision I/7 on the review of compliance by acclamation".

[28] See *Report of the First Meeting of the Parties*, Addendum, Decision I/7, Review of Compliance, 21-23 October 2002, Doc. ECE/MP.PP/2/Add.8.

[29] See *Report of the Second Meeting of the Parties*, Decision II/5, General Issues of Compliance, para. 12, Doc. ECE/MP.PP/2005/2/Add.6.

[30] See Decision I/7, para. 11, "(e)very member serving on the Committee shall, before taking up his or her duties, make a solemn declaration in a meeting of the Committee that he or she will perform his or her functions impartially and conscientiously".

bers are elected "by consensus or, failing consensus, by secret ballot" by the MOP. However, NGOs that promote environmental protection and have been admitted to the MOP's activities as observers can appoint candidates just like the States that are parties to the AC (and Signatories, *i.e.* countries that have not ratified the treaty domestically). Candidates are then elected by the MOP itself[31]. These elements show that the Committee is set up autonomously from government pressure and with a significant role being played by NGOs. The intention was clearly that of having a body responsible for compliance review that is balanced and unbiased.

The Compliance Committee meets several times a year and NGOs participate in the meetings as observers[32]. The Compliance Committee has responsibilities for monitoring procedures and reviewing compliance. The former consists in examining the regular reports sent by States Parties which provide useful information for outlining the situation of individual countries[33]. The latter can be started by a request called "submission", "referral" or "communication", depending on the entity submitting the request - Member States, Secretariat or citizens - and consists in examining issues of compliance with the AC. The request must be made in written form, can be sent electronically and must be accompanied by relevant information or adequate evidence. There is no final date for sending in the request.

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31 "[..] the right of NGOs to nominate candidates is already significant... two of the present members of the Committee were in fact nominated by NGOs", see JEREMY WATES, NGOs and the Aarhus Convention, *in*: *Civil Society, International Courts and Compliance Bodies* 183 (TULLIO TREVES / MARCO FRIGESSI DI RATTALMA / ATTILA TANZI / ALESSANDRO FODELLA / CESARE PITEA / CHIARA RAGNI eds., 2005).

32 See *Report of the Compliance Committee*, 11 March 2005, Doc. ECE/MP.PP/2005/13, para. 3.

33 The Compliance Committee supervises the national reports and the summary reports sent by the Secretariat. Reports must be drafted according to the transparency principle, involving citizens in the drafting process; also, they must be completed and filed in the terms specified, pursuant to Decision I/8 on reporting requirements, see Doc. ECE/MP.PP/2/Add.9, and Decision II/10, Doc. ECE/MP.PP/2005/2/Add.14. Other possible sources of information are shadow reports, prepared by NGOs, following a practice already known in the area of human rights, and sent to the Secretariat. It is uncertain if the latter can use this information in preparing the summary report. On this point, see *The Role and Tasks of the Compliance Committee in relation to the Reporting Regime under the Convention*, Notes of the Secretariat, 20 January 2004.

As regards the procedure of reviewing compliance, the power of raising issues of "non-compliance [...] by one or more members of the public", considerably broadens the potential of this arrangement. Furthermore, the provision does not specify any requirement of citizenship, so private persons or NGOs who make a request could live in a country other than the country where the procedure has begun[34].

Private individuals enjoy a broad access to the procedure; however, there are some admissibility requirements. If the communication is anonymous, or is an abuse of this power, or is clearly unreasonable, or else is incompatible with the provisions of the Convention, the Committee declares its inadmissibility through a "preliminary determination". At the same time, 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"[35]. The provision is ambiguous. In particular, it is not clear if it is possible to accept communications when not all domestic remedies have been exhausted, nor is the reference to means of redress obvious, considering that the review of compliance does not restore the *status quo ante*.

Nonetheless, it is certain that the Committee interpreted this provision in a broad sense, *i.e.* that it does not prevent the Committee from reviewing matters that have not been finally settled domestically[36]. This might imply a risk of overlapping judgements, from national, Community or international entities, which might result in conflicting or mutually conditioned decisions. Besides, there is not even a preclusion to review requests that are identical to others dealt with in another international forum. All in all,

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[34] In fact, in the procedure started by Communication ACCC/C/2004/05, an NGO of the Moldova Republic asked for the review of the regulation on public associations, approved by the Republic of Turkmenistan in November 2003. Through a new regime for the registration of NGOs, the regulation limited the activities of NGOs working on environmental matters and prevented the exercise of their rights if they lack the requirements of citizenship, nationality or domicile.

[35] See Doc. ECE/MP.PP/2/Add.8, para. 21.

[36] "The Committee's view is that this provision does not imply any strict requirement that all domestic remedies must be exhausted, *i.e.* the Committee would not be precluded from considering a case even where the application of the remedy was not unreasonably prolonged". "The fact that a domestic remedy, even one which is not unreasonably prolonged or does provide an effective or sufficient means of redress, was available and was not used in the case does not in itself preclude the Committee from considering the communication", Doc. ECE/MP.PP/2005/13, para. 15.

the rule is not applied that "States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system"[37].

An exchange between the Compliance Committee and the State concerned is started as soon as the request is made. In fact, once the State has been informed, it can send the Compliance Committee written notes or the documents needed within five months. The Compliance Committee can gather information in the territory of the State concerned, with the consent of the same; it can consider information sent by different subjects, guaranteeing confidentiality in case those who have sent the information risk being discriminated or penalized; and can seek the services of experts and advisers. This shows the importance of the information-gathering and on-the-spot appraisal activity, which must be as complete and accessible as possible[38].

Similarly, the principles of participation and exchange between the parties during the proceedings are key. The private individual and the country involved in the communication are entitled to participate, also orally, in the discussion of the matter, must receive the draft decision, and can submit their comments on the draft decision. However, they cannot take part in the intermediate procedure, when the Committee decides and assesses the measures to adopt. Procedural and substantial guarantees seem to make the review of compliance an equitable procedure. At the same time, the Committee enriched its *modus operandi* on the basis of the above criteria, by regulating some procedural aspects, also autonomously[39]. The Compliance Commission is thus intended as an independent entity that works

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[37] See European Court of Human Rights, *Akdivar and others v. Turkey* (21893/93) [1996] ECHR 35 (16 September 1996), para. 65. For instance, the same rule is adopted in the compliance procedure of the North American Agreement on Environmental Cooperation (Art. 14).

[38] All details of the proceeding are made available on the Internet, which might lead other NGOs to follow suit. On this point, see Compliance Committee, Second Meeting, September 2003, *Information gathering and on-the-spot appraisal*, which takes into account the experience of other Committees performing identical functions, such as the Committee on Human Rights, or which work under the umbrella of other treaties, such as the Bern Convention or the Montreal Protocol.

[39] See *Report on the Sixth Meeting*, Doc. MP.PP/C.1/2004/8: "The Committee revisited the question of the late submission of substantial new information. It considered that it should not feel constrained to take account of any such information submitted less than two weeks before the meeting at which it was due to be discussed. Nevertheless, it should remain free to take account of information submitted after that deadline if to do otherwise would hamper its work".

with quasi-judicial character, even though this feature is mitigated by taking into account some State sovereignty.

The Compliance Committee does not perform its tasks by reviewing the compatibility of domestic legislation with the Convention's requirements in abstract terms. It starts from the case in point submitted to it, firstly reviewing the procedures and the final acts taken by public administration, from the perspective of the procedural rights guaranteed to private parties[40]. It takes into consideration the interpretation, the implementation and the enforcement of the international rule, as well as the concrete developments and circumstances behind the case. This does not mean that the Compliance Committee is bound by the rule of the correspondence between the relief sought and the decision. On the one hand, the Committee focuses on what it considers to be the most relevant aspects[41]; on the other, it is not compelled to review the case as presented by the parties concerned, but it is free to draw conclusions that go beyond what was requested.

At the end of the review, the Committee compiles the Findings and Recommendations, including the assessment of the alleged violation and the proposed measures to be adopted. The document is sent to the MOP.

The measures are typified in the document regulating the compliance procedure, and are to be chosen on the basis of the cause, degree and frequency of non-compliance. They can consist of recommendations, the imposition of report obligations, the verification of the violation, up to the

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[40] On this aspect, the form of the administrative act does not influence the application of the access and participation rights contained in the AC. In fact, in the procedure started by Communication ACCC/C/2004/08, some decrees of the Government of the Republic of Armenia which were legislative in nature, but had a substantially administrative content, were considered to be in violation of the international rule. Through these decrees, the authority had zoned a particular area for business concerns, specifying the names of the firms that would run the businesses. Irrespective of the legal form of the act, the Committee considered two infringements of international legality: *i)* the decree had not been preceded by appropriate public participation, and *ii)* there was no reason to use a decree - which in Armenia can only be reviewed by the Constitutional Court on the initiative of the President, of a member of the Government or of the Parliamentary Assembly - rather than a measure that is subject to administrative judicial review (See *Findings and Recommendations*, Doc. ECE/MP.PP/C.1/2006/2/Add.1).

[41] See *Report on the Sixth Meeting*, Doc. MP.PP/C.1/2004/8: "The Committee, for practical reasons, should be free to decide not to address all the arguments and assertions presented but rather to focus upon those that it considered most relevant".

suspension of the State's special rights and privileges arising from the international agreement[42]. It is explicitly specified that, in the cases of communications (by private actors), the MOP urges the State to commit to a plan, to be sent to the Compliance Committee, with a view to reaching full compliance with international provisions "concerned on specific measures to address the matter raised by the member of the public". Hence, the decision is not just a general invitation to comply with the provisions of the Convention; it binds the country concerned to adopt timely remedies which can redress the infringement of the international rule.

Softer measures can be taken by the Committee itself, in agreement with the country concerned, pending the opening of the Meeting of the Parties. The other measures must be recommended by the MOP. Some of them do not seem to be fully consistent with Article 15 of the AC, in which this procedure is defined as "non-confrontational, non-judicial and consultative"[43]. In particular, the "stronger measures", such as the suspension of rights and privileges of a Contracting party, though not yet enforced so far, seem to be sanctions inflicted by a body having authority rather than the outcome of a dialogue between entities on equal terms[44].

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[42] Namely, they are: *a)* "provide advice and facilitate regarding the implementation"; *b)* "make recommendations"; *c)* "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"; *d)* "issue declarations of non-compliance"; *e)* "issue cautions"; *f)* "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" (See Decision I/7, Doc. ECE/MP.PP/2/Add.8).

[43] See Annex, ECE/MP.PP/2, *Statement by the delegation of the United States with respect to the establishment of the Compliance Committee*: "it is difficult to see how measures such as the issuance of 'declarations of non-compliance', the issuance of 'cautions', and the suspension of a Party's rights and privileges could be considered 'non-confrontational, non-judicial and consultative' [...] we view each compliance procedure as uniquely reflective of the particular obligations and character within the governing agreement [...] the United States will not recognize this regime as precedent".

[44] As is clearly noted in MARK R. GOLDSCHMIDT, The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation, 29 *B.C. Envtl. Aff. L. Rev* 343, 346 (2002), "[t]he traditional view of international law is that countries accept treaties that are in their best interest; because of this, countries generally comply with them. When countries do not comply with treaties, sanctions are employed

Once these premises have been made, attention should be devoted to three aspects: the ascertainment, the expertise, and the nature of the decision concluding the procedure.

Firstly, the MOP has the power "[to] issue declarations of non-compliance". In practice, however, this power has been taken on by the Committee: in all its decisions, it moves from the ascertainment of an infringement of one or more AC provisions. This changes the nature of the activity of this body. Instead of providing a mechanism aimed at supporting and facilitating compliance with the obligations under the Convention and preventing litigation, it becomes an instrument that ascertains the reasons of one party and the wrongdoing of the other.

Secondly, an approach based on the independence and the expertise of the compliance body has already been greatly enhanced in the compliance review. The MOP has always endorsed the Committee's findings in all its decisions, thus supporting its strength and authority[45]. Although this results in recommendations that are not always detailed, the system is enhanced by its flexibility: the case is tried with the support of technical considerations through a procedure that draws inspiration from the due process logic.

Thirdly, the MOP's decision is not a binding obligation for the State to which the resolution is addressed, as it is a soft law measure[46]. However, even if a compliance obligation is lacking, there is indeed a strong incentive to implement the MOP's final decision in the domestic legal system. This incentive is the Compliance Committee monitoring the enforcement of this decision. A member of the public may raise again an issue of non-compliance, thus reopening the proceedings.

From the point of view of the member of the public who has submitted the "communication", however, neither the Compliance Committee nor the MOP has the power to compensate for or take measures that can make up for any damage incurred by the applicant and restore the previous situa-

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both to punish offenders and to serve as deterrents designed to encourage future compliance".

[45] This was the case in the following MOP's decisions: Decision II/5a (Doc. ECE/MP.PP/2005/2/Add.7); Decision II/5b (Doc. ECE/MP.PP/2005/2/Add.8); and Decision II/5c (Doc. ECE/MP.PP/2005/2/Add.9).

[46] On the effectiveness of the global order, even if grounded on non-binding rules such as soft law, best-practice rules, and standards, see DIETER KERWER, Rules that Many Use: Standards and Global Regulation, 18 *Governance* 611 (2005). With particular reference to compliance systems, see GOLDSCHMIDT, *supra* note 44, at 343.

tion. They can neither replace the assessment of the national public authority with theirs nor reverse a domestic administrative measure, since it is indeed the State that has to adopt the most appropriate measures to eliminate the effects of the infringement of the international rule.

Ultimately, the Compliance Committee interprets the Treaty provisions that are directly applicable in national systems[47]. When it identifies the public authorities falling within the scope of the Convention, the documents to which access is to be granted, or the requirements conferring participation rights, this body specifies the scope of the international rules that are binding on national administrative authorities[48]. On the one hand, the MOP's ascertainment acquires unusual features, and *can be considered nearly equivalent* to the international rule. On the other, the issue of compliance obligation is reduced, as it does not represent a new obligation, but it only stems from an interpretation of the Convention. This seems to confirm the remark whereby global law is based on the power of the courts, since it tends to originate from judgements settling international controversies[49].

V. Similarities and Differences with Other Compliance Review Systems

A broad notion of compliance review includes a number of systems. Some of them are based on the trial model: they produce direct effects, have authoritative character, are regulated by international rules, are executed by independent and permanent bodies, work according to criteria of reliability, and provide the public with participatory instruments. Others, instead, produce indirect effects, are based on the "persuasive" character of

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[47] On judicial law-making at an international level, see Tullio Treves, Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?, *in*: *Developments of International Law in Treaty Making* 587 (Rüdiger Wolfrum / Volker Röben eds., 2005).

[48] For instance, in the procedure started by the communication filed by Ecopravo-Lviv, ACCC/C/2004/03, concerning the construction of a navigable canal on the Danube delta by the Ukraine Government (Bystroe Canal Project), the decision concerns the interpretations given by the Ministry of Environment and the domestic courts to the requirements allowing public participation in the environmental impact assessment decision-making process.

[49] See Andreas Fischer-Lescano, Die Emergenz der Globalverfassung, *in*: 63 *ZaöRV* 717 (2003).

the bodies entrusted with the review, and are led by bodies consisting of national representatives who assess the domestic degree of policy implementation. Environmental guidelines tend to belong to the second model[50].

The common trait of compliance systems lies in the "collective management" of the problem of monitoring the implementation of the obligations stemming from conventions by the Parties to the treaty. This implies the involvement of global bodies specifically established by national governments and civil society.

Before comparing the most significant aspects with other compliance systems in environmental matters, the rationale underlying this mechanism must be briefly outlined. The NGOs' prominent role does not only concern the compliance procedure, but it can also be traced in the procedure that was conducive to the adoption of the AC, and, subsequently, its implementation mechanisms. The NGOs, gathered in the European ECO Forum, have led the way in the preparatory stage for the Convention, the so-called road to Aarhus[51]. This was an exception to the rule whereby NGOs are not

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[50] UN/ECE adopted the "Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements in the ECE region", Fifth Ministerial Conference Pan-European "Environment for Europe", Kiev, Ukraine, 21-23 May 2003, Doc. ECE/CEP/107. These are non-legally-binding criteria, of a consultative nature, which should inform existing and future monitoring procedures within environmental framework conventions. Also, the "Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements", adopted in 2002 by the UNEP Governing Council, contain a set of instruments, advice, proposals and measures that might be used in compliance mechanisms. The two documents do not differ much in terms of content, since both of them consider this procedure as a way to specify criticalities in the implementation of obligations arising from an international treaty, to probe causes and generally offer solutions appropriate to each case, including the provision of technical and/or financial support. The procedures aimed at pursuing the international compliance objective are typically two: a monitoring activity, through the appraisal of the regular progress reports presented by the States on the fulfilment of relevant obligations, and direct proceedings aimed at assessing individual non-compliance situations, brought before competent bodies.

[51] On the importance of the Pan-European NGO Coalition first, and the European ECO Forum later, defined "citizen diplomats", in the making of this Treaty (Fourth Ministerial Conference "Environment for Europe"), see SVITLANA KRAVCHENKO, Citizen Enforcement of Environmental Law in Eastern Europe, 10 *Widener L. Rev.* 475, 497 (2004). On the role of cultural change aimed at participatory democracy, see REC, Regional Environmental Center for Central and Eastern Europe, *Doors to Democracy - A Pan-European Assessment of Current Trends and Practices in Public Participation in Environmental Matters*, Hungary, 1998.

entitled to take part in the formation of an international agreement[52]. It suffices to consider that: *a)* the idea of adopting a Convention on environmental procedural rights was put forward by the NGOs themselves during the 1994 Geneva meeting; *b)* the NGOs have cooperated with the UN/ECE Secretariat in drawing up the draft that laid the groundwork for intergovernmental negotiations; *c)* the same NGOs have taken part in the negotiation procedure on a substantially equal footing as the governmental delegations, although they had an observer status. In practice, the role that NGOs play in the review of compliance largely depended on the weight that they had in the treaty-making process and the subsequent MOP's activity. Their success was favoured by the financial support offered by some governments to the participation of those organisations[53].

Compared with the compliance procedures adopted in environmental matters, those of the AC differ because of a greater public involvement, similarly to what happens for human rights protection. The procedures to monitor the enforcement of the rules laid down in international treaties vary according to the bodies in charge of this function, the stages through which the examination is carried out, and the subjects that are entitled to initiate the procedure. The four following aspects differentiate this compliance procedure from the procedures adopted within other international agreements: the make-up of the compliance body, the procedural rights and guarantees granted to the public, the distinctive nature of the decision and the characteristics of this mechanism.

In the past few years compliance bodies have increasingly grown in number: this function is directly performed by a Secretariat[54] under some Conventions, sometimes resulting in a duplication of structures with refer-

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[52] Another exception concerns the role played by workers' and employers' representatives in the International Labour Organization (ILO); on this see MENNO T. KAMMINGA, The Evolving Status of NGOs under International Law: A Threat to the Inter-State System, *in*: *State, Sovereignty, and International Governance* 394 (GERARD KREIJEN ed., 2004).

[53] On the different stages of the Aarhus Convention negotiation process, see WATES, *supra* note 31, at 167. According to KAMMINGA, *supra* note 52, at 404: "international decisions taken without the input of NGOs risk remaining unimplemented because they lack the required degree of public support. By contributing expertise NGOs also help to improve the *quality* of international decisions".

[54] See *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITIES, 1973).

ence to the obligations laid down in the annexed protocols[55]. In most cases, those bodies consist of individuals who have close links with the governments that appoint them, which removes their independence[56]. In contrast, in the AC - as well as in the Kyoto protocol - a different approach was adopted, aiming at reducing the level of State control over compliance bodies, that consist of members who "act[...] in their personal capacity"[57]. Independence is so great that it might give rise to problems: the link with these non-State organisations might entail conflicts of interest with regard to the issues under discussion[58].

The autonomy and independence of a structure are closely linked with the way it works. Bodies that consist of government delegates only are less inclined to involve civil society. By contrast, this procedure is characterised by two points: the power of private individuals to bring a case of non-compliance to the Committee's attention and the participation rights afforded to them. Firstly, private individuals are not usually entitled to file a complaint against States alleging that international obligations have been

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[55] For the Protocol on Pollutant Release and Transfer Registers (PRTR), adopted in 2003 by the AC's MOP, a different compliance procedure has been established, as provided in Art. 22.

[56] See *Montreal Protocol on Substances that Deplete the Ozone Layer*, Compliance Procedure, para. 5; *UNECE Convention on Long-range Transboundary Air Pollution*, Compliance Procedure, para. 1; *UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context, Espoo*, Compliance Procedure, para. 1.

[57] In addition, NGOs have the power to propose candidates for appointment in the Committee, the final choice being made by the MOP.

[58] For instance, as observed by WATES, *supra* note 31, at 183, it may happen that an official of an NGO or a person with strong ties with an NGO is appointed member of the Compliance Committee. The issue of the conflict of interest is not explicitly regulated by Decision I/7, but it is the focus of increasing attention from the Compliance Committee, which has repeatedly stressed the need for protecting the principle of independence of its members, *i.e.* the equidistance from all parties involved in the review of compliance. On this point, see Doc. ECE/MP.PP/2005/13, para. 11; Doc. ECE/MP.PP/C.1/2003/2, para. 22; Doc. ECE/MP/PP/C.1/2004/2, para. 38: "[t]he Committee decided that if a Committee member considers himself or herself to have a possible conflict of interest, he or she would be expected to bring the issue to the Committee's attention and decision before consideration of that particular matter. [...] A member deemed to have a conflict of interest would be treated throughout the procedure as an observer and would not take part in formal discussions or participate in the preparation or adoption of findings, measures or recommendations with respect to the case in question".

infringed, except for systems that are in place to protect human rights[59]. The AC is the first Convention that has laid down this entitlement in environmental matters, thus placing private entities in a better position to achieve the common goal, *i.e.* to ensure the effectiveness of the procedural rights under the Treaty. In practice, only NGOs have made use of this remedy by making their requests through an easily accessible instrument. However, this may entail the risk of an excessive workload, and of a political use of the review of compliance, so the MOP has an important mediation role to play. In order to avoid those risks, procedural guarantees appear decisive. Impartiality is guaranteed by the fact that the parties are on an equal footing: the State concerned may reply and take part in the discussion, just like the private actor who has filed the communication.

This broad legitimisation mostly coincides with a more careful ascertainment decision that is adjusted to take into account the requests of the private party. This character is all the more evident if a comparative analysis is made with the Factual Record of the Citizen Submission Process, provided within the North American Agreement on Environmental Cooperation (hereinafter NAAEC)[60]. This arrangement does not provide for the failure to enforce the international environmental rule on the part of public

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[59] A non-compliance mechanism in the field of human rights can be triggered by individuals and NGOs: *Human Rights Committee; International Covenant on Civil and Political Rights (First Optional Protocol); International Labour Organization* (by *employers* and *trade union organizations*). And also in the *NAFTA Environmental Side Agreement*. On "third-party intervention" by NGOs before the International Court of Justice according to Art. 66 Court's Statute, see DINAH SHELTON, The Participation of Nongovernmental Organizations in International Judicial Proceedings, 88 *Am. J. Int'l L.* 611, 619 (1994).

[60] A Citizen Submission Process is also provided in NAAEC, in which it "addresses domestic legal enforcement through an international agreement, and it empowers individuals, even those from other jurisdictions, to bring claims against a sovereign state [...] is an example of 'complaint-based monitoring' and while it is not a form of supranational adjudication, it shares some important characteristics of such adjudication", see KAL RAUSTIALA, Police Patrols & Fire Alarms in the NAAEC, 26 *LoY. L.A. Int'l & Comp. L. Rev.* 389, 397 (2004). Basically, citizens may raise non-compliance issues with respect to one of the three NAFTA countries, as regards the Environmental Side Agreement. The procedure is handled by a technical body, the Secretariat, with technical and scientific responsibilities. See DAVID L. MARKELL, The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance, 26 *LoY. L.A. Int'l & Comp. L. Rev.* 341 (2004); JOHN H. KNOX, Separated at Birth: The North American Agreements on Labor and the Environment, 26 *LoY. L.A. Int'l & Comp. L. Rev.* 359 (2004).

powers, since it only collects the opinions of the parties, supplemented by sectoral experts[61]. Therefore, the monitoring body cannot take a stance, but can only account for what emerges from the investigation. Yet, transparency, public participation and, especially, the objective character of the investigation that are upstream this decision-making process "more effectively influence long-term domestic behaviour than do coercive international enforcement measures"[62]. Notwithstanding, this character limits this procedure, compared to which the decision of the AC compliance system is surely a step forward.

As a general rule, the aim of the monitoring mechanisms is to ascertain compliance failures, to identify the causes and aspects of the difficulties encountered in enforcing the obligations under the Convention, and to offer appropriate solutions, including the submission of a technical and financial report. In fact, monitoring mechanisms are non-confrontational, in that they should enable a dialogue between the parties aimed at achieving consensus-based solutions in a constructive environment. The entity that has raised the issue should step aside, while the Committee and the allegedly non-compliant Party enter into a dialogue. These features discriminate this procedure from dispute settlement, which is adversarial - *i.e.* the parties confront each other, so that one is afforded a remedy for the prejudice incurred. The compliance procedure is therefore future-oriented and proactive, in that the aim is to find the causes and work out the most appropriate response to remain compliant or to restore a compliance level. By contrast, dispute settlement is past-oriented and reactive, in that it is a remedy to afford compensation to a party injured by an illegitimate act. Moreover, the former is an instrument aimed at protecting the *common interest, i.e.* compliance with the Treaty, while the main aim of the latter is to protect the *individual interests* of a State. For these reasons also, the former is mandatory while the latter is consensual.

If the theoretical framework is compared to the outcomes of the AC's compliance procedure that has been analysed, some features emerge that

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61 "A factual record is a document that lays out the facts of a submission and the subsequent investigation and makes no attempt to conclude whether a Party has failed to enforce its own domestic environmental laws effectively", see GOLDSCHMIDT, *supra* note 44, at 345. In addition, pursuant to Art. 15 of NAAEC, the preparation of a factual record can begin only after a favourable vote - two-third majority - of the Council, a body including governmental representatives.

62 See GOLDSCHMIDT, *supra* note 44, at 346.

make the compliance procedure look like a dispute settlement process[63]. In fact: *a)* cooperation profiles are weaker, in that the decision has a declaratory nature, since the Treaty provisions are interpreted and non-compliance is ascertained[64]; *b)* there are proactive recommendations to adapt the domestic rules to the AC provisions, but there are also reactive measures to remedy the infringement of the rule, by recommending immediate conformity with the international norm[65]; *c)* the system contains adversarial features, in that both parties, on a substantially equal footing, take part in the discussion prior to the resolution; *d)* the procedure does not restore the procedural rights of the private party, nor is it supplemented by economic sanctions[66]; however, it is an important means of pressure to enforce those rights in the domestic legal system; *e)* the system is consensual as there exists an opting-out clause: any State is entitled - though this must occur explicitly and in writing - not to accept resolutions that are the outcome of a proceeding initiated by a "communication from the public"[67].

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[63] See VOLKER RÖBEN, Institutional Developments under Modern International Environmental Agreements, 4 *Max Planck Y.B. U.N.L.* 365, 412 (2000).

[64] Following the example of the interpretation activity carried out by the *Human Rights Committee* with its "general observations", the Committee intends to strengthen its interpretation activity, as shown in the *Guidance Document on Aarhus Convention Compliance Mechanism*, at 27, specifying that "due to its mandate, the Committee will have to develop some interpretation for some provisions of the Convention as well as a jurisprudence, in order to make recommendation following communications or to answer to requests of the Meeting of the Parties".

[65] See Doc. ECE/MP.PP/2005/13/Add.5: The Compliance Committee recommends to the Meeting of the Parties to "recommend that the Government of Turkmenistan should immediately take appropriate interim measures with a view to ensuring that the provisions of the Act are implemented as far as possible in a manner which is in compliance with the requirements of the Convention".

[66] See KYLA SANDOR, Compliance and the Acid Rain Program, Climate Change Central, Discussion Paper C3-03, April 27, 2002, at 13.

[67] However, the consensual nature of the system is mitigated by three factors: *a)* the choice is public, which is a disincentive; *b)* it is so only for requests coming from members of the public; *c)* the opting-out clause is subject to a (four year) time term, after which the mechanism becomes mandatory. As contained in Doc. ECE/MP.PP/2/Add.8, para. 18, "[...] communications may be brought [...] by one or more members of the public concerning that Party's compliance [...], 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". Finally, in Doc. ECE/MP.PP/2005/13, para. 19, it is specified that "To date, no Party has opted out [...]".

VI. Final Considerations: Implications on the Behaviour and Accountability of States

Some features of the review of compliance under the AC are extremely interesting if combined with the provisions of this international Convention that do not impose obligations on States, but procedural rights that States have to grant to the public[68]. And since the interests of three actors (international, national, and private) are at stake, the consequences on accountability should be considered of the mechanism whereby a citizen may claim against his or her own State's compliance with a global administrative law affording rights of information, participation and judicial review[69].

First and foremost, global law is higher law. As indicated above, the obligations under this Convention are binding, since they are ratified by a national law and incorporated in Community legislation. However, this does not completely solve the issue of compliance with international rules. Resorting to traditional domestic dispute settlement mechanisms may prove insufficient to ensure full compliance with obligations under the Convention[70]. Hence, the compliance procedure makes it possible for private entities, and notably NGOs, to access an *ad hoc* international body that, out of

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[68] With regard to this, see Ruth W. Grant / Robert O. Keohane, Accountability and Abuses of Power in World Politics, 99 *American Political Science Review* 29 (2005).

[69] In contrast, the accountability issue may concern the Compliance Committee: to whom are Compliance Committee members accountable? This point is not the subject of this paper, but it deserves attention, especially when considering the hybrid nature of the Committee. In fact, its independence, its close ties with NGOs and its wide discretionary powers in considering any issues raised by members of the public may lead to a biased use of this mechanism. To compensate for this, some factors may be of help: *a)* transparency in the performance of this activity; *b)* the participation of the parties involved; *c)* the typical remedies for solving conflicts of interests (See Doc. ECE/MP.PP/C.1/2003/2, para. 22, "'Normal principles' of conflict of interest apply for the Committee"); and *d)* the intermediation of the MOP, the final arbitrator of the decision.

[70] As claimed by Gordon Silverstein, Globalization and the rule of law: "A machine that runs of itself?", 1 *Int'l J. Const. L.* 427, 444 (2003), "[g]lobalization requires the rule of law. The rule of law requires a reliable and at least somewhat independent judiciary to enforce established rules". A sceptical position toward the domestic level of compliance in environmental governance is expressed by David Markell, "Slack" in the Administrative State and its Implications for Governance: The Issue of Accountability, 84 *Or. L. Rev.* 1, 6 (2005).

all these systems, is the only one to be independent and unbiased, and that monitors the domestic legislative and administrative activity with a view to guaranteeing compliance with the procedural rights afforded to private entities by the Convention's obligations. In this way, global law acquires a new characteristic without changing into a different category: it is not only higher law, but it also becomes stronger law, because its structure is suitable to prevail over national systems, even though it does not resort to mainly coercive means[71].

It is the global dimension of the interests that explains the reasons for such a wide protection, which would not be feasible if the entitlement were not so generalised and if decisions taken by other States could impinge on them. Therefore, if the interests belonging to the universal legal sphere cannot be left to the exclusive control of national constituencies, possibilities for extra-territorial protection from States tend to become wider[72].

If the action were adjudicated in court, it would be an "*actio popularis*". In this way civil society stands up to the role of "watchdog", by making its voice heard with a view to making national governments accountable for their conduct[73]. Citizens "keep watch" on governments and participate in

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[71] The pair higher law and stronger law applied to global law is used by CASSESE, *supra* note 4. See also CHRISTOPH MOELLERS, Transnational Governance without a Public Law?, *in*: *Transnational Governance and Constitutionalism* 329 (CHRISTIAN JOERGES / INGER-JOHANNE SAND / GUNTHER TEUBNER eds., 2004).

[72] As observed by KRISCH, *supra* note 3, at 254, "on many issues, regulation produces effects well beyond national boundaries and thus cannot be left to national constituencies if all affected interests are to be dealt with in a fair way".

[73] See BENEDICT KINGSBURY, The Democratic Accountability of Non-Governmental Organizations: First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal Ngo Model of International Civil Society, 3 *Chi. J. Int'l L.* 183 (2002). See also GOLDSCHMIDT, *supra* note 44, at 351: "as the international legal system shifts away from a state-centered, hierarchical, and static model to a system of networks comprised of state and non-state actors in a non-hierarchical and dynamic framework, citizens and NGOs gain greater influence concerning not only international behavior, but also domestic behavior. Pressure from domestic NGOs and the public comprises an important mechanism for promoting implementation of and compliance with treaty obligations. The more a country allows the participation of domestic groups and NGOs, the greater the probability of implementation and compliance; thus, the effectiveness of a treaty may be realized". On this topic, see SABINO CASSESE, Relations between International Organizations and National Administrations, *in*: *IISA, Proceedings, XIXth International Congress of Administrative Sciences*, Berlin, 1983.

achieving the final objective, *i.e.* the protection of the environment. The AC inspiration is transferred from the domestic sphere to the global level by setting up a forum that brings civil society and governments together, before an arbitrator that has no ties with governments[74]. The participation of civil society is useful not so much in enhancing the legitimisation of the international system, but in rendering it more efficient by improving the effectiveness and justiciability of claims[75]. Global administrative law becomes closer to and interlaces with domestic administrative law.

The strength of this mechanism lies in its being half way between a compliance and a dispute settlement procedure. Although lacking financial incentives - which played a major role, for instance, in the effectiveness of the action of the Montreal Protocol's Committee[76], or "access barriers to a club"[77] - the features of this procedure seem to render it an effective instrument. Even though the period of activity has been too short to make a general evaluation, the wide legitimacy, the specialisation in environmental issues and the incisive role played by NGOs in the make-up of the compliance body, the declaratory nature of the resolution, the monitoring of national enforcement, and the possibility to reopen the procedure whereby stronger measures may be imposed upon the State, seem to "recommend"

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[74] On the global emissions trading system, see RICHARD B. STEWART / JONATHAN BAERT WIENER, *Reconstructing Climate Policy. Beyond Kyoto* 121 (2003): "private sector firms, investors, and other entities that will be important players in global trading are an important constituency that should support credible and consistent monitoring, reporting, and compliance arrangements".

[75] It should not be forgotten that the particular structure of this system depends on the fact that the norms of the Aarhus Convention constitute obligations that States take on with respect to the general public and not obligations between State entities. Basically, the international rule is intended directly for citizens, which allows their greater involvement in public decision-making; from this perspective, the mechanism is similar to Community rules. On this topic, see GIACINTO DELLA CANANEA, Is Due Process a Global Principle of Administrative Law?, Paper written on the occasion of the Yale Law School Seminar on Law and Globalization, 25 April 2006.

[76] See BENEDICT KINGSBURY, The Concept of Compliance as a Function of Competing Conceptions of International Law, 19 *Mich. J. Int'l L.* 345, 366 (1998).

[77] For instance, an industrialised country can participate in the Kyoto Mechanism only if it complies with the emission inventory and the reporting requirements, and if it abides by Art. 18. On this point, see JUTTA BRUNNÉE, COPing with Consent: Law-Making Under Multilateral Environmental Agreements, 15 *Leiden J. Int'l L.* 1, 26 (2002).

an adequate level of compliance with international rules[78]. In any case, the setting up of a system for continuous monitoring should encourage the States to make all the necessary efforts to comply with international obligations. Its "collective" nature should facilitate the exchange of information, and finally, the cooperative spirit should permit the States' traditional reluctance to submit to forms of international control to be overcome.

Nonetheless, the compliance procedure under the AC increases the public's chances to affect the decisions taken by the national authority. Even if the result of the compliance procedure lacks the formal authority of the adjudged matter in domestic court sentences, it substantially prevents the assessment of the interests from being consolidated as contained in the domestic decision. It works as an implicit impediment to different forms of preclusion of administrative or judicial review usually characterising administrative acts in national legal systems at present, after the impugnation terms have elapsed or once they have been exercised. Hence, considering that the Committee gave a broad interpretation to the requirement that all domestic remedies must be exhausted, the possible overlapping with the domestic judicial review seems likely to result in a more direct link between international and national authorities[79].

Hence, this compliance mechanism seems to reinforce the accountability of national authorities vis-à-vis civil society, since citizens can: *a)* make use of a mechanism that contributes to ensuring the direct applicability already provided for in the international norm; *b)* take part in the proceedings they have initiated on equal terms with the State concerned, but in a privileged position with respect to other States Parties that are not involved in the non-compliance issue and are not entitled to intervene[80]; *c)*

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[78] As we have seen, so far the coercive instruments provided by the AC compliance system have not been exploited. This position of self-restraint may be accounted for by different reasons. Certainly, at the present stage of experimentation, the Committee members are inclined to have their position legitimised by their technical expertise rather than the use of last resort instruments.

[79] On this topic BENEDICT KINGSBURY, Is the proliferation of International Courts and Tribunals a systemic problem?, 31 *N.Y.U. J. Int'l L. & Pol.* 679, 695 (1999), specified that "international tribunals may not have the legitimacy necessary to play such roles in every situation, and, in deeply divided societies, they may be wiser to defer to a complex national compromise than to take the sometimes dangerous step of overturning it". On this topic, for a different perspective, see JOSEPH H.H. WEILER, The Geology of International Law - Governance, Democracy and Legitimacy, 64 *ZAÖRV* 547, 550 (2004).

[80] In this area, global administrative law seems to give life to open and not elitist and closed procedures, as claimed by M. SHAPIRO, Administrative Law Un-

claim respect for the rule of law on the part of national institutions before an international body. In conclusion, there emerges an "increased accountability of government for its actions"[81], and public powers, which can affect the environmental conditions of the community, must be subject to the scrutiny of citizens.

But there is more to it. A State can also be called to account for the international legitimacy of its environmental choices by a member of the public or by an NGO residing in another country. As the impact of environmental decisions exceeds the geographical scope of national choices, domestic authorities are liable for those who appear to be affected by the decisions taken by them, even if they reside in another State. Global administrative law seems to make up for the lack of authority of an adjudicated matter and of the coercive force of the international body's decision with a much broader standing system than allowed by national systems: a close link with the country where the violation of the international rule has taken place is not indispensable.

Finally, it is confirmed that when global rules are added to national rules, there result interpenetration and mutual strengthening[82]. The procedure permits a horizontal dialogue between legal systems aimed at mitigating differences, giving momentum to reformist forces. A widespread dissemination of administrative principles is thus facilitated in different political and institutional contexts. Suffice it to think of countries with transition economies, which have come out of the experience of socialism not long ago, and which are usually less accustomed to issues of environmental democracy[83]. It is not by chance that almost all "communications" have been submitted by NGOs from East-European countries or Central

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bounded: Reflections on Government and Governance, 8 *Ind. J. Global Legal Stud.* 369, 375 (2001).

[81] See RICHARD B. STEWART, The Reformation of American Administrative Law, 88 *Harv. L. Rev.* 1667 (1975). For a recent overview, see RICHARD B. STEWART, Administrative Law in the Twenty-First Century, 78 *N.Y.U. L. Rev.* 437 (2003).

[82] See CASSESE, *supra* note 1, at 671.

[83] See STEC, *supra* note 11, at 21: "The standards set by the Convention, rooted in the circumstances of transitional societies, serve as the benchmark against which reformed countries in transition can be measured". See also DELLA CANANEA, *supra* note 3. On the relationship between standing and administrative court review in Estonia, see HANNES VEINLA / KAAREL RELVE, Influence of the Aarhus Convention on Access to Justice in Environmental Matters in Estonia, 14 *European Environmental Law Review* 326 (2005).

Asia[84]. The very same organisations have played a major role in the process that led to the approval of the AC.

In conclusion, it is not to be ruled out that this *review of compliance* might foreshadow further developments, considering the legal saliency of its objective: ensuring the enforcement of global administrative law. In this sense, it is a system that might have an expansive capacity, provided that synergies between the global bodies and States involved are perfected[85]. This has been the case with the European Convention on Human Rights[86]. This is what might happen with the Compliance Committee of the Aarhus Convention. Besides, when authority is confronted with a crisis, a small countryside community might invest itself with the power of

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[84] To date - August 2006 - sixteen communications have been filed to the Compliance Committee. Fourteen of them concern Eastern European or Central Asian countries.

[85] On this point, see ECE/MP.PP/2002/9. para. 39. Guidelines, investigations or studies made by international organisations result in an ongoing assimilation process of mechanisms and models, which draw on what has already been developed by other organisations. Consequently, there tends to be a stratification of regulations that quickly become very complex, and this holds true even for the most recent ones.

[86] The original formulation of the European Convention stated that after exhausting domestic remedies, individual and State complaints are ascertained by the European Commission of Human Rights, which attempts to settle the controversy and submits a report to the Committee of Ministers. According to Articles 24 and 25 of the original text of the Convention, the individual complaint can be introduced only if the State recognises the competence of the Commission. Failing this, the case may be referred to the European Court of Human Rights by the Commission or by a State concerned - and from 1994, with Protocol No. 9, also by the claimant. Even though the Committee of Ministers does not perform the role of a judicial body, it decides whether or not the Convention has been violated and indicates the general measures to be adopted by the States concerned to put right the violation. This is what basically happens for the AC compliance review: following the ascertainment of the Compliance Committee, the Meeting of the Parties issues a decision. It seems unavoidable that decisions on international rule violations are entrusted to a body representing the States first, and only later to a judicial body. In the case of the Strasbourg Court, this has occurred after the overdue affirmation of human rights covered by international regulation. The increased number of complaints and the extension of responsibilities has led, in fact, to a reconsideration and changing of the compliance mechanism of the European Convention: Protocol No. 11 of 1 November 1998 provided for a single body, the European Court, with investigation and decision responsibilities.

stopping the flight of King Louis XVI from the Tuileries, as happened on the night of 21 June 1791.

ABSTRACTS / RÉSUMÉS

"Compliance system" and "private enforcement" are two terms commonly used to designate actions brought by a private party to recover the full and right execution of obligations arising from international rules. These two terms, although used interchangeably, have different connotations: the former reflects the nature of such claims, while the latter highlights their deterrent effect. This article considers the architecture of the Aarhus Convention, which introduced an innovative review of compliance, which deserves attention for two closely related reasons. In the first place, the Aarhus Convention concerns obligations that directly rest on public administrations, aiming at environmental protection. Secondly, this procedure allows any individual to ask an international independent body to verify that the national public authority has correctly applied the global regulation. The analysis in the paper demonstrates that the approach adopted by the Compliance Committee contributes to the strengthening of the national decision's legality. Nonetheless it may also appear somehow controversial. On the one hand, it shows respect for specific policy choices enshrined by the Member State. On the other hand, and more importantly, the Compliance Committee energetically pushes forward its own vision of the Convention rights. The paper seeks to set out a general framework for understanding the administrative compliance system more broadly. It becomes clear that the Aarhus Compliance System touches upon issues of cardinal importance to the Global Administrative Law, as it seeks to clearly establish its own role as the ultimate guarantor of legality in this new field. In order to achieve this goal, the Compliance Committee endeavours to ensure the protection of rights and thereby impliedly recognises the supremacy of Aarhus law.

"Système de conformité" et "exécution privée" sont deux expressions communément employées pour désigner des actions introduites par un particulier pour obtenir l'exécution entière et correcte d'obligations résultant de règles internationales. Bien qu'employées de manière interchangeable, ces deux expressions n'ont pas la même connotation: la première évoque la nature de ces demandes tandis que la seconde en reflète l'effet dissuasif. Cet article examine l'architecture de la Convention d'Aarhus, qui a introduit une révision innovatrice de la conformité, qui mérite attention pour deux raisons étroitement liées. En premier lieu, la Convention d'Aarhus traite d'obligations qui incombent directement à des administrations publiques, visant à la protection de l'environnement. En second lieu, cette procédure permet à tout individu de demander à une institution internationale indépendante de vérifier que l'autorité publique nationale a correctement appliqué l'ensemble de la réglementation. L'analyse montre que l'approche adoptée par la Commission de conformité contribue à renforcer la légalité des décisions nationales. Mais elle peut aussi sembler un peu controversée. D'un côté, elle fait preuve de respect envers les choix politiques spécifiques entérinés par les Etats membres. De l'autre, et cela est

plus important, la Commission de conformité promeut énergiquement sa propre vision des droits de la Convention. L'article tente de présenter un cadre général pour comprendre plus largement le système de conformité administrative. Il devient clair que le système de conformité d'Aarhus effleure des problèmes d'importance capitale pour le droit administratif global, dans la mesure où il cherche à établir clairement son propre rôle d'ultime garant de la légalité dans ce nouveau domaine. Pour atteindre ce but, la Commission de conformité fait tout pour assurer la protection des droits et reconnaît donc implicitement la primauté du droit d'Aarhus.

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