THE NON-COMPLIANCE PROCEDURE OF THE AARHUS CONVENTION:
BETWEEN ENVIRONMENTAL
AND HUMAN RIGHTS CONTROL MECHANISMS

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1. INTRODUCTORY REMARKS

When the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters1 (“the Aarhus Convention” or “the Convention”), at their first meeting in Lucca (Italy) in 2002, adopted Decision I/7 on review of compliance, establishing a Compliance Committee (the Committee),2 it was immediately clear that something unusual and peculiar was taking place in international environmental law.

Decision I/7 has its legal basis in Article 15 of the Convention, which provides that:

“The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and

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consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention". 3

This language makes an evident, although implicit, reference to the practice of setting up non-compliance procedures (NCPs) under multilateral environmental agreements (MEAs), 4 along the lines traced by that established under the Montreal Protocol 5 and subsequently followed under several other MEAs. The link to this model is indeed reflected in the institutional and procedural features of the mechanism, as well as in the language used in the Decision, in that it avoids any wording possibly suggesting judicial or confrontational attitudes. Therefore, expressions such as “non-compliance”, “submission” or “communication”, and “Party concerned” are used instead of the words “breach”, “application” or “defendant”.

At the same time, some aspects of the Aarhus Convention NCP are tremendously innovative. The Compliance Committee is conceived as a body of experts, rather than of Parties’ representatives, and non-State actors (“the public”, in the language of the Convention) 6 are provided with a wide array of entitlements, including that of making communications. 7 These features, unusual for NCPs and akin to those of quasi-judicial procedures under human rights treaties, 8 have prompted strong criticism. In particular the United States, a member of UNECE, which is not a Party, nor a signatory to the Convention, requested and obtained to have a state-

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3 On the controversial negotiation of this provision see KOESTER, “Review”, ibidem, pp. 31-32.
4 Reference to the extensive literature on NCPs will be made throughout the article. For a synthetic overview on NCPs, see GOOTE and LEFEBER, Compliance Building under the International Treaty on Plant Genetic Resources for Food and Agriculture, CGRFA Background Study Paper No. 20, 2003, available at: <ftp://ext-ftp.fao.org/ag/cgrfa/BSP/bsp20e.pdf>. For a more comprehensive analysis and further references, see BEYERLIN, STOLL and WOLFRUM (eds.), Ensuring Compliance with Multilateral Environmental Agreements, Leiden/Boston, 2006.
6 “The public” is broadly defined as “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups” (Aarhus Convention, Art. 2.4).
8 See also VOÎNOV KOHLER, Le mécanisme de contrôle du respect du Protocole de Kyoto sur les changements climatiques: entre diplomatie et droit, Zurich, 2006, pp. 86-87.