Review of Compliance under the Aarhus Convention: a Rather Unique Compliance Mechanism

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I. Introduction

The importance and character of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention or Convention) is underpinned by its provisions on the review of compliance (Article 15). The compliance provisions of the Convention are closely connected with the specific nature of the Convention. The imposition on the Contracting Parties of obligations towards their own citizens creates a rather striking similarity between the Convention and international human rights law. At the same time, however, the Convention also focuses on the protection of the environment. These two elements are not only combined in the objectives of the Convention, but also in Article 15. The history and theory of compliance and compliance review mechanisms are closely related to Multilateral Environmental Agreements (MEAs), likewise, some international bodies in the field of human rights accept complaints (communications) from individuals (members of the public). However, the provisions of Article 15 are rather weak (II). After the adoption of the Convention a process was set in motion with a view to developing the compliance mechanism (CM). This was a somewhat challenging task due to the various options included in Article 15 and the requirement that the mechanism be established on a consensus basis. In spite of this, the final outcome can be regarded as a success (III). The CM has a number of unique features. To these belong, inter alia, the composition of the Compliance Committee (CC/Committee), the triggering of the CM by communications from members of the public and its procedures (IV). The CM, established a couple of years ago, has already received a number of communications and one party-to-party submission. These are currently being considered by the Compliance Committee, inter alia with a view to making recommendations to the forthcoming Meeting of the Parties (MoP) in May 2005 (V). In due course the Convention will be applicable to EC institutions and bodies and most, if not all, EU Member States will become Contracting Parties. Also, more or less all the substantive provisions of the Convention will be covered by EC legislation. The legal consequences, particularly the relationship between the CM and the role of the European Commission and the European Court of Justice in respect of compliance with EC legislation, are not that clear and deserve further analysis (VI). It is probably too early to draw any firm conclusions on the future impact of the CM and its importance from a political point of view. However, the CM of the Aarhus Convention may, in any event, serve as a source of inspiration for the development of other compliance mechanisms, thus contributing to the development of international environmental law (VII).

II. Article 15: not a promising start

Article 15 of the UN/ECE 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Envi-
ronmental Matters (Aarhus Convention or Convention) contains the provisions of the Convention on the review of compliance. Article 15\(^2\) is quite exceptional in several respects. The Article provides for the establishment of, 1) on a consensus basis\(^3\), 2) optional arrangements for reviewing compliance with the Convention's provisions. The arrangements 3) must allow for appropriate public involvement, and 4) may include the option of considering communications from members of the public on matters related to the Convention\(^2\). The scope of the compliance arrangements, however, is fairly traditional in so far as it is limited to "reviewing compliance with the provisions of this Convention"\(^2\) corresponding to provisions in other treaties on the establishment of compliance arrangements\(^4\). Also, the requirement that the arrangements are to be of a non-confrontational, non-judicial and consultative nature is a common feature of other compliance arrangements.

The compliance provisions are closely connected to the specific nature of the Convention. The imposition on the Contracting Parties of obligations towards their own citizens creates a rather striking similarity between the Convention and international human rights law. At the same time, however, the Convention also focuses on the protection of the environment. These two elements are not only combined in the objectives of the Convention\(^7\), but also in Article 15. The history and theory of compliance, and compliance review mechanisms are closely related to MEAs, while some international bodies in the field of human rights accept complaints (communications) from individuals (members of the public)\(^5\).

Article 15 is very much characterised by the history of its negotiation. It contains all the relevant elements but the provisions are rather weak, providing for optional arrangements which may include the option of considering communications from members of the public. Furthermore, these elements shall be agreed by consensus, potentially implying a further weakening of the compliance mechanism and there is no requirement to establish the CM at the first MoP, in fact there is no time frame at all. These features reveal how difficult it was to negotiate Art 15 and to achieve consensus, which was only reached at the final working group session\(^9\).

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3 Besides the Aarhus Convention only the 2003 Protocol on Pollutant Release and Transfer Registers (2003 PRTR Protocol) to the Convention, Art. 22, contains a similar requirement.

4 No other MEAs seem to contain provisions providing for optional arrangements, public involvement or communications from members of the public, although Art. 22 of the 2003 PRTR Protocol charge the MoP to consider, inter alia, whether to allow for information to be received from members of the public.

5 Art. 15. The scope of the CM, as decided by the MoP, namely "review of compliance by the Parties with their obligations under the Convention" (Doc. ECE/MP/PP/2/Add. 8, Decision U7, Review of Compliance (hereinafterDecision U7) with Annex, Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance (hereinafterDecision U7, Annex), re. Decision U7, para. 1, could be interpreted as offering more flexibility, e.g. as including compliance with (binding) decisions of the MoP. However, it is not likely that the different wording is intentional. The Annex of Decision U7 refers simply to "compliance with the Convention" (para. 37) corresponding to e.g. Art. 18 of the 1997 Protocol to the United Nations Framework Convention on Climate Change (the 1997 Kyoto Protocol). There is, in parallel with other treaty provisions on compliance, no definition of compliance/non-compliance, neither in Art. 15, nor in Decision U7.


7 Article 1. Objectives: In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.


9 Brady, "New Convention on Access to Information and Public Participation in Environmental Matters", EPL 282, 1998 pp. 69-75 (73), describing Article 15 as "[p]erhaps the most controversial provision" and referring to "persistent opposition from Russia, and to a lesser extent Turkey, to inclusion of a strong compliance mechanism". Ironically enough neither Russia nor Turkey signed the Convention, and none of them have later ratified or otherwise acceded to it.