Public Administration and International law: should or shall?
The review of compliance in the Aarhus Convention.

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1. The Aarhus Convention, States and private actors.

"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[1]. This statement raises a number of questions. Can citizens hold Governments accountable for the commitments they have made at international level? If this is the case, which instruments do citizens have at their disposal? And why should they raise this issue? What is their underlying reason to do so?

The content, the developments and the bodies of the Aarhus Convention (AC)[2] are a sound starting point to attempt a reply to these questions.

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 recognizes rights. The Kyoto Protocol and the relevant commitment to reducing greenhouse effect gases fall within the first kind. The AC and the grant of procedural right to private actors belong to the second one[3].

The AC that was signed under the aegis of the *United Nations Economic Commission for Europe (UN/ECE)*, harmonizes environmental quality and human rights[4], thus strengthening

[1] The episode was told by Mr S. Kravchenko, *Strengthening Implementation of MEAS: The Innovative Aarhus Compliance Mechanism*, in *Seventh International Conference on Environmental Compliance and Enforcement*, 257.

[2] *Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 25 June 1998 (entered into force 30 Oct. 2001), in *International Legal Materials*, 3, 517.

[3] See also UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland, 25 Feb. 1991), in *International Legal Materials*, 1991, 802.

[4] The AC «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», S. Stec, *"Aarhus Environmental Rights" in Eastern Europe*, in *Yearbook of European Environmental Law*, vol. 5, 2005, 9.

Principle 10 of the Rio Declaration, 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[5]. 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)[6], the responsibility of contributing to safeguarding the environment. The public is required to make up for the role that public bodies should have performed. This is the procedural approach of US environmental law[7].

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[8]. 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, where the former is at the service of the latter.

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. Among them is the European Community that 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[9]. These rights are applicable in a rather

[5] 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.
[6] See S. Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, in *Michigan Journal of International Law*, 1997, 268.
[7] See J. Brunnée, *The United States and International Environmental Law: Living with an Elephant*, in *European Journal of International Law*, 2004, 628.
[8] See F. de Lange, *Beyond* Greenpeace, *Courtesy of the Aarhus Convention*, in *Yearbook of European Environmental Law*, 3, 2003, 227.

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

Is this enough to guarantee that public authorities comply to 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. The mandatory nature of the AC provisions, however, do not always result in the enforcement of the international rule, and in case of violation, the parties concerned should be assured of 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.

2. A case-study: to whom are governments accountable?

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 recognize Green Salvation the right and sufficient interest to file a suit in its own name.

The NGO, in a communication[10], 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[11]; i.e., if the access to

[9] 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, 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».

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

[11] 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; [...]».

environmental information should be allowed also when information does not concern a decision-making process under way, but only proposals; or, in other words, if a NGO is entitled to such information.

The Committe determined that the communication was admissible[12], 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 reasons 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.

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[13] with training and capacity-building activities. The MOP implemented what was indicated by the Compliance Committee[14]. At a later stage (March 2006), as a follow-up to the recommendation, Kazakhstan's Ministry of the Environment sent the Compliance Committee a draft report implementing the measures required in MOP Decision II/5a[15].

In the case described, a national government was held accountable for the 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 to the international rule; the MOP is

[12] Fourth Meeting Compliance Committee, Doc. MP.PP/C.1/2004/4, para. 18.
[13] Report on the Seventh Meeting, Compliance Committe, Findings and Recommendations, 11 March 2005, Doc. ECE/MP.PP/C.1/2005/2/Add.1.
[14] 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.
[15] The information is contained in the comments on the Draft Findings and Recommendation concerning Communication ACCC/C/2004/06 on Kazakhstan sent by the Government of Kazakhstan.

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»[16].

This mechanism raises a number of questions. What are the criteria informing this compliance procedure? Are the Committee's decisions substantially, though not formally, binding? Are there risks of overlapping with other dispute resolution remedies? Can this procedure impose the national authority to comply with the international rule? Last, but not least, does this procedure contribute to extend national governments' accountability?

An attempt will be made to answer these questions firstly by analysing the functioning and the characteristics of the AC's review of compliance; and secondly by pointing out similarities and differences with other compliance systems. Finally lights and shadows of this procedure will be highlighted with respect to the behaviour of public players.

3. The review of compliance in the Aarhus Convention.

The adoption of instruments to assure the compliance of public powers to the rule contained in international conventions is an increasingly widespread practice in international organizations, both at regional and universal level. In fact, compliance to these provisions is a measure of the strength of an international system.

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 the bodies entrusted with the review, and are led by bodies consisting of national representatives who assess the domestic degree of policy implementation.

In the environmental field, UN/ECE adopted «Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements in the ECE region»[17]. These criteria are not legally binding and are of a consultative nature, but should inform review procedures to be established or already in place within framework conventions on matters pertaining to the environment. At the same time, guidelines «on Compliance with and

[16] Doc. ECE/MP.PP/2005/13/Add.3.
[17] Fifth Ministerial Conference Pan-European "Environment for Europe", Kiev, Ukraine, 21-23 May 2003, Doc. ECE/CEP/107.

Enforcement of Multilateral Environmental Agreements (MEAs)», adopted in 2002 by the UNEP Governing Council, include a set of instruments, advice, proposals or possible measures that could be used in compliance mechanisms. The two documents are not very different in terms of content since both see this procedure as a way to specify criticalities in implementing obligations stemming from an international treaty, investigate causes and offer general solutions that are case-specific, including technical and/or financial support.

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. There are typically two procedures for pursuing compliance at international level: a monitoring activity, through the review of regular progress reports presented by States, and procedures aimed at analysing individual situations of non-compliance, submitted to the attention of competent authorities.

Both procedures are provided for in the AC and both are under the responsibility of the Compliance Committee, a subsidiary body of the MOP, established as provided in article 15, AC[18]. 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»[19]. 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».

The review of compliance, as designed in Decision I/7[20] 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.

[18] Report of the First Meeting of the Parties, 17 December 2002, Doc. ECE/MP.PP/2, para. 47, «(t)he Meeting adopted the decision I/7 on the review of compliance by acclamation».
[19] AC, art. 15, *Review of Compliance*.
[20] 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.

The Committee is made of nine members [21] – eight when it was set up – who work independently and impartially[22] 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 members 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[23]. 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[24]. The Compliance Committee has responsibilities for monitoring procedures and reviewing compliance. The former consists in examining the regular reports sent by State Parties which provide useful information for outlining the situation of individual countries[25]. 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.

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 that private persons or NGOs who make a request could live in a country other than the country where the procedure is begun.

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[21] 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.

[22] 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».

[23] «.. the right of NGOs to nominate candidates is already significant.. two of the present members of the Committee were in fact nominated by NGOs», J. Wates, *NGOs and the Aarhus Convention*, in T. Treves, M. Frigessi di Rattalma, A. Tanzi, A. Fodella, C. Pitea, C. Ragni (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague, 2005, 183.

[24] Report of the Compliance Committee, 11 March 2005, Doc. ECE/MP.PP/2005/13, para. 3.

[25] Decision I/8 on reporting requirements, Doc. ECE/MP.PP/2/Add.9; Decision II/10, Doc. ECE/MP.PP/2005/2/Add.14. On the *shadow reports*, see *The Role and Tasks of the Compliance Committee in relation to the Reporting Regime under the Convention*, Note by the Secretariat, 20 January 2004.

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»[26]. 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[27]. This might imply a risk of overlapping judgements, from national, community or international entities, that 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, 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»[28].

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 collect information gathering 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[29]. This shows the importance of the information-gathering and on-the spot appraisal activity, which must be as

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

[27] "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.

[28] ECtHR 16 Sep. 1996, *Akdivar v. Turkey*, para. 65.

[29] See Compliance Committee, Second Meeting, September 2003, "Information gathering and on-the-spot appraisals". The document takes into account the experience of other Committees performing the same functions, such as the Committee on Human Rights, and Committees operating under other treaties, such as the Bern Convention, or the Montreal Protocol.

complete and transparent as possible. In line with these requirements, all relevant information connected to the procedure is made available on the web[30].

Similarly, the principles of participation and exchange between the parties during the proceedings are key. The private individual and the country concerned by 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[31]. The Compliance Commission is thus intended as an independent entity that works 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, reviewing the way in which the international law was applied, 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[32]; 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 are as follows: a) «provide advice and facilitate regarding the implementation»; b) «make recommendations»; c) «request the Party concerned to submit a strategy, including a time

[30] The dissemination of these documents may lead other NGOs to do the same.

[31] 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».

[32] Report on the Sixth Meeting, Doc.MP.PP/C.1/2004/8: «The Committee, for practical reasons, should be free to decide non to address all the arguments and assertions presented but rather to focus upon those that it considered most relevant».

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». It is explicitly specified that, in the cases of communications, 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».

Some of those measures (a, b, c) 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 AC, in which this procedure is defined as «non-confrontational, non-judicial and consultative»[33]. In particular, the «stronger measures», such as the suspension of rights and privileges of a Contracting party, though never 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.

Finally, three aspects have to be considered: the ascertainment, the expertise, and the nature of the decision concluding the procedure. Firstly, as already noted, 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 wrong doing of the other.

Secondly, in the compliance review an approach based on the independence and the expertise of the compliance body has already been greatly enhanced. In all its decisions the MOP has always endorsed the Committee's findings, thus supporting its strength and authority. Although this results in recommendations that are not always detailed, the system is

[33] 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».

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. 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 order. 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 situation. 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[34]. 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[35], this body specifies the scope of the international rules that are binding on national administrative authorities. Hence, on the one hand, the MOP's ascertainment acquires unusual features, and *can be considered nearly equivalent* to the international rule, while, on the other, the compliance obligation issue is reduced, as it does not represent a new obligation.

4. Main features: similarities and differences with other compliance review systems.

The description of the functioning of the Compliance Committee under the AC makes clear that this is one of the most "advanced" participatory models of non-State actors and, in particular, of NGOs at the international level.

Before comparing the most significant aspects with other compliance systems in environmental matters, the rationale underlying this mechanism must be briefly outlined. The

[34] See T. Treves, *Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?*, in R. Wolfrum e V. Roeben (eds.), *Developments of International Law in Treaty Making*, Berlin, Springer, 2005.

[35] On the opportunities for partecipation in decision-making relating to permitting, see Communication by Ecopravo-Lviv (Ukraine), ACCC/C/2004/03.

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[36]. This was an exception to the rule whereby NGOs are not entitled to take part in the formation of an international agreement[37]. 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[38].

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 three following aspects differentiating this compliance procedure from the procedures adopted within other MEAs will be considered: the make-up of the compliance body, the procedural rights and guarantees granted to the public, 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[39] under some Conventions, sometimes resulting in a duplication of structures with reference to the obligations laid down in the annexed protocols[40]. In most cases, those bodies consist of individuals who have close links with the

[36] On the Pan-European NGO Coalition and European ECO Forum, called "citizen diplomats", see S. Kravchenko, *Citizen Enforcement of Environmental Law in Eastern Europe*, in *Widener Law Review*, 2004, 497; 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.

[37] Also on workers' and employers' representatives in International Labour Organization (ILO), see M.T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System*, in G. Kreijen (ed.), *State, Sovereignty, and International Governance*, Oxford, 2004, 394.

[38] J. Wates, *NGOs and the Aarhus Convention*, n. 23 above, 167.

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

[40] *Protocol on Pollutant Release and Transfer Registers* (PRTR), art. 22, 2003.

governments that appoint them, which removes their independence[41]. By 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». In addition, NGOs have the power to propose candidates for membership of the Committee, while the choice rests with the MOP. 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[42].

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 characterized 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 infringed, except for systems that are in place to protect human rights[43]. 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 that 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.

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[41] *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.

[42] «The 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 partecipate in the preparation or adoption of findings, measures or recommendations with respect to the case in question», 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

[43] 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 with art. 66 Court's Statute, see D. Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, in *American Journal of International Law*, 1994, 619.

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 in a dialogue. These features discriminate this procedure from dispute settlement, that 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 make the compliance procedure look like a dispute settlement process[44]. 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; 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[45]; 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[46]; 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

[44] See V. Röben, *Institutional Developments under Modern International Environmental Agreements*, in *Max Planck Y.B. U.N.L.*, 2000, 412.

[45] 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».

[46] See K. Sandor, *Compliance and the Acid Rain Program*, Climate Change Central, Discussion Paper C3-03, April 27, 2002, 13.

must occur explicitly and in writing – not to accept resolutions that are the outcome of a proceeding initiated by a «communication from the public»[47].

5. Final remarks: implications on the behaviour and accountability of States.

Some features of the review of compliance under the AC are extremely interesting if they are read in combination with the provisions of this international Convention that do not impose obligations on States, but procedural rights that they have to grant to the public. If the interests of three actors (international, national, and private) are at stake, can a citizen claim against his or her own State's compliance with an administrative norm adopted at international level that affords rights of information, participation and judicial review? What are the consequences of this mechanism in terms of accountability[48]?

As indicated above, the obligations under this Convention are binding, since they are ratified by a national law. 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[49]. Hence, the compliance procedure makes it possible for private entities, and notably NGOs, to access an ad hoc international body that, out of 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.

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 generalized and if decisions taken by other States could impinge on them[50].

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[47] 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». Doc. ECE/MP.PP/2005/13, para. 19: «To date, no Party has opted out..».

[48] See S. Cassese, *Global Administrative Law: an introduction*, available at http://www.iilj.org/global_adlaw/documents/Cassesepaper.pdf; Id., *Oltre lo Stato. Verso una Costituzione globale?*, forthcoming; S. Battini, *La globalizzazione del diritto pubblico*, forthcoming; R.O. Keohane, *Global Governance and Democratic Accountability*, in D. Held, M. Koenig-Archibugi (eds.), *Taming Globalization. Frontiers of Governance*, Cambridge, Polity, 2003, 139; B. Kingsbury, R.B. Stewart, N. Krisch, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1.

[49] See D. Markell, *"Slack" in the Administrative State and its Implications for Governance: The Issue of Accountability*, in *Oregon Law Review*, 2005, 6.

[50] C. Joerges, *Compliance research in legal perspectives*, in M. Zürn, C. Joerges (eds.), *Law and Governance in Postnational Europe. Compliance beyond the Nation-State*, Cambridge, 2005, 261; L. Casini, *Diritto amministrativo globale*, in S. Cassese (ed.) *Dizionario di diritto pubblico*, forthcoming.

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[51]. Citizens «keep watch» on governments and participate in achieving the final objective, i.e. the protection of the environment[52]. 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. The participation of civil society is useful not so much in enhancing the legitimisation of the international system[53], but in rendering it more efficient by improving the effectiveness and justiciability of claims[54].

The strength of this mechanism lies in its being half way between a compliance and a dispute settlement procedure[55]. Although lacking financial incentives – which played a major role, for instance, in the effectiveness of the action of the Montreal Protocol's Committee[56], or "access barriers to a club"[57] – 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, the possibility to reopen the procedure whereby stronger measures may be imposed upon the State, seem to "recommend" an adequate level of compliance with international rules. In any case, the setting up of a system for continuous monitoring should encourage the States to make all the necessary efforts to

[51] See B. 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*, in *Chicago Journal of International Law*, 2002.

[52] On the global emissions trading system, see R.B. Stewart, J.B. Wiener, *Reconstructing Climate Policy. Beyond Kyoto*, Washington, The AEI Press, 2003, 121: «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».

[53] See M.T. Kamminga, *The Evolving Status of NGOs*, n. 37 above, 404, in which it is stressed that «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 G. della Cananea, *Is Due Process a Global Principle of Administrative Law?*, Paper for the Yale Law School seminar on Law and Globalization, Yale 25 April 2006.

[55] Such as the North American Agreement on Environmental Cooperation (NAAEC) Citizen Submissions Process. 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 characteristic of such adjudication», K. Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, in *Loyola L.A. International and Comparative Law Review*, 2004, 397.

[56] See B. Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, in *Michigan Journal of International Law*, 1998, 366.

[57] See J. Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, in *Leiden Journal of International Law*, 2002, 26.

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. 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[58].

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 Party States that are not involved in the non-compliance issue and are not entitled to intervene; c) 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»[59].

But there is more to it. A State can also be held accountable for 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.

The procedure permits a horizontal dialogue between legal systems aimed at mitigating differences. A widespread dissemination of administrative principles is facilitated in countries with transition economies that are less accustomed to issues of environmental democracy[60]. It is not by chance that almost all «communications» have been submitted by NGOs from East-

[58] The fact still remains 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», B. Kingsbury, *Is the proliferation of International Courts and Tribunals a systemic problem?*, in *New York University Journal of International Law and Politics*, 1999, 695.

[59] See R.B. Stewart, *The Reformation of American Administrative Law*, in *Harvard Law Review*, 1975. For a recent overview, see Id., *Administrative Law in the Twenty - First Century*, in *New York Law Review*, 2003.

[60] «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», S. Stec, *"Aarhus Environmental Rights"*, n. 5 above, 21. See also G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, in *European Public Law*, 2003, 577. On the relationship between standing and administrative court review in Estonia, see H. Veinla, K. Relve, *Influence of the Aarhus Convention on Access to Justice in Environmental Matters in Estonia*, in *European Environmental Law Review*, 2005, 326.

European countries. The very same actors have played a major role in the process that led to the approval of the AC.

In turn, the accountability issue may also concern the Compliance Committee: to whom are the Committee members accountable? This question exceeds the scope of this paper; however, it deserves consideration, because some of the aspects highlighted above also emphasize the hybrid nature of the Committee. Its independence, close ties with NGOs and a large discretion in considering any question that might be raised by members of the public may entail the risk of the Committee being used in a biased way[61].

Some factors that have already been outlined can help redress the balance: a) transparency in its operation; b) the participation of the parties involved; c) the typical remedies for solving conflicts of interests[62]; d) the intermediation of the MOP, the final decision-maker.

[61] Nevertheless non-member states may be able to hold international organizations accountable through private complainants in the case of the international financial institutions, see D.D. Bradlow, *Private Complainants and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, in *Georgetown Journal of International Law*, 2005, 406.

[62] Doc. MP.PP/C.1/2003/2, para. 22, «'Normal principles' of conflict of interest apply for the Committee».