

STRENGTHENING IMPLEMENTATION OF MEAS: THE INNOVATIVE AARHUS COMPLIANCE MECHANISM

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1 INTRODUCTION

International compliance mechanisms vary greatly from one multilateral environmental agreement (MEA) to another. The compliance mechanism established under the Aarhus Public Participation Convention² is unique in some respects. This article will provide a brief look at its innovations.

The United States made an appearance at the First Meeting of the Parties under the Convention in Lucca, Italy, in 2002, apparently for the primary purpose of criticizing the compliance mechanism. In a prepared statement, delivered forcefully, it noted a “variety of unusual procedural roles that may be performed by non-State, non-Party actors, including the nomination of members of the Committee and the ability to trigger certain communication requirements by Parties under these provisions.” The United States stated further that “the United States will not recognize this regime as precedent.”³ The Western European nations participating in the Meeting of the Parties⁴ responded with vigor from the floor⁵ and proceeded to adopt the compliance mechanism by a unanimous vote.⁶

What sparked such debate? What were the innovations adopted in this compliance mechanism? How is the mechanism actually being implemented? And is it likely that this mechanism will be successful in improving compliance by Parties, as compared to compliance mechanisms used under other MEAs?

2 AARHUS AND PUBLIC PARTICIPATION: LAYING THE GROUNDWORK FOR DEMOCRATIC “REVOLUTIONS”

After the fall of the Berlin Wall in 1989 and the breakup of the Soviet Union in 1991, Western Europeans were determined to bring democracy and wisdom from the West to the East. The Aarhus Convention became a key part of the democratization process of Central Europe, Eastern Europe, the Caucasus region, and Central Asia.⁷

Democratization – both in the voting booth and in the halls of bureaucratic decisionmaking – is surely succeeding. After several years of debilitating civil war in former Yugoslavia, we all witnessed the inspiring protest against government vote fraud that became a democratic revolution in Serbia in 2000. Then, 12 years after the fall of the Soviet Union, we marveled at the seemingly swift “Rose Revolution” in the Republic of Georgia in 2003, as citizens again took to the streets to demand that those who had falsified the election resign. Finally, the cliff hanging weeks of demonstrations and legal actions of the Ukraine’s Orange Revolution, after yet another example of massive vote fraud on the part of the authorities, resulted in the January 2005 inauguration of the first President of Ukraine after a re-run of the election that became truly free and fair.

These events did not “drop from the Moon,” as we say in Ukraine. Rather, they grew from the soil of local grassroots democratic activism, watered by international efforts to broaden public participation in government decisionmaking, and fertilized by both local and international support for the steady growth of civil society.

Two particular international efforts to broaden public participation between election days deserve special recognition. The Regional Environmental Center for Central and Eastern Europe (REC) in Hungary provided funding, guidance, and inspiration for a whole generation of

local advocates for environmental democracy (public participation in environmental decisionmaking) through projects including the seminal publication of a four-volume series of books titled *Doors to Democracy*.⁸

The second event combined international diplomacy with grassroots activism. Negotiations throughout the 1990s culminated in the signing of the Aarhus Public Participation Convention in Denmark in 1998 by 35 countries. Efforts to obtain the required minimum number of 16 ratifications of the Convention resulted in its entry into force just three years later in October 2001.⁹

During the negotiation of the Convention between 1996 and 1998, the governments of Western, Central, and Eastern Europe and the Caucasus and Central Asia broke new ground in the involvement of civil society in international diplomatic negotiations. Early on, the participants decided that because the goal of this Convention was to provide new avenues for transparency and public participation in government decisionmaking, it made sense to apply those principles in the very process being used to create the Convention. As a consequence, nongovernmental organizations were invited to form an NGO coalition and take seats at the negotiating table. To an extent apparently unprecedented in the negotiations of MEAs, the NGO “observers” were given their own “flag” of identification at the table and the right to request the floor and offer the views of civil society at each stage of the negotiating process. They were able to lobby governmental delegates in the corridors and coffee shops, and they offered specific language for the Convention, some of which was accepted by the delegates from participating countries.¹⁰

In the period between signing the Convention in 1998, entry into force in 2001, and the first Meeting of the Parties in 2002, a great deal of preparatory work had to take place. Under the auspices of the United Nations Economic Commission for Europe (UNECE) in Geneva, the countries that negotiated the Convention worked in task forces and intergovernmental working groups to design various measures necessary for the smooth functioning of a new MEA. These included holding Meetings of the Signatories in Moldova and Croatia, drafting proposed Rules of Procedure, preparing proposals for a Bureau of the Convention and Working Groups of the Parties to function between Meetings of the Parties, and designing a Compliance Mechanism required by the Convention. As before, NGO representatives were constant participantobservers in all these processes.¹¹

3 INNOVATIVE NATURE OF THE AARHUS COMPLIANCE COMMITTEE

One of the most significant and interesting innovations for MEAs is the compliance mechanism that was created to help ensure that countries comply with the commitments that they have made to one another in the Aarhus Convention. The compliance mechanism is now working. Ten cases have been brought to the Compliance Committee by NGOs and, in one case, by a government. The Aarhus compliance mechanism has several innovative features.

First, pursuant to Decision I/7 of the Meeting of the Parties (2002)¹² the Compliance Committee consists of eight independent experts who have recognized competence in the field and who serve in their personal capacity. In comparison with other conventions, which have compliance mechanisms consisting of representatives of governments,¹³ this structure is more dynamic and flexible because members can express their own opinions and do not have obligations to check with their governments. One example of the effect of a compliance committee consisting of Parties instead of independent experts occurred at a conference where a member of the Espoo Convention’s Implementation Committee encountered an

NGO representative who had filed a complaint with the Committee. She said to him, “How can you oppose your own government? Shame on you!”¹⁴

Furthermore, while serving as independent experts, they are expected to give their best professional judgment in the matters brought before them, and not compromise that judgment in order to achieve diplomatic or political goals. The committee’s recommendations go

to

the

Meetings of the Parties, where governments have the opportunity to bring diplomatic and political concerns to bear in reaching a decision.

Second, members of the Committee were nominated not only by Parties and Signatories (which is the general rule), but also by non-governmental organizations promoting environmental protection and falling within the scope of article 10, paragraph 5, of the Convention. This was one of the features that drew the ire of the representative of the United States at the first Meeting of the Parties in Lucca, Italy, in 2002.

Third, the Compliance Committee accepts not only the submissions of Parties and referrals from the Secretariat about non-compliance with the Convention (which is a rule in other conventions),¹⁵ but also communications from the public. Article 15 of the Convention provides:

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.¹⁶

This was followed by adoption of the compliance mechanism, which provides that “communications may be brought before the Committee by one or more members of the public concerning that Party’s compliance with the Convention.”¹⁷

This openness to public participation by civil society has already produced remarkable results in the functioning of the committee. Eleven cases have been initiated by communications from NGOs.¹⁸

4 TRANSPARENCY OF THE CC PROCEDURE

According to the Committee’s *Modus Operandi*, in order to facilitate public access to information related to compliance issues, the Committee agreed that communications that had, on a preliminary basis, been determined to be admissible should be posted on the UNECE website after they had been forwarded to the Parties concerned.¹⁹

Almost all information in the Compliance Committee is open. No information held by the Committee is to be kept confidential unless it falls under the narrow grounds for exemption in Article 4, paragraphs 3 and 4 of the Convention. In addition, information is to be kept confidential if the person who submitted information to the Committee has asked to keep it confidential because of concern that she or he may be penalized, persecuted or harassed.

The Committee requested the Secretariat to publicize all official documentation and new aspects of modus operandi through the website to enable the public to track the processing of submissions, referrals and communications.

The Compliance Committee meetings are open for the public, except for the deliberations and decision-making. Non-governmental organizations such as Earthjustice and the Center of International Environmental Law participate regularly in the Committee meetings as observers, offering their comments on each case. The Committee invites parties to a dispute – the Party (state) concerned or the Party making a submission, and the member of the public making a communication to the Committee – to Committee meetings in order to participate in the discussion. They can participate in the entire meeting except during closed deliberations involving adoption of findings, and measures and recommendations of the Meeting of the Parties.

5 THE POWER OF THE COMMITTEE

The Compliance Committee began to address the merits of the communications at its

sixth meeting, in December 2004 in Geneva. The Committee's Chairman, Prof. Veit Koester (Denmark), a distinguished veteran of negotiations on many international environmental treaties, has stated that: "If and when the Committee does reach some conclusions, these will be referred to the Meeting of the Parties, which will be the final arbiter as to whether or not there is a case of non-compliance."²⁰

The Committee makes recommendations to the Meeting of the Parties. In addition, the compliance mechanism adopted by the First Meeting of the Parties provides that, with a goal of addressing compliance issues without delay prior to a Meeting of the Parties, the Compliance Committee may, in consultation with the Party concerned, "provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention."²¹

Furthermore, with the agreement of the Party concerned, the Committee can (prior to a Meeting of the Parties) take the measures listed in paragraph 37(b), (c) and (d) of the compliance mechanism, namely:

[M]ake recommendations to the Party concerned; request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; in cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public.²²

6 NATIONAL REPORTS

In addition to the complaint procedure, the required submission of a National Report by each Party has the potential to become an important tool, especially if NGOs are allowed to participate. The Compliance Committee will make a report and the Secretariat will make a synthesis report to the 2005 Meeting of the Parties based on the National Reports. On the invitation of the Secretariat the Compliance Committee plays a consultative role in preparation of a synthesis report. However, it is already obvious that some Parties do not treat this duty to report seriously.²³ Only 16 out of 33 Parties sent their National Reports on time, plus another 4 submitted them with a small delay. In addition, the quality of National Reports differed greatly. For example, Turkmenistan wrote a report just two pages long and did not provide any information, and it was of low quality. Ukraine's report was too long and repetitive. The Reports of Norway and Belarus, on the other hand, were excellent.

Almost all National Reports were made in a transparent and participatory process. Governments sent draft reports to NGOs or put them on a website, and held consultations or public hearings. The public had a chance to submit comments. In some National Reports public comments were taken into account or even included in the addendum (Armenia, Kyrgyzstan). Many other countries, however, provided no indication in their National Reports of whether the public participation made any difference or whether public comments were taken into account.

The 2005 National Reports show that many countries changed their legislation to comply with the Aarhus Convention. Western European countries, according to their legal traditions, made legislative changes before ratification. EECCA countries, on the other hand, continue to change their domestic laws after ratification. The Constitutions in several countries declare that international treaties and conventions have direct effect on the legal system, but without clear transposition of Convention provisions into national legislation there is little hope that real change will occur as a mere result of ratification.

The National Reports do show that a great deal of progress has been made by EECCA countries in terms of making environmental information available on the Internet, which was only a dream a few years ago. Furthermore, Aarhus Convention information centers have been created in many countries. Trainings have been organized for NGOs and decision makers. Still, problems exist. Countries in transition identified obstacles in their 2005 National Reports such as lack of capacity to implement the Aarhus Convention, financial difficulties, and a low level of

public awareness.

7 FIRST CASES BEFORE THE AARHUS COMPLIANCE COMMITTEE

All EECCA countries (except Russia and Uzbekistan) signed the Convention and ratified it, but this does not necessarily mean that they will comply with it. There is a longstanding tradition to have international conventions and domestic laws on paper but with inadequate enforcement. Of the eleven cases under consideration by the Committee, eight are about alleged non-compliance of EECCA countries. Three cases of alleged non-compliance by Parties, which were considered by the Compliance Committee at its 7th meeting on February 16-18, 2005, will illustrate the range of issues that face the Parties and the public.

Kazakhstan ratified the Convention in 2001, which as an international treaty ratified by Kazakhstan, has direct applicability in the Kazakh legal system. Kazakhstan's Law on Ecological Expertise (adopted in 1997) contains general provisions on public participation, but it was not implemented in the case of construction of the Gornyi Gigant power line²⁴ because regulations for public participation were not adopted until 2004.

Turkmenistan deposited its instrument of accession to the Convention on June 21, 1999. The Convention entered into force for Turkmenistan on October 30, 2001. On October 21, 2003, a new law "On Public Associations" was adopted. This Law does not comply with the Convention, according to the decision of the Compliance Committee at its 7th meeting. The Law introduced a new regime for registration, operation, and liquidation of non-governmental organizations. This appears to be in breach of the provisions of article 3, paragraph 4, of the Convention, which require a country to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and to ensure that its national legal system incorporates this obligation. It also does not comply with article 3, paragraph 9, which requires countries to provide the possibility for the public to exercise their rights under the Convention without discrimination as to citizenship, nationality, domicile, or location of an entity's registered seat.²⁵

The Committee received a submission by the Government of Romania concerning compliance by the Government of Ukraine with the treaty.

The submission, made on June 7, 2004, alleged a violation by Ukraine of the provision that ensures that the public affected or likely to be affected by the Bystroe deep-water navigation canal project in the Danube Delta was informed early in the decision-making procedure about the fact that the project was subject to a national and transboundary environmental impact assessment procedure. The Committee agreed to consider the issues side-by-side with a communication on the Bystroe canal made by the Ukrainian NGO Ecopravo-Lviv on May 5, 2004.

The Committee determined that Ukraine failed to provide for proper notification and participation of civil society in its decision-making, in particular, the organizations that indicated their interest in the procedure, as required under article 6. Ukraine also failed to allow the public to study the information on the project and prepare and submit its comments. The Party did not allow the public officials responsible for making the decision sufficient time to take any comments into account in a meaningful way, as required under article 6, paragraph 8.

The Committee found that the lack of clarity with regard to the public participation requirement in EIA and environmental decision-making procedure on projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making information available in the context of article 6, indicates the absence of a transparent and consistent framework for implementation of the Convention and constitutes noncompliance with article 3, paragraph 1 of the Convention.²⁶

8 PROSPECTS FOR SUCCESS

The first attempts to evaluate implementation of the Aarhus Convention show both

difficulties and successes in building an environmental democracy, improving transparency, and enhancing the quality of decision-making. The Convention gives citizens the possibility to control their governments and to make an increased contribution to the protection of the environment. The Convention is an important international instrument for the protection of the right to a healthy environment. Most importantly, the Convention's novel compliance mechanism is an ambitious effort to bring democracy and participation to the very heart of compliance itself. Whether this will be successful will depend on the Committee itself, the Meeting of the Parties, and whether citizens will continue to be vigilant in demanding compliance with their Convention.

9 REFERENCES:

² Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on June 25, 1998 (in force from October 30, 2001).

³ Statement By The Delegation Of The United States With Respect To The Establishment Of The Compliance Mechanism, Annex to REPORT OF THE FIRST MEETING OF THE PARTIES, page 19, *available at* <http://www.unece.org/env/documents/2002/pp/ece.mp.pp.2.e.pdf>.

⁴ The vast majority of Western European nations had not ratified the Aarhus Convention by the time of the First Meeting of the Parties, but participated fully as Signatories.

⁵ REPORT OF THE FIRST MEETING OF THE PARTIES, paragraph 46, page 8, *available at* <http://www.unece.org/env/documents/2002/pp/ece.mp.pp.2.e.pdf>.

⁶ *Id.* at paragraph 47, page 9.

⁷ I use "Central Europe" for the Visegrad states of the Czech Republic, Hungary, Poland, and Slovakia. As for those states further east, "Eastern Europe, Caucasus, and Central Asia" (EECCA) is the term now widely used in international meetings to replace the former appellations "former Soviet Union" and the "Newly Independent States of the former Soviet Union" (NIS).

⁸ The present author was project leader and editor for the volume covering several states of the former Soviet Union. S. Kravchenko, DOORS TO DEMOCRACY: CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING IN THE NEWLY INDEPENDENT STATES (Regional Environmental Center, Budapest, Hungary, 1998) (with co-authors) (English), *available at* <http://www.rec.org/REC/Publications/PPDoors/NIS/PPDoorsNIS.pdf>.

⁹ Two-thirds of the countries providing these early ratifications came from the EECCA, (the former Soviet Union). The author was hired by the European Union to organize "open parliamentary meetings" in the countries of the EECCA in order to promote ratification by their parliaments. Her title was Director, Parliamentary Component, EUTACIS Environmental Awareness Raising Program for Newly Independent States and Mongolia (1998-1999). See <http://www.hcg.helsinki.fi/projects/TEAP2.html>.

¹⁰ The most thorough study of NGO involvement in the negotiation of the Aarhus Convention, by Magdi Toth-Nagy of REC, has not been published but is in the present author's files. The present author participated in most of the negotiations.

¹¹ The present author served as a nongovernmental expert on the Task Force for Rules of Procedure and Compliance Mechanism, and as a nongovernmental representative on the subsequent Intergovernmental Working Group on the same matters.

¹² See <http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

¹³ For example, the Espoo Convention on Environmental Impact Assessment in

Transboundary Context provides that the Implementation Committee consists of eight Parties to the Convention, each of which appoints a member of the Committee. See <http://www.unece.org/env/eia>.

¹⁴ Incident relayed to the author by the NGO representative.

¹⁵ For example, see <http://www.unece.org/env/eia>.

¹⁶ See <http://www.unece.org/env/pp/treatytext.htm>.

¹⁷ Decision I/7, Review of Compliance, VI, Communications from the Public, paragraph 18, available at <http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

¹⁸ An additional complaint was lodged by the Government of Romania against the Government of Ukraine.

¹⁹ Guidance Document on Aarhus Convention Compliance Mechanism, “Modus Operandi,” page 8, available at <http://www.unece.org/env/pp/compliance/manualv2.doc>.

²⁰ UNECE press release, May 14, 2004, available at http://www.unece.org/press/pr2004/04env_p08e.htm.

²¹ Decision I/7, Review of Compliance, VI, Consideration By The Compliance Committee, paragraph 36, available at <http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

²² *Id.*

²³ National Reports will be available on the UNECE website prior to the Second Meeting of the Parties in May 2005.

²⁴ ACCC/C/2004/02.

²⁵ AACC/C/2004/05.

²⁶ ACCC/S/2004/1; ACCC/C/2004/04.