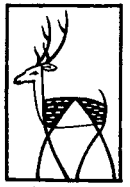
The Aarhus Convention

A Guide for UK Lawyers

Edited by Charles Banner



• HART •
PUBLISHING
OXFORD AND PORTLAND, OREGON
2015

10

The Aarhus Convention Compliance Mechanism and Proceedings before its Compliance Committee

VEIT KOESTER*

Introduction

Compliance mechanisms ('CMs') are mechanisms established by parties to international treaties with a view to assisting parties having compliance problems and addressing individual cases of non-compliance. Such mechanisms constitute a relatively new phenomenon in public international law. The first CM was established in 1992 under the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer. Presently, there are about 20 CMs, almost all of them established under multilateral environmental agreements ('MEAs').

Although the precise nature of individual CMs differ considerably, CMs have a common objective, namely to address non-compliance, ie non-fulfillment by contracting parties of their obligations under an international treaty. Principally, non-compliance constitutes a violation of the rule on *pacta sunt servanda*,[1] but the application of the notion of 'non-compliance' instead of the notion of 'breach' indicates the underlying assumption of CMs that parties basically wish to comply with their obligations. Hence, non-compliance is a result of lack of ability or capacity to comply rather than of a deliberate decision to ignore obligations. This

* Chair of the Aarhus Convention Compliance Committee 2003–2011, Chair of the Compliance Committee of the Cartagena Protocol 2004–2009 and Chair of the Compliance Committee of the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 2010–present. The author wishes to express his gratitude to Aphrodite Smagadi, Environmen tal Affairs Officer at UNECE, Secretary to the Implementation Committee, Espoo Convention Secretariat (former Secretary to the Aarhus Convention Compliance Committee) for having reviewed the draft article and for a number of useful comments. The responsibility for any errors lies, however, solely with the author.

[1] In the words of Article 26 of the 1969 Vienna Convention: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

is why all CMs, although drafted in various ways, are designed to be of a facilitative and non-confrontational nature.[2]

CMs also share some other features, notably that consideration of non-compliance issues is, in the first instance, normally entrusted to a special, relatively small, body established by the governing body of the treaty—usually named the Conference or the Meeting of the Parties ('COP' or 'MOP')—named an implementation or compliance committee.

One of the existing CMs is the CM of the Aarhus Convention, being the subject of the present paper, focusing on the proceedings before the Compliance Committee.

The Aarhus Convention Compliance Mechanism

The Aarhus Convention Compliance Mechanism is rooted in Article 15 of the Convention on 'Review of Compliance' which reads:

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

Based on this provision the first Aarhus Convention MOP (2002) adopted by consensus 'Decision I/7, Review of Compliance' which establishes the Aarhus Convention Compliance Committee and sets out its structure and functions as well as the procedures for review of compliance.[3] This decision which has only been subjected to a minor amendment, increasing the number of the members of the Committee from eight to nine in the tacit understanding to include three members from each of three regions: Western, Central and Eastern Europe, is the cornerstone of the CM of the Convention.

[2] The academic literature on compliance mechanisms is extensive. More recent literature includes, *inter alia*, J Klabbers, 'Compliance Procedures' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (New York, Oxford University Press, 2008) (in paperback) 995–1009, T Treves et alia (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague, TMC Asser Press, 2009), G Rose, 'Interlinkages between Multilateral Environmental Agreements: International Compliance Cooperation' in LR Paddock et alia (eds), *Compliance and Enforcement in Environmental Law. Towards More Effective Implementation* (Cheltenham, Edward Elgar Publishing, 2011) 3–32, and A Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements' (2012) 24 *Journal of Environmental Law* 103–32.

[3] Appendix 2 of this book. The decision was amended by MOP Decision II/2 (2005), para 12 to increase the number of the members of the Aarhus Convention Compliance Committee from eight to nine, in order to include three members from the Western, Central and Eastern European regions respectively.

Decision I/7 does not explicitly reiterate the requirements of Article 15 of the Convention on arrangements that the CM be of a non-confrontational and consultative nature. It is clear, however, that in practice the Compliance Committee's procedure under the CM does not involve a confrontation between the initiator of the procedure and the Party concerned ('non-confrontational'), and that it aims at assisting Parties facing compliance problems, thereby meeting these requirements.

The procedure is in practice also 'non-judicial' in the sense that it is not a trial, but the procedure, nevertheless, shares a number of features with trials, especially those related to due process (centered on impartiality, provision of a hearing and a reasoned decision) and procedural safeguards. Furthermore, the outcome of the proceedings before the Compliance Committee, leaving aside a potential politically influenced final decision by MOP, is based on conclusions and findings of a strictly legal character. Hence, the nature of the CM, despite of the wording of Article 15 of the Convention, has been referred to as 'quasi-judicial' and the Compliance Committee as 'an independent and impartial review body of a quasi-judicial nature.'[4]

The Aarhus Convention CM differs from most other CMs in two regards. First, and most importantly the CM may, in addition to submissions by the Parties and referrals by the Secretariat, be triggered by complaints by members of the public (communications) which is highly unusual in respect of environmental treaties.[5] At the time of the adoption of the CM it was the only existing CM allowing for communications, but in the course of the last 10 years a few other similar CMs

[4] C Pitea, 'The Compliance Procedure of the Aarhus Convention: Between Environmental and Human Rights Control Mechanisms' in XVI *The Italian Yearbook of International Law* (Martinus Nijhoff Publishers, Leiden, 2007) 85–116, at 115, and V Koester, 'The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)' in G Ulfstein, T Marauhn and A Zimmermann (eds), *Making Treaties Work, Human Rights, Environment and Arms Control* (Cambridge University Press, Cambridge, 2007) 179–217, at 204. The dilemma, which, however, has not till now materialised, is according to J Klabbers, *International Law* (Cambridge University Press, Cambridge, 2013) 265 that 'the more compliance procedures comes to resemble regular judicial procedures, the less it will operate as originally intended, as a gentle way to persuade parties to comply.'

[5] This is the main reason why the Aarhus Convention CM has attracted a considerable interest from legal scholars. Hence, the literature is vast. Apart from articles referred to in other notes, more recent articles include C Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters' in Treves et alia (eds), *Non-Compliance Procedures and Mechanisms* (2009) (n 2) 221–49, S Kravchenko, 'Giving the Public a Voice in MEA Compliance Mechanisms' in Paddock et alia (eds), *Compliance and Enforcement* (2011) (n 2) 83–109, A Tanzi and C Pitea, 'The Interplay between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by EU Member States' in M Pallemaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europe Law Publishing, Groningen, 2011) 369–81, J Jendroska, 'Aarhus Convention Compliance Committee: Origins, Status and Activities' (2011) 8 *Journal for European Environmental and Planning Law* 301–14, A Alf, 'The EU and the Compliance Mechanisms of Multilateral Environmental Agreements: The Case of the Aarhus Convention' in E Morgera (ed), *The External Environmental Policy of the EU* (Cambridge University Press, Cambridge, 2012) 287–303, and J Ebbesson, 'The Aarhus Convention, Access to Justice and Compliance by the UK' (2013) 25 *Environmental Law and Management* 56–60.

have been adopted.[6] In addition to communications from the public, submissions may be made by a Party to the Convention about the compliance either of itself or another Party. The Convention's Secretariat may also refer matters of compliance to the Committee. Communications from the public have proved to be frequently more common, the total to date standing at over 100 compared to *one* Party-to-Party submission and no submissions by one Party about its compliance or referrals by the Secretariat.

Secondly, members of the Compliance Committee, who are elected by the MOP based on nominations by States and NGOs, are, by virtue of a well-established, consistent and firm practice by the MOP, independent in the sense that they do not belong to an executive branch of the Government.[7] All members of the Compliance Committee are lawyers,[8] mostly university professors or privately practicing public interest lawyers, working pro bono.[9] The number of annual meetings and of meeting days have gradually increased to, presently, four to five annual meetings, each of which lasting four to five days.

Powers of the Compliance Committee

Although the immediate task of the Compliance Committee implicitly is to decide whether an alleged instance of non-compliance does indeed amount to non-compliance, its ultimate goal is to further compliance in the future by providing advice, facilitating assistance or making recommendations (either directly or through the MOP) to non-complying Parties. Hence, the CM is a forward-looking mechanism, not a redress mechanism. Accordingly, the Compliance Committee is not empowered to overrule decisions of national courts or administrative authorities, abrogate national laws or intervene directly on a communicant's behalf with the authority about whose act or omission a communicant is complaining about, or to require financial damages to be paid as a result of a Party's non-compliance with its obligations. The Compliance Committee may, however, well conclude that a decision by a domestic court or authority is not in compliance with the

[6] Ie the compliance mechanisms under the 1999 Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). Most other CMs may be triggered only by Parties vis-à-vis themselves, by a Party in respect of another Party (submissions) and by the secretariat of a treaty (referral). So far, the Compliance Committee of the Aarhus Convention has in addition to numerous communications only received one party-to-party submission.

[7] The formal requirements, shared with a number of other CMs, being (only) that members act in their personal capacity.

[8] According to para 2 of Decision I/7 Annex the requirement is (only) that the Compliance Committee includes 'persons having legal experience.' In practice, however, all members are and have always, save one member who served for a limited period during the first years of the existence of the CM, been lawyers.

[9] Travel costs (economy class!) and per diems are reimbursed by the Convention's budget through its host organisation, United Nations Commission for Europe (UNECE).

provisions of the Convention, which the Committee has been doing in practice several times.[10]

The Compliance Committee's findings on non-compliance are not legally binding. This, however, may be remedied by an endorsement by the MOP of the decision of the Committee, because such endorsement may constitute a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' which pursuant to Art 31(3)(a) of the 1969 Vienna Convention on the Law of the Treaties must be taken into account for the purposes of the interpretation of a treaty.[11] As of yet the MOP has never set aside findings by the Compliance Committee on non-compliance. Whilst the practice of the MOP is to decide whether or not to endorse the Compliance Committee's findings of non-compliance, its practice in relation to the Compliance Committee's findings of no non-compliance has so far been simply to take note of them.[12] In the rather hypothetical event that the MOP cannot reach consensus owing to disagreement about the interpretation or application of the Convention, the most likely result would be some kind of a political compromise concealing or at least not exposing the disagreement, but, naturally depending on the concrete findings of the Compliance Committee, related circumstances as well as the very nature of the disagreement.

Aside from the ability to make findings of non-compliance with the Convention, the powers of the Compliance Committee are, on the one hand, rather limited in the sense that the provisions of advice and assistance to a non-compliant Party is subject to consultation with that Party and that recommendations directly to the Party concerned require the Party's agreement.[13] The Compliance Committee, however, is entirely free to propose[14] any of the non-compliance response measures listed in the Annex to Decision I/7 by way of recommendations to the MOP.

[10] See for example the Compliance Committee's findings in ACCC/C/2008/33 (United Kingdom of Great Britain and Northern Ireland), adopted on 24 September 2010, on the compatibility with Article 9 of the Convention on the principles set out in English case-law regarding protective costs orders in environmental judicial review litigation.

[11] See generally, G Nolte, 'Reports of the ILC Study Group on Treaties over Time' in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, Oxford, 2013) 169–386, at 370–77.

[12] See generally, V Koester, 'The Compliance Mechanism of the Aarhus Convention—Outcomes of the Fourth Session of the Meetings of the Parties' (Chisinau, Moldova, 29 June–1 July 2011) and 'A Stock-taking of the Work and Accomplishment of the Compliance Committee' (2011) *Environmental Policy and Law* 196–205.

[13] Decision I/7. Annex, para 36 (a) and (b). In practice, however, Parties almost always accept recommendations when they do not disagree with the findings of the Compliance Committee on non-compliance. The reason, however, that the recommendation in ACCC/2012/68 (European Union and United Kingdom of Great Britain and Northern Ireland), adopted on 24 September 2013, was issued to the MOP (para 108) and not to the UK, was probably due to the recently established practice by the CC of only issuing recommendations directly to the Parties when there is sufficient time to implement the recommendations before the MOP due to consider the decisions. The result of this practice is that recommendations in decisions made by the CC within 1–1½ years before the forthcoming MoP are issued as recommendations to the MoP, ie, in reality representing suggestions to the MoP on what measures the MoP should recommend to the Parties concerned to implement. Hence, the UK ultimately accepted the recommendation.

[14] Decision I/7. Annex, paras 33 and 34 are referring to 'measures' and 'recommendations' which are understood to refer both to measures/recommendations provided for in para 36 and recommendations to the MOP, including recommendations to take

By contrast the Compliance Committee has a wide discretion as to how to deal with a communication (a submission or a referral). Thus, the Compliance Committee is not bound to address all issues, points, allegations, objections or arguments reflected in the communication or put forward during its consideration by the communicant or the Party concerned.[15] In the same vein, the Compliance Committee is free to address issues related to the communication which may not emerge directly from the communication. The Compliance Committee has also stated that practice in dealing with communications is that it 'does not exclude when determining issues of non-compliance to take into consideration general rules and principles of international law, including international human rights law.'[16]

Proceedings Before the Compliance Committee

General Remarks

The Compliance Committee has published, as an electronic publication, a guide entitled 'Guidance Document on the Aarhus Convention Compliance Mechanism' ('the Guidance Document')[17] divided into the following six parts: Introduction, Composition, Election and Functions, Modus Operandi, The NGOs and the Compliance Committee, Communications—useful information for the public and the Party concerned, and Annexes.[18] From a procedural point of view the 'Modus Operandi', which describes all the procedural rules of the Compliance Committee, is the most important part. As of yet all such rules have been endorsed by the MOP. Leaving aside a procedural incident which inspired the Committee to adopt detailed guiding principles on the independence and impartiality of Committee Members,[19] major procedural problems have never occurred.

[15] See for example the Compliance Committee's decision in ACCC/C/2010/48 (Austria), adopted on 16 December 2011, 'to focus its considerations on selected issues', because 'some allegations are very broad and general and, with respect to a number of issues the Committee was invited to consult academic writings' (paras 25 and 52).

[16] V Koester, 'The Compliance Committee of the Aarhus Convention—An Overview of Procedures and Jurisprudence' (2007) *Environmental Policy and Law* 83–96, at 87.

[17] Available on the website (n 3). See the weblinks at Appendix 14 to this book.

[18] Annex I—Compliance Committee Operation Procedure (representing a one page summary), Annex II—Checklist for communications, and Annex III—Chair's introduction to formal discussions on the substance of communications and submissions. Annex II was at the Committee's 46th meeting (22–25 September 2014) (doc ECE/MP.PP/C.1/2014/10) replaced by 'Recommended format for communications' which, as of yet, has not been included in the Guidance Document, but is available on the website (n 3).

[19] Guidance Document, 'Conflict of Interest' (see further below).

Since the Guidance Document includes detailed information on all relevant aspects of the proceedings,[20] the overview below is focusing on the main features only and those traits that might be most important or interesting seen from a lawyer's perspective. Furthermore, the Guidance Document is currently under revision which is expected to be completed by the middle of 2015. Some of the potential and most interesting elements resulting from the revision are addressed in 'Main Phases of a Compliance Procedure'below.

It should be noted that aside from the overarching rules of the Annex to Decision I/7, the Compliance Committee is in charge of its own procedure. Accordingly, the Committee has decided to apply, *mutatis mutandis*, the rules of procedure of the MOP.[21] In practice, however, those rules do not play any important role, in particular because procedural decisions are consensus-based. Substantive decision-making is as a matter of principle governed by rules of the Annex to Decision I/7,[22] but hitherto, all substantive decisions have been made by consensus.

The principles set out in the Guidance Document governing proceedings before the Compliance Committee are broadly formulated, ie as guidelines rather than as specific rules, although some of them elaborate upon provisions set out in the Annex to Decision I/7. The overview in 'Main Phases of a Compliance Procedure'below does not distinguish between procedural rules set out in the Annex to Decision I/7 and the principles set out in the Guidance Document. This overview is primarily directed at the procedures related to communications from the public given that these form by far the largest proportion of the Compliance Committee's case-law. However, it is also largely applicable to submissions by one Party about another Party. It should be noted, though, that the procedural steps may vary pending the particularities or specific circumstances in respect of the communications in question. The examples from the case-law of the Compliance Committee are all taken from the period 2011–2014,[23] since earlier examples

[20] The Guidance Document, however, does not (as of yet) include the decision of the Compliance Committee relating to submission to the Committee of disorganised and unstructured information difficult to examine. The decision, reflected in the Report on the 34th meeting of the Compliance Committee (2030 September 2011) (doc ECE.MP.PP.C.1. 2011/8), para 52, inter alia, empowers the chair to decide whether excessive information fulfill the criteria specified by the Committee in the decision. If not, such information would not be processed or considered by the Committee.

[21] Rules of procedure of the MOP are available on the website of the Convention (n 3). Rules 19, 20, 24–27, 29–42, 44, 46, and 48 of those are considered by the Compliance Committee to be the most relevant.

[22] Substantive decision-making is governed by para 35 of Decision I/7. Annex requiring every effort to be made to achieve consensus, but according to the above rules of procedure of the MOP substantive decisions may as a last resort be made by three-quarters of the members being present and voting.

[23] All decisions of the Compliance Committee are accessible on the website of the Committee under the website of the Convention (n 3), and all decisions referred to in the notes below were endorsed by MOP 5 (2014) by its Decisions V/9a-9o comprising the decisions by the MOP relating to 14 findings of the Compliance Committee on non-compliance submitted by the Committee to the MOP.

are set out in the 'Case Law of the Aarhus Convention Compliance Committee 2004-2011'.[24]

The overview does not include handling by the MOP of the decisions of the Compliance Committee,[25] nor does it include monitoring by the Compliance Committee of fulfillment of recommendations of the MOP to a non-compliant Party.[26]

Main Phases of a Compliance Procedure

(i) Triggering Phase

The first phase is obviously a communication, including corroborating information, by a member of the public brought before the Compliance Committee via the Secretariat. The 'Checklist for Communications' included in the Guidance Document has been replaced by 'Recommended Format for Communications' that might be useful also for lawyers.[27]

The Secretariat acknowledges the receipt of the communication, registers the communication, and verifies that all necessary information is provided. The final decision on whether the communication should be forwarded to the Compliance Committee for consideration of preliminary admissibility, however, rests with the Chair and the Vice-chair of the Committee. Provided that the communication in their view is sufficiently well-prepared to be considered by the Committee for a preliminary determination on admissibility at the next meeting of the Committee, the Secretariat informs Committee Members of the communication, and that it will be considered in that respect at the upcoming meeting. Simultaneously the Chair decides which Member of the Committee should serve as 'curator' for the case.[28]

[24] A Andrusevych, T Alge and C Konrad (eds), *Case Law of the Aarhus Convention Compliance Committee 2004-2011*, 2nd edn (RACSE, Lviv, 2011) which is accessible on the internet at www.unece.org/index.php?id=31320. Case law relating to procedural issues is cited under the relevant provisions of the Annex to Decision I/7, Part II, 100–120. An updated version of the publication is expected to be completed, and to be available on the internet, by the middle of 2015.

[25] Theoretically speaking, the MOP may be perceived as a kind of appellate body, but in practice the MOP has not been called upon in that capacity by Parties having been found to be non-compliant by the Compliance Committee. This is evidenced by the fact that all MOP decisions relating to findings of the Committee on non-compliance have been taken by consensus.

[26] On those aspects, see generally Koester, *Stocktaking* (2011) (n 12).

[27] Included at Appendix 3 of this book (an electronic version is available on the website of the Committee). The 'Recommended format' was adopted at the 46th meeting of the Compliance Committee (22–25 September 2014), and will be included in the revised Guidance Document, possibly with some minor amendments. On communications relating to significant events that occurred before the entry into force of the Convention for the Party concerned, see Guidance Document p 33 and eg the decision in ACCC/C/2010/53 (United Kingdom of Great Britain and Northern Ireland), adopted 28 September 2012, in which the Compliance Committee decided not to consider the process leading to the adoption of the Central Edinburgh Traffic Management Scheme, 'because this process was effectively concluded in 2003, before the entry into force of the Convention for the Party concerned' (para 81).

[28] An individual Member who assists the Chair and the Committee with the preparation of the draft decision and more generally to take responsibility for engaging in the details of the communication. The curator also introduces the communication with a view to a determination of its preliminary admissibility.

Based on the outcome of an open dialogue with Parties and stakeholders[29] the Compliance Committee has developed new procedures for processing communications pending determination of preliminary admissibility.[30] The procedures are, however, going to be tested at a couple of meetings of the Committee before their finalisation and inclusion in the revised Guidance Document. The main feature of the new procedures, which most likely is going to be included in those procedures as finally adopted, is that both the communicant and the Party concerned are being informed that the communication will be discussed in open session[31] as to its preliminary admissibility at the next meeting. The communication, together with any attachments, is then posted on the website.[32] At the meeting any representatives of the parties concerned present either in person or via audio-conference may briefly state its view regarding the admissibility. Statements should, according to the new procedures, however, not finally adopted, 'be concise and strictly limited to the issue of admissibility, while leaving aside the substance of the communication'.

The working language of the Compliance Committee is English.[33] This may require translation of communications drafted in one of the two other official languages of the Convention, French or Russian,[34] entailing some delays in respect of the procedures outlined below.

(ii) Initial Handling by the Committee and Determination of Preliminary Admissibility

At the first meeting of the Compliance Committee at which its agenda includes the communication, the Committee will consider whether the communication is preliminary admissible, ie make a preliminary determination on whether the communication is admissible, having regard to requirements for communications set out in the Annex to Decision I/7. In particular

— these requirements provide for a communication to be supported by corroborating information.[35] The refusal of the Compliance Committee to consider in its substantive decision allegations that have not been (sufficiently)

[29] Report on the 45th meeting (29 June–2 July 2014) (doc ECE/MP.PP/C.1/2014/10), para 42.

[30] Available on the website (n 3). See the list of weblinks at Appendix 14 of this book.

[31] Also hitherto the issue of preliminary admissibility was discussed in open session, but the parties concerned were not specifically informed that the communication would be on the agenda of the meeting of the Compliance Committee for such discussion.

[32] The former practice implied that communications were only posted on the website when a determination of preliminary admissibility had been made, but if either of the parties concerned happened to be present at the meeting they would be provided an opportunity to make a statement on the issue of preliminary admissibility. As hitherto observers will be permitted to state their views.

[33] Decision I/7. Annex, para 22.

[34] Guidance Document 35. On translation of corroborating information, see Guidance Document 17. Interpretation is provided at discussions of the substance of the case when the parties concerned are French or Russian speaking.

[35] Decision I/7. Annex, paras 19 and 20.

substantiated is a reflection of this requirement.[36] It is, however, obvious that also objections need to be substantiated, but the Committee is free to consider the evidence presented.

— other requirements to a communication include that it is not 'anonymous', 'an abuse of the right to make communications', 'manifestly unreasonable'[37] or—as supplemented by a decision of the Compliance Committee—not *de minimis*.[38]

In considering admissibility the Compliance Committee also has to take into account the availability of any 'domestic remedies unless the application of the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.'[39] This means that exhaustion of domestic remedies is not in every case an absolute requirement for the admissibility of a communication.

Inadmissible communications are not a rare phenomenon. Out of the 60 communications received before MOP 4 (June 2011), 15 were deemed inadmissible, a few of them after a determination on preliminary admissibility had been made. Out of the 40 communications submitted to the Committee between MOP 4 and MOP 5 (June 2014), 10 were found inadmissible.

If the Compliance Committee reaches the preliminary decision that the communication is admissible the Party concerned is formally informed about the communication, its preliminary admissibility, and the corroborating information. The letter to the Party concerned is usually accompanied by specific questions to the Party raised by the Committee. The communicant is also informed, quite often accompanied by questions to clarify the facts and/or allegations of the communication.

The Party concerned has five months to 'submit to the Committee written explanations or statements clarifying the matter and describing any response

[36] See eg the decision in ACCC/C/2010/50 (Czech Republic), adopted on 29 June 2012, para 64, and the decision in ACCC/C/2010/53 (n 27), para 71.

[37] Decision I/7. Annex, para 20 (a), (b) and (d).

[38] See generally Koester, *Stocktaking* (2011) (n 12), including on the approach of the Compliance Committee in respect of communications that might be inadmissible.

[39] Decision I/7. Annex, para 21, to which the fifth session of the MOP (July 2014) referred in Decision V/9 *on general issues of compliance*, para 6 (b) by noting that 'the Committee should ensure that, where domestic remedies have not been utilized and exhausted, it takes account of such remedies'. The decision of the Committee in ACCC/C/2010/59 (Kazakhstan), adopted 28 March 2013, provides not only an example of the application of this provision, but also an example of the freedom of the Committee to decide which aspects of a communication to consider (see in particular para 42 and 'Powers of the Compliance Committee'above). On the last issue, see also eg the decision in ACCC/C/2010/48 (Austria), adopted 16 December 2011, para 52. In ACCC/C/2010/53 (n 27) the Committee decided not to address some allegations relating to access to information and public participation, because the communicant had the possibility to address the issue with the Scottish Information Commissioner and because other domestic remedies were not exhausted (para 71). This decision is in conformity with para 21 of the Annex to Decision I/7 which requires that the issue of domestic remedies is to be taken into account 'at all relevant stages'. In ACCC/C/2012/68 (n 13), para 75, the Committee applied the concept of *lis pendens* by its decision not to consider some allegations with respect to compliance by the EU, because those allegations were currently before the General Court.

it may have made',[40] as well as to respond to specific questions posed by the Committee.[41] The same deadline applies for the communicant.

If the communication is found to be inadmissible the case is closed without further information to the Party concerned. Both inadmissible and preliminary admissible communications are allocated a case number in the meeting report.

(iii) Discussion of the Substance

The general approach of the Compliance Committee is to seek to arrange for a formal discussion[42] of the communication with the parties concerned at the first meeting that takes place more than two weeks after the expiry of the period mentioned above. In practice, however, whether this timescale is possible or feasible does not only depend on the substance of the communication, responses from the parties concerned to questions posed by the Committee, and other circumstances related to the communication, but as well as the Committee's workload. The communicant and the Party concerned are, naturally, given advance notice of the scheduling of the formal discussion, sometimes accompanied by information on specific issues that the Committee wishes to focus on at the discussion.[43]

The formal discussion with the two parties is following a specific pattern outlined in the Modus Operandi. The first issue being addressed is whether the communication is admissible. Normally this, however, simply involves confirming the Compliance Committee's earlier preliminary determination on the admissibility of the communication.[44] The main purpose of the discussion is to clarify the facts and legal issues by means of a constructive dialogue between the Committee and the two parties concerned. The discussion is conducted so as to avoid it becoming confrontational and adversarial.[45] However, participants are entitled to, and often use, legal representation.

The procedure does not provide for an *amicus curiae*-system, but since the procedure is quite flexible, recognising the presence of observers and providing a possibility for them to intervene,[46] the lack of provision on *amici curiae* has not caused any problems.

[40] Decision I/7. Annex, para 23.

[41] The Party concerned may, of course, also use this opportunity to question or disagree with the Compliance Committee's determination on preliminary admissibility, which under the procedure before the introduction of the, not as of yet finally adopted, procedures on the processing of communications pending determination of preliminary admissibility, referred to in 'Main Phases of a Compliance Procedure'above, could remedy the fact that the Party concerned was usually not present when that determination was made.

[42] In practice, a formal discussion corresponds to a hearing, which the Compliance Committee according to Decision I/7. Annex, para 24 may hold.

[43] Travel costs and per diems are being reimbursed by the Convention's budget for eligible State Parties as well as for most communicants.

[44] So much more because this issue has already been discussed with parties concerned under the new, not as of yet finally adopted, procedures referred to in 'Main Phases of a Compliance Procedure' above.

[45] See also Annex III to the Guidance Document.

[46] Observers may equally present comments in writing, before the formal discussion takes place.

(iv) The Committee's Preparation and Adoption of its Decision

After the formal discussion the Compliance Committee will discuss the case in closed session with a view to preparing conclusions and findings, and, if relevant, measures or recommendations ('decision'),[47] sometimes but not always based on a draft decision already prepared by the curator.[48] In the course of such session the Committee may identify further questions to be raised with the Party concerned and/or communicant. Normally, the closed session takes place on the same meeting day as that of the formal discussion so as to allow for a resumed discussion with the parties concerned after the closed session. Further questions may also be identified during the Committee's deliberations after the meeting during which the session of the formal discussion with the parties concerned takes place[49] and, in some cases, the deliberations of the Committee may, pending the circumstances and due to the extensive workload of the Committee, continue at a number of meetings thereafter[50] notwithstanding the possibilities for electronic decision-making.[51]

When the Compliance Committee has agreed on a draft decision it is, following a notice 1–2 days before to the parties concerned in order to allow them to prepare for inquiries from the public and media,[52] being forwarded to the parties concerned who are usually given a delay of one month to provide any comments. The draft decision is also posted on the website of the Committee in order to enable any observers to make comments. As soon as possible after the delay the Committee will proceed formally to adopting the decision, taking into account any comments received.[53]

Decisions of the Compliance Committee are drafted following a specific pattern: The first part, 'I Introduction', presents the basic facts relating to the communication and the Committee's handling of the case. The second part, 'II Summary of facts, evidence and issues', is divided into three subsections, the first of those outlining the legal framework, the second the facts, as presented by the parties involved, and the third substantive issues, namely the specific allegations and how the Party concerned responded. This part usually also includes

[47] The notion of decision is applied in the present paper for practical reasons only to characterise the outcome of the deliberations of the Compliance Committee, because the outcome may vary considerably pending the circumstances. It may include findings on no non-compliance, or findings on non-compliance with recommendations either to the MOP or to the Party concerned, or without recommendations. The notion of decision in the present paper should not be confused with the decision of the MOP, representing deliberations of the MOP on the 'decision' of the Committee.

[48] See n 28.

[49] Over and above the procedure is rather inquisitive, simply because a prerequisite of a decision is a full understanding of the facts and none the least the legal situation at stake.

[50] The average time to reach substantive decisions was in the intersessional period between MOP 2 (2005) and MOP 3 (2008), 389 days from the date of the communication and between MOP 3 (2008) and MOP 4 (2011), 540–570 days. See Koester, *Stocktaking* (2011) (n 12).

[51] Guidance Document 9.

[52] Report of the Compliance Committee on its 45th meeting (29 June–2 July 2014) (doc ECE/MP.PP/C.1/2014/10), para 44.

[53] Decision I/7. Annex para 34.

a section on the exhaustion of domestic remedies, being relevant in particular when the Committee decides to proceed with the consideration of the case, even if domestic remedies are still pending. Part three, 'III Consideration and evaluation by the Committee', is divided into subsections which the Committee considers to be the main issues. When relevant, the Committee will in that part refer to its previous case law.[54] Finally, the fourth part, 'IV Conclusions and recommendations', contains in a first subsection a summary of the main findings and in the second subsection the recommendations of the Committee.

(v) Finalisation and Communication of the Decision

The final version of the decision is produced as an official document available in the three UNECE languages and transmitted to the parties concerned, but an advance unedited copy of the decision is being communicated to the parties concerned and being posted on the website, shortly after the meeting during which the Compliance Committee adopted the final text.[55] Until the production of the decision as an official document, editorial and minor substantive changes aiming at correcting errors but without any impact on the conclusion and findings may take place. The final version is being published as a pre-session document, along with the agenda, of the second meeting of the Committee following the finalisation of the decision.[56]

Procedural Safeguards

The Annex to Decision I/7 includes a number of procedural safeguards, most of which have been referred to above, the others including quite detailed rules on conflict of interest and on information gathering as well as rules on confidentiality.[57]

Some key features of the compliance procedure may also be characterised as procedural safeguards, including the openness and transparency of the process, the fact that the draft decision is forwarded to the parties concerned for comments, and that both the draft decision and comments to the draft decision as well as other correspondence with the parties concerned are posted on the website.[58]

[54] See eg the decision in ACCC/C/2011/58 (Bulgaria), adopted 28 September 2012, paras 52 and 53.

[55] Parties are provided a notice 1–2 days before. See n 52 above.

[56] Until 2012, the adopted findings were an addendum to the report of the Committee on the meeting where the findings were adopted. Because of a change in the proceeding of UN documents that set some limitations to the overall length of the UN documents, the practice for the publication of the findings of the Compliance Committee changed: from 2012 onwards, Committee findings are produced as a separate (ie not as an addendum to a report) UN document, bearing their own UN document symbol number, and thus the Committee at the second meeting following the meeting at which it adopted the findings, also has an opportunity to review the editorial changes made and also the translations, before 'confirming' its findings.

[57] Guidance Document, respectively 11–12, 23–26 and 35. Decision I/7. Annex, para 25 includes a few rules on information gathering, and paras 26–31 rather extensive rules on confidentiality.

[58] Meeting reports are obviously equally posted on the website.

In addition, the procedure is flexible and easily adaptable to changing circumstances without foreclosing legal predictability, because substantive procedural rules are not obviously being amended retroactively.

Some Concluding Remarks

The Aarhus Convention CM has been and is being used extensively by the NGO community, and frequently also by individual citizens. No other compliance or implementation committee is handling more cases than the Aarhus Convention Compliance Committee.

It is obvious that the 'success' presents some problems of its own, mainly due to the very construction of the mechanism centered on a committee the members of which having their main occupation elsewhere. The Compliance Committee has, however, been quite innovative to adapt its procedures so as to enable it to handle the steadily increasing number of communications, although decisions in that respect are also governed by other considerations. The introduction of the *de minimis* criterion (see 'Main Phases of a Compliance Procedure' above) is one example, and the decision on excessive disorganised and unstructured information (see 'Proceedings before the Compliance Committee' above) another. A further example is the introduction of summary proceedings in respect of communications reflecting the same legal issues upon which the Committee has already deliberated in previous communications.[59]

Furthermore, the procedures of the Compliance Committee have not caused any major problems. They seem to be appropriate and easily understandable and applicable by those having been engaged in communications. This observation includes also the many lawyers from a variety of countries having represented either communicants or Parties. Arguments over procedure are exceptional.[60]

[59] See Guidance Document 22 and as an example the decision in ACCC/C/2010/45 & ACCC/C/2011/60 (United Kingdom of Great Britain and Northern Ireland), adopted 28 June 2013. When only a part of a communication relates to legal issues already considered by the Compliance Committee, the Committee simply decides not to consider that part of the communication. As an example the Committee decided in ACCC/C/2012/68 (n 13), para 77, not to consider whether the EU had in place a regulatory framework to ensure proper implementation of National Renewable Energy Action Plans 'given that this was considered in its findings on communication ACCC/C/2010/54 concerning compliance by the EU'.

[60] In one case, however, such discussion entailed elaboration by the Compliance Committee of more detailed rules on conflict of interest. See above at n 19, and the discussion as reflected in the Report of the Compliance Committee on its 25th meeting (22–25 September 2009) (doc ECE/MP.PP/C.1/2009/6), paras 6–11 with annexed statements: 1) by the Committee concerning the allegation of a conflict of interest in connection with the communications ACCC/C/2008/23 and ACCC/C/2008/27; 2) by the United Kingdom concerning the issue of conflict of interest with respect to the communications ACCC/C/2008/23 and ACCC/C/2008/27 as well as to ACCC/C/2008/33; and 3) by the communicants in the form of three statements relating to respectively the three communications referred to. The issue of conflict of interest was pursued by the Committee at the following four meetings, see in particular Report of the Compliance Committee on its 26th meeting (15–19 December 2009) (doc ECE/MP.PP/C.1/2009/8), para 5 and Report of the Compliance Committee on its 29th meeting (21–24 September 2010) (doc ECE/MP.PP/C.1/2010/6), paras 6 and 7 referring to the adoption of the Committee of detailed rules on conflict of interest.

It has to be seen, however, whether the new procedures concerning the processing of communications pending determination of preliminary admissibility that are currently being tested[61] are going to work in an appropriate and feasible manner. In any event, however, the Compliance Committee has to take into account that the fifth session of the MOP in July 2014 noted in one of its decisions

> the need for the Committee to ensure transparency and due process for both communicants and the Parties concerned in respect of communications received from members of the public (including informing the Party concerned, at an early stage, of the receipt of a communication by the Committee).[62]

[61] Above at nn 29 and 30.

[62] *Decision V/9 on general issues of compliance,* para 6(a).