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ARTICLE

Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice

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Abstract
In accordance with Article 15 of the Aarhus Convention, the first meeting of the parties to this Convention established a non-judicial and consultative Compliance Committee to consider, among other matters, individual cases concerning compliance by parties with their obligations. The Committee is traditionally viewed as a non-judicial, soft mechanism and its rulings as non-binding, soft law. In recent years, however, to support the claim that rulings of the Committee have an impact and legal effects, some scholars have departed from the traditional perspective and characterized the Committee as a more judicialized mechanism, which issues legally binding rulings.

This characterization assumes a correlation between judicialization and binding effect on the one hand, and legal effect on the other. The latter claim, however, has not been supported by a systematic assessment of the impact of the Committee's rulings on domestic practice. Against this background, the article assesses the impact of Article 9-related rulings of the Committee, issued between 2004 and 2012, on national legal orders. The assessment reveals that in fewer than 41% of the cases parties recorded some degree of compliance with the rulings of the Committee, whereas in 59% they recorded no progress. The quantitative assessment and respective qualitative insights, among other factors, suggest that the normative character of the Committee and its rulings play an auxiliary role in the process of ensuring compliance with the provisions of the Aarhus Convention. The decision of parties to comply is determined typically by the substance of the rulings as they stand in relation to domestic circumstances rather than by the institutional features of the Committee and binding effect of its rulings.

Keywords: Aarhus Convention, Compliance Committee, Access to environmental justice, SDG16, Soft law, Environmental litigation

1. INTRODUCTION

In the face of omnipresent cross-border environmental concerns, confrontational and competitive international adjudication has not proved to be an effective strategy for

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improving state compliance with international environmental obligations. In response, advisory and non-adversarial mechanisms were considered more appropriate for encouraging gradual compliance by parties with their treaty obligations. Consequently, almost all the major multilateral environmental agreements (MEAs) have established compliance and implementation mechanisms, without prejudice to the availability of dispute settlement procedures.[1] Notable among them is the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[2]

Article 15 of the Aarhus Convention envisages the establishment of a committee to review state compliance with the provisions of the Convention. The first meeting of the parties (MoP) to the Aarhus Convention, in Lucca (Italy) in October 2002, adopted Decision I/7 on the Review of Compliance, establishing the Compliance Committee of the Aarhus Convention (the Committee).[3] Decision I/7 charged the Committee with, among other matters, the obligation to consider individual cases of compliance[4] submitted by members of the public, including natural persons, non-governmental organizations (NGOs), and private legal entities. During 15 years of operation (from 2004 to June 2019) the Committee has become one of the most active compliance mechanisms in existence. Since its establishment, it has received 169 communications from members of the public concerning questions of compliance affecting the majority of member states and addressing key provisions of the Convention.[5]

The dominant epistemic narrative surrounding the Committee portrays it as a non-judicial, optional arrangement the rulings of which are non-binding, authoritative interpretations. However, during recent years this narrative has been reconsidered, with commentators claiming that the Committee offers not just a soft remedy but has taken the path towards judicialization, and issues rulings which are binding, authoritative interpretations of the Aarhus Convention.[6] The scholarly debate on the legal status of the rulings of the Committee is, to a certain degree, a response to the concern that the findings and recommendations of an advisory and non-judicial body might not have the necessary legal impact on the behaviour of non-compliant parties. This line of thinking suggests that treating the rulings as authoritative interpretations,

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1 See, e.g., the implementation committee of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), Montreal, QC (Canada), 16 Sept. 1987, in force 1 Jan. 1989, available at: http://ozone.unep.org/new_site/en/montreal_protocol.php, and the implementation committee of the Convention on Long-range Transboundary Air Pollution, Geneva (Switzerland), 13 Nov. 1979, in force 16 Mar. 1983, available at: http://www.unece.org/env/lrtap.

2 Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: https://www.unece.org/env/pp/treatytext.html.

3 United Nations Economic and Social Council (ECOSOC), Report of the First Meeting of the Parties: Addendum, Decision I/7 'Review of Compliance' (21 Oct. 2002), UN Doc. ECE/MP.PP/2/Add.8.

4 The encompassing term 'individual cases of compliance' is used to refer to (i) submissions by parties on the compliance of another party or on their own compliance; (ii) referrals by the Secretariat of the Convention; and (iii) communications from the public.

5 United Nations Economic Commission for Europe (UNECE), 'Communications from the Public', available at: https://www.unece.org/env/pp/pubcom.html.

6 E. Fasoli & A. McGlone, 'The Non-Compliance Mechanism under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65(1) *Netherlands International Law Review*, pp. 27–53.

legally binding decisions or 'something more than soft law'[7] will ensure or strengthen the desired legal effect.

This reasoning assumes that the more the Committee is perceived as a quasi-judicial body and the more its rulings are viewed as binding, the higher will be the impact of the Committee on domestic practice. Yet, this assumption has never been empirically tested. To fill this gap this article first conducts an assessment of the impact of the rulings of the Committee related to access to justice provisions of the Aarhus Convention (Article 9). It examines how and to what degree the Committee's recommendations[8] issued between 2004 and 2012 have been absorbed into state practice.[9] The impact assessment reveals that in fewer than 41% of the cases parties have recorded some degree of compliance with Committee rulings, whereas in 59% they recorded no progress.

Based on the empirical findings, the article then engages with the academic discourse concerning the legal binding effect of the rulings of the Committee. A holistic view of the Committee's practice and its impact offers an alternative way of evaluating the status and binding effect of its rulings. It suggests that the decision of parties to comply is determined typically by the substance of rulings as it relates to domestic circumstances rather than by the institutional character of the Committee and the binding effect of its rulings. Additionally, the use of the term 'soft law' in relation to the Committee's rulings denotes not only their lack of binding effect but also their future-oriented character, their capacity to create expectations about future conduct throughout the compliance process, and to inform the understanding of all parties about what constitutes compliant behaviour. The empirical insights caution against attaching too much importance to the role of binding effect in ensuring compliance.

The article is organized in seven sections. Following this introduction, Section 2 provides a general overview of the Aarhus Convention, its Compliance Committee and the normative character of its rulings. Section 3 defines the methodology of the impact evaluation, after which Section 4 describes the Committee's practice relating to access to justice. Section 5 discusses the domestic circumstances that lead to non-compliance by parties. Section 6 then explores the Committee's impact on improving state practice. Finally, Section 7 reviews the issues of judicialization of the Committee and the normative character of its rulings in light of the empirical findings.

2. THE AARHUS CONVENTION AND ITS COMPLIANCE MECHANISM

2.1. *The Three Pillars of the Aarhus Convention*

The Aarhus Convention is a legally binding international treaty. As at December 2019 it has 47 parties (46 states parties and the European Union (EU)). Its subject matter

[7] Ibid., p. 38.

[8] The Committee recommends that the MoP should advise the respective party on the necessary actions to bring the party into compliance. What this article refers to as Committee recommendations are, therefore, formally also the recommendations of the MoPs. The evaluations in this article are based on recommendations and progress evaluations adopted by the MoPs.

[9] As for the rationale for choosing this period, see Section 3 below with regard to methodology.

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comprises three procedural human rights: (i) the right to information; (ii) the right to participation; and (iii) the right of access to justice.

Academic discussion of the Aarhus Convention ranges from its general contribution to the field as arguably 'the most significant international achievement in the field of environmental rights of recent years'[10] and the implementation of various provisions of the Convention,[11] to the relevance of the Convention for other human rights treaty regimes in Europe.[12] These are but a few themes explored in the context of the Aarhus Convention's third pillar of access to justice. Special mention must also be made of the numerous implementation studies[13] and facilitative work[14] carried out by the Task Force on Access to Justice of the Aarhus Convention.[15]

The right of access to justice is enshrined in Article 9 of the Aarhus Convention. It entitles the public to have access to domestic review procedures (a court of law or other independent and impartial body established by law) in respect of all matters of environmental law,[16] including (i) refusals and inadequate handling of requests for information; (ii) reviewing the lawfulness of decisions, acts, or omissions as part of the decision-making process for activities with environmental impact; and

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[10] A quotation from the statement by Ralph Hallo, President of the European Environmental Bureau (EEB) and Coordinator of the International Programme, *Stichting Natuur en Milieu* (the Netherlands), available at: https://www.unece.org/fileadmin/DAM/env/pp/documents/statements.pdf. See also 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 T. Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T.M.C. Asser Press, 2009), pp. 221–51, K. Brady, 'New Convention on Access to Information and Public Participation in Environmental Matters' (1998) 28(2) *Environmental Policy and Law*, pp. 69–76, V. Koester, 'Review of Compliance under the Aarhus Convention: A Rather Unique Compliance Mechanism' (2005) 2(1) *Journal for European Environmental & Planning Law*, pp. 31–44.

[11] N. Hartley & C. Wood, 'Public Participation in Environmental Impact Assessment: Implementing the Aarhus Convention' (2005) 25(4) *Environmental Impact Assessment Review*, pp. 319–40.

[12] F. Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21(1) *European Journal of International Law*, pp. 41–55; S. Kravchenko & J. Bonine, 'Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights' (2012) 25(1) *Global Business & Development Law Journal*, pp. 245–87.

[13] J. Darpö, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', UNECE, 2013; D. Skrylnikov, 'Study on Standing for Individuals, Groups and Environmental Non-Governmental Organizations before Courts in Environmental Cases: Eastern Europe, the Caucasus and Central Asia', UNECE, 2014; ECOSOC, 'Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, Addendum to the Report of the Fifth session of the Meeting of the Parties' (30 June 2014), UN Doc. ECE/MP.PP/2014/2/Add.2, available at: https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppppdm/ppdm-recs.html.

[14] UNECE, 'Electronic Information Tools: Case Studies', available at: https://www.unece.org/env/pp/aarhus/tfai/case_studies.html.

[15] Task Force on Access to Information, further information is available at: https://www.unece.org/env/pp/tfai.html; Task Force on Public Participation in Decision-Making, further information is available at: https://www.unece.org/env/pp/ppdm.html; Task Force on Access to Justice, further information is available at: https://www.unece.org/env/pp/tfaj/background.html.

[16] UNECE, *The Aarhus Convention: Implementation Guide*, 2nd edn (UNECE, 2014).

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(iii) reviewing the acts and omissions of private persons and public authorities in alleged violation of national environmental laws.[17]

Article 9(4) and (5) detail the merits of the review, which require the availability of (i) adequate and effective remedies (including injunctive relief); (ii) fair, equitable, and timely procedures; (iii) access that is not prohibitively expensive; (iv) review of decisions issued in writing; and (v) public access to those decisions. Article 9(5) also encourages parties to establish appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

2.2. *The Committee as an Optional Arrangement for Compliance Review*

Article 15 of the Aarhus Convention obliges the MoP to establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention. It also provides for the right of the public to submit communications.

The compliance mechanism was 'one of the most contentious issues during negotiations'[18] and Article 15 emerged as 'merely an enabling clause'[19] for the process of setting up the Committee. The Committee's creation turned out to be challenging because of the open-ended formulation of Article 15.[20] Nevertheless, the first MoP in October 2002 adopted Decision I/7 on the Review of Compliance, establishing the Committee and its general procedural arrangements. Over the course of its existence the Committee has developed and continuously updates its *modus operandi*.[21]

Decision I/7 requires the Committee to consider the following cases: (i) submissions by parties on the compliance of another party or on their own compliance; (ii) referrals by the Secretariat of the Convention; and (iii) communications from the public. The Committee first convened on 17 March 2003. It meets three times a year in Geneva (Switzerland). All nine members[22] of the last intersessional Committee[23] serve in

[17] Additionally, the Committee considers that the use of the formulation '"laws relating to the environment" in Article 9(3) is not limited to "environmental laws", e.g., laws that explicitly include the term "environment" in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a "law under any policy, including and not limited to, chemicals control and waste management"': see Findings and Recommendations with regard to Compliance by Austria (ACCC/C/2011/63) (this and other findings are referred to in this article as 'F&R with regard to Compliance').

[18] J. Jendrośka, 'Aarhus Convention Compliance Committee: Origins, Status and Activities' (2011) 8(4) *Journal for European Environmental & Planning Law*, pp. 301–14, at 303.

[19] Ibid., p. 303.

[20] See further Koester, n. 10 above.

[21] UNECE, 'Guidance Document on the Aarhus Convention Compliance Mechanism', last revised version of Nov. 2018, available at: https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-62/Guide_to_the_ACCC_fifth_draft_for_CC62.pdf.

[22] Three members are environmental law academics, and the remaining six are environmental law practitioners.

[23] The last intersessional period is 2017 to 2020. Members of the Committee are elected either for one or two intersessional periods.

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their personal capacity and are legal practitioners or academics, mainly in the field of environmental law.

According to the Committee's *modus operandi*, following discussion of a compliance case (which includes also a formal hearing to which parties are invited), the Committee finalizes its findings and submits them to the case participants for final comment. The Committee's findings and recommendations are then provided to the forthcoming MoP[24] for endorsement of the findings and adoption of recommended actions.[25]

Upon the adoption of the decisions by the MoP, the Committee starts the follow-up and monitoring of progress in the implementation of its recommendations. The Committee reports on any progress made to each subsequent MoP until full compliance is achieved. The objective of the compliance procedure is therefore not only the determination of (non-)compliance, but also the ultimate compliance of the party concerned.[26] The Committee determines the non-compliance of the party and the applicable law, and carries out further administration of the compliance case. The latter aspect is crucial for the purpose of understanding the legal characteristics of the rulings of the Committee.

2.3. *The Legal Nature of the Rulings of the Committee*

Decision I/7 and the *modus operandi* of the Committee are silent on the legal quality of the Committee's rulings. Academic commentators give different views on the issue. The prevailing interpretation of the rulings pivots upon Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT).[27] On this basis, some authors claim that the Committee's findings of non-compliance are not legally binding, but that this 'may be remedied by an endorsement by the MoP of the rulings 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'[28] in

[24] UNECE Guidance Document, n. 21 above, p. 38.

[25] In exceptional circumstances, when compliance issues need to be addressed without delay, the Committee, 'in consultation with the Party concerned' or 'subject to agreement with the Party concerned', may resort to the measures listed in para. 37(a) (provide advice and facilitate assistance to individual parties regarding the implementation of the Convention); 37(b) (make recommendations to the Party concerned); 37(c) (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); or 37(d) (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) of the Annex of MoP Decision I/7 on review of compliance, n. 3 above.

[26] The separation of adjudication from post-adjudication phases is fundamental for international courts and tribunals: see S. Rosenne & Y. Ronen, *The Law and Practice of the International Court, 1920–2005* (Martinus Nijhoff, 2006). In the compliance process the declaration of non-compliance and the post-compliance phase (follow-up) are integral parts of one entire compliance process.

[27] Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[28] V. Koester, 'The Aarhus Convention Compliance Mechanism and Proceedings before Its Compliance Committee', in C. Banner (ed.), *The Aarhus Convention: A Guide for UK Lawyers* (Hart, 2015), pp. 201–15, A. Tanzi & C. Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward', in Treves et al., n. 10 above, pp. 569–80.

accordance with Article 31(3)(a) VCLT. Others consider that, upon MoP endorsement, the rulings of the Committee become legally binding on the contracting parties and the Convention bodies as far as the findings of the Committee may explain the meaning of Convention provisions or interpret the obligations under the Convention in such a way that the practice of a particular party constitutes a breach of those obligations.[29]

Given the advisory and non-adversarial nature of the Committee, relevant scholarship also uses the term 'soft law' to describe the rulings of the Committee.[30] Soft law is a residual category, defined only doctrinally. To say that the rulings of the Committee are soft law is firstly to invoke their non-binding effect.[31] However, the term 'soft law' denotes meanings other than simply non-binding. The International Common Law (ICL) framework, for example, provides an explanatory framework to qualify the legal effects of the decisions of international tribunals and implementation bodies.[32] According to the ICL, the rulings of the Aarhus Committee could indeed be labelled 'soft law' because they create expectations about the future conduct of parties and interpret or inform our understanding of binding provisions of the Aarhus Convention.[33]

The scholarly debate on the legal character of Committee rulings has emerged in response to concern that the findings and recommendations of an advisory and non-judicial body might not have the necessary legal impact on the behaviour of non-compliant parties. This line of reasoning suggests that accepting the rulings as authoritative interpretations, legally binding decisions or 'something more than soft law'[34] will ensure or strengthen the desired legal effects. Though these claims presume a correlation between the normative character of the Committee rulings and their legal effects, the impact of the rulings on national legal orders has never been assessed.[35] The next sections of this article address this gap in our knowledge. Firstly, the impact on national legal orders of rulings in relation to Article 9 will be assessed for the period 2004–12. In light of the empirical findings, the article will then discuss whether the normative characteristics of the rulings of the Committee, in effect, play a significant role in the decision of parties to comply with them.

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29 Fasoli & McGlone, n. 6 above, p. 38.

30 C. Brölmann & Y. Radi, *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar, 2016), p. 258; G. Loibl, 'Compliance Procedures and Mechanisms', in M. Fitzmaurice, D.M. Ong & P. Markouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar, 2010), pp. 426–49, at 435.

31 A. Guzman & T. Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis*, pp. 171–225, at 172.

32 Ibid., p. 171.

33 Ibid., p. 174.

34 Fasoli & McGlone, n. 6 above, p. 29.

35 Some authors, however, have recognized the need for such an assessment: see, e.g., Á. Ryall, 'Access to Justice in Environmental Matters in the Member States of the EU: The Impact of the Aarhus Convention' (2000) 5(16) *Jean Monnet Working Paper*, pp. 1–56, at 55.

3. DATA AND THE METHODOLOGY OF THE IMPACT EVALUATION

3.1. *Data Sources*

The impact assessment is based on primary sources,[36] namely, the Committee's rulings (findings and recommendations on compliance), decisions of the MoP, and the Committee's progress reports. Each non-compliance case was coded and scored manually.

This article's evaluation of the impact of the Committee is based on communications submitted between 2004 and 2012, regarding which Committee rulings were adopted at the fifth MoP in 2014 (19 cases in total). Fixing 2012 as the final year for the impact evaluation was preconditioned by the regularity with which the MoP convenes (every three years). As the MoP conclusions on the progress of Committee recommendations are the basis for the evaluation, measuring the progress recorded during the fifth session of the MoP in July 2014 will be possible only by comparison with the decisions of the sixth session of the MoP, which took place in September 2017. The parties' progress can therefore be evaluated only with regard to Committee findings issued by the end of 2013 and approved by the fifth MoP in 2014.

3.2. *The Approach to and the Methodology of Quantitative and Qualitative Impact Evaluation*

Progressive changes in the parties' behaviour indicate the impact of the Committee. Accordingly, this article occasionally uses the terms 'compliance' and 'impact' synonymously. Although the work of the Committee might have multiple spillover effects, the current evaluation does not consider the Committee's broader socio-economic, environmental, and political implications or influence.

The Committee's quantitative impact is measured as being the positive difference between the number of recommendations issued and the number of recommendations complied with. Respectively, a four-degree index is applied for the impact evaluation: (i) no impact/compliance; (ii) minor impact/compliance; (iii) partial impact/compliance; and (iv) full impact/compliance. If the party has made no progress under a particular communication it remains *non-compliant*. If it complies with fewer than half of the recommendations its compliance level will be labelled as *minor compliance*. If it has complied with half but not all of the recommendations it is considered to be in *partial compliance*. Compliance with all of the recommendations is considered to be *full compliance*. A numerical value is attached to each impact rate to calculate the Committee's final impact rate: non-compliant (0); minor compliance (1); partial compliance (2); and full compliance (3).

[36] The data for this article is sourced from a database created for a research project on the evaluation of the impact of 18 compliance committees. The data is coded for the first time, and is not fully publicly available. The impact assessment data is available in Appendix I and verifiable through the respective references. The remaining data can be provided upon request to the author of this article.

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The objectivity of such an evaluation of the Committee's recommendations[37] may not account for the significance of complying with some recommendations over others. However, any assessment of compliance based on the significance of non-compliance introduces additional biases, as it involves a subjective judgment of domestic conditions. For example, if the Committee recommended that country X and country Y establish more open standing rules for NGOs, the same recommendation for party X may be implementable without significant effort, whereas implementation for party Y may be a challenging 10-year task.

The MoP decisions that evaluate parties' progress are considered with 'no ifs or buts'. The only exception is communication ACCC/C/2008/31 concerning compliance by Germany. The Committee's conclusion about Germany's full compliance is oddly inconsistent with the role it attributes to domestic practice when determining parties' compliance. The Committee provides no grounds for such a deviation but includes a statement that:

> [D]ue to the short time since the 'Aarhus amendment's' entry into force, its application in practice is not yet known and … in the future it might examine allegations regarding the application of the 'Aarhus amendment' in practice or allegations regarding access to review procedures under Article 9 paragraph 3, should such cases be brought before it.

Ironically, in the same communication ACCC/C/2008/31 concerning compliance by Germany, the Committee expressly states its stance on the role of national practice.[38] I therefore include Germany among the non-compliant parties, which deviates from the evaluation method otherwise adopted in this article.

With regard to the degree of party compliance, the article also considers the directions and temporal aspects of improvements in compliance. The timing of compliance includes the period from the MoP decision on non-compliance to the MoP decision on compliance progress.

4. THE COMMITTEE'S ARTICLE 9 PRACTICE

Of the 87 communications submitted for the Committee's consideration in the period 2004–13,[39] the Committee deemed (i) 60 cases (69%) admissible; (ii) 25 cases (29%)

[37] In its recommendations the Committee puts forward practical, legislative, and policy measures, implementation of which should bring parties into compliance.

[38] In its F&R with regard to Compliance by Germany (ACCC/C/2008/31) the Committee stated: 'The mere hypothesis that courts could interpret the relevant national provisions contrary to the Convention's requirement is not sufficient to establish non-compliance by the Party concerned … the Committee considers whether the evidence submitted to it demonstrates that the practice of the courts of the Party concerned indeed follows this approach. If it does not, the Committee may conclude that the Party concerned fails to comply with the Convention'. If this is a reasoning the Committee follows when deciding the question of non-compliance the same merit should be applied when evaluating the progress of the parties. When reviewing Germany's progress the Committee recognized the adequacy of legislative measures but did not request evidence of relevant judicial practice. Instead, the Committee leaves the matter of practice for future consideration.

[39] There were more than 87 communications up to the end of 2013; however, the article includes those cases in respect of which the MoP's decisions on non-compliance could have been issued by 2012.

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non-admissible; and (iii) in two cases (2%)[40] summary proceedings were applied.[41] In 19 (out of 60) admissible communications the Committee found 12 parties to be in non-compliance with the Article 9 provisions.[42] Figure 1 below illustrates the distribution of these 19 communications among the 12 parties.

Ten other Article 9-related communications were deemed inadmissible: in one instance for unknown reasons,[43] in five instances for being manifestly unreasonable,[44] and in four instances for lack of corroborating information.[45]

The following tables list parties that have been found to be non-compliant solely with Article 9 (Table 1) or conjointly with other articles of the Convention (Table 2).

The United Kingdom (UK) is at the top of the list with three cases,[46] followed by Armenia, Austria, Bulgaria, Kazakhstan, and Spain, all tied with two communications each. The remaining parties each have one communication. Parties are most commonly found to be non-compliant with Article 9(4) (in 15 cases) and least often with Article 9(1) (in two early cases only).

All communications relating to Article 9 were initiated by non-state actors. Among the communicants are small or recognized transnational non-profit organizations (such as Ecoera NGO in Armenia and the Association for Environmental Justice in Spain) or their associations (such as ClientEarth and OEKOBUERO), natural entities, environmental protection associations and foundations (such as the Danish Ornithological Society, the Balkani Wildlife Society in Bulgaria, and the Environmental Law Foundation in the UK), private actors (Greenpeace UK), and others (see the distribution of communicants among the 19 cases in Figure 1).

Although the Committee provides no redress for violations of individual rights,[47] communications by the public stem mostly from unsuccessful attempts or prospective failures to exercise treaty-enshrined rights within national legal systems.[48] However, even if this does not technically constitute redress, the Committee's recommendations

[40] F&R with regard to Compliance by the United Kingdom (UK) (ACCC/C/2011/65).

[41] '… in cases which were determined to be preliminarily admissible, but where the legal issues raised by the communication had already been tackled by the Committee, summary proceedings could apply': for further information see UNECE, 'Guidance Document on Aarhus Convention Compliance Mechanism', Dec. 2010, p. 22, available at: http://www.unece.org/index.php?id=21457.

[42] The parties concerned are Armenia (AM), Austria (AT), Bulgaria (BG), Czech Republic (CZ), Germany (DE), Denmark (DK), Spain (ES), European Union (EU), Kazakhstan (KZ), Moldova (MD), Romania (RO), United Kingdom (UK).

[43] ACCC/CC/2004/10 (KZ).

[44] ACCC/C/2007/20 (KZ), ACCC/C/2009/40 (UK), ACCC/C/2012/72 (EU), ACCC/C/2012/75 (UK), ACCC/C/2013/82 (Norway).

[45] ACCC/C/2010/47 (UK), ACCC/C/2010/49 (UK), ACCC/C/2012/74 (UK), ACCC/C/2013/84 (UK).

[46] Under another communication relating to the UK (ACCC/C/2008/23) the Committee found non-compliance *stricto sensu* with Art. 9(4) but no evidence was presented as to whether it was a result of systemic error; hence no recommendations were issued. With regard to two other communications concerning the UK's compliance the Committee applied summary proceedings (ACCC/C/2011/64, ACCC/C/2012/65), and thus the communications were no longer pursued.

[47] Koester, n. 10 above, p. 34.

[48] The Committee requires exhaustion of domestic remedies before a compliance case can be initiated. In practice, however, the Committee also considers whether those remedies are sufficient and effectively available, and whether their application is not unreasonably prolonged so that it effectively impedes access to justice (Decision I/7, n. 3 above, para. 21).

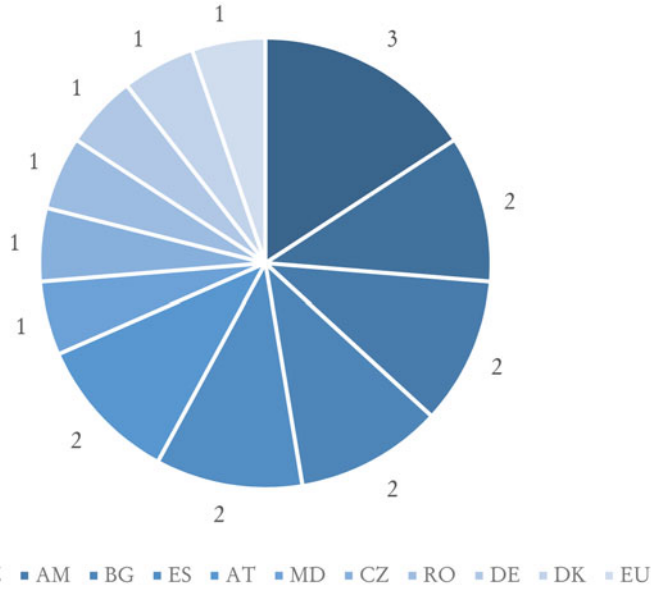

Figure 1 Distribution of 19 Non-Compliance Cases

Table 1 Cases of Non-Compliance with Article 9

No.	Cases	Provisions Not Complied With
1	ACCC/C/2004/06 Kazakhstan	9(3), 9(4)
2	ACCC/C/2008/27 United Kingdom	9(4)
3	ACCC/C/2008/31 Germany	9(2), 9(3)
4	ACCC/C/2008/32 European Union	9(3), 9(4)
5	ACCC/C/2008/33 United Kingdom	3(1), 9(4), 9(5)
6	ACCC/C/2011/57 Denmark	9(4)
7	ACCC/C/2011/58 Bulgaria	9(2), 9(3), 9(4)
8	ACCC/C/2011/62 Armenia	9(2)
9	ACCC/C/2011/63 Austria	9(3), 9(4)
10	ACCC/C/2012/76 Bulgaria	9(4)
11	ACCC/C/2012/77 United Kingdom	9(4)

provide indirect remedies for members of the public, particularly given that Article 9 communications stem from domestic public interest litigation.

The average duration of case processing for the Committee is 24.5 months (median 21). The longest durations were 60 months (Germany, ACCC/C/2008/31) and 99 months (EU, ACCC/C/2008/32). The minimum was eight months (Moldova, ACCC/C/2008/30).

5. A KIND REMINDER TO COMPLY

Louis Henkin stated that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[49] To an extent,

[49] L. Henkin, *How Nations Behave* (Columbia University Press, 1979), p. 47.

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Table 2 Cases of Non-Compliance with Article 9 and Other Articles

No	Cases	Articles Not Complied With	Article 9 Provisions Not Complied With
1.	ACCC/C/2004/01 Kazakhstan	3(1), 4(1), 4(7), 6, 9(1)	9(1)(3)(1)
2.	ACCC/C/2004/08 Armenia	4(1), 4(2), 6(1)(a); Annex I, paras 20, 6(2), 6(3), 6(4), 6(5), 6(7), 6(8), 6(9), 7, 9(2), 9(3), 9(4)	9(2), 9(3), 9(4)
3.	ACCC/C/2008/24 Spain	4(1)b, 4(2), 4(8), 6(3), 9(4)	9(4)
4.	ACCC/C/2008/30 Moldova	3(1), 3(2), 4(1), 4(2), 4(4), 4(7), 9(1)	9(1)
5.	ACCC/C/2009/36 Spain	4(1), 4(2), 4(1)b–6(6), 6(3), 3(8), 9(4), 9(5)	9(4), 9(5)
6.	ACCC/C/2010/48 Austria	4(7), 9(4), 9(3)	9(3), 9(4)
7.	ACCC/C/2010/50 Czech Republic	6(3), 6(8), 9(2), 9(3)	9(2), 9(3)
8.	ACCC/C/2012/69 Romania	4(1), 4(2), 4(6), 4(7), 6(3), 6(7), 9(4)	9(4)

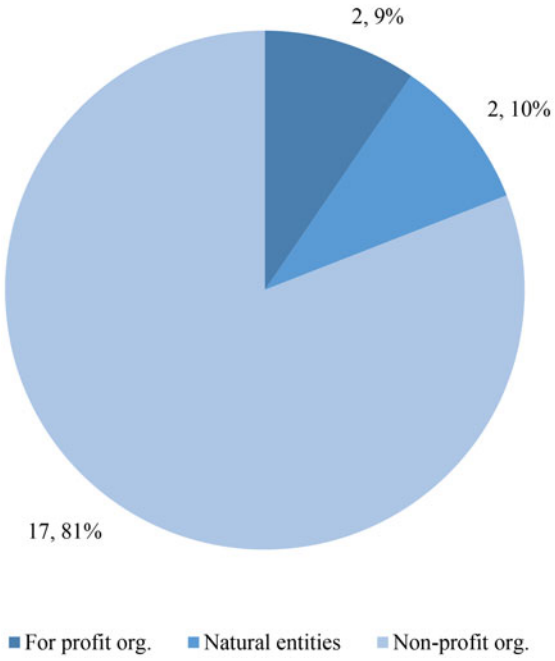

Figure 2 The Breakdown of Communicants in Access to Justice Cases

this optimistic statement is true for compliance with Article 9 of the Aarhus Convention.[50] Eight years of Committee practice reveal an ongoing struggle on the part of nation states to nurture a legal culture that prioritizes access to justice for the protection of the environment across the United Nations Economic Commission for Europe (UNECE) region.

[50] There have also been 13 cases of alleged non-compliance with Art. 9 where the parties were found to be in compliance.

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The circumstances that led the Committee[51] to declare non-compliance with Article 9 vary considerably. Those circumstances are listed below, as reflected in Article 9.

Firstly, lengthy legal procedures, including denial of access to justice through which members of the public might challenge decisions permitting activities with environmental impact, led the Committee to declare non-compliance with Article 9(1) and (2) by Kazakhstan,[52] Moldova,[53] Armenia,[54] the Czech Republic,[55] and Germany.[56] In the case of Germany[57] and the Czech Republic[58] the Committee found there were limitations on challenging acts or omissions by public authorities or private persons contravening national environmental laws (Article 9(3)).

Secondly, in Armenia the absence of access to review procedures for NGOs and the non-availability of adequate and effective remedies led the Committee to find non-compliance with Article 9(2), (3) and (4).[59] Similar findings of non-compliance in Bulgaria were based on the unavailability of access to challenge General Spatial Plans or Detailed Spatial Plans, and final decisions permitting activities listed in Annex I to the Convention.[60]

Thirdly, lack of access to a timely review procedure, no standing for NGOs to challenge acts or omissions of a public authority or private person in many of its sectoral laws that enforce environmental legislation, as well as failure to ensure that courts properly notify parties of the time and place of hearings and of the decision made, led to conclusions of non-compliance with Article 9(3) and (4) in four communications involving three parties: Kazakhstan,[61] the EU,[62] and Austria.[63]

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[51] Studies carried out under the auspices of the Aarhus Task Force on Access to Justice have also shown the existence of implementation loopholes in legal systems (e.g., the Netherlands, Sweden and Estonia, Azerbaijan, Belarus) whose compliance with Art. 9 has never come under the Committee's scrutiny for the period evaluated in this article: see, e.g., Darpö, n. 13 above; Skrylnikov, n. 13 above.

[52] F&R with regard to Compliance by KZ (ACCC/CC/2004/10) (lengthy legal procedures and denial of NGO standing for access to environmental information).

[53] F&R with regard to Compliance by MD (ACCC/C/2008/30) (failure of public authority of Moldova to fully execute the final decision of the Civil Chamber of the Chisinau Court of Appeal).

[54] F&R with regard to Compliance by AM (ACCC/C/2011/62) (denial in standing by the Court of Cassation of Armenia for NGOs to challenge mining permits in the court).

[55] F&R with regard to Compliance by CZ (ACCC/C/2010/50) (no access to a review procedure in the Czech Republic to challenge the legality of environmental impact assessment screening conclusions).

[56] F&R with regard to Compliance by DE (ACCC/C/2008/31) (the requirement in German legislation for NGOs to assert that under the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) (EAA) the challenged decision contravenes a legal provision 'serving the environment').

[57] F&R with regard to Compliance by DE (ACCC/C/2008/31).

[58] F&R with regard to Compliance by CZ (ACCC/C/2010/50).

[59] F&R with regard to Compliance by AM (ACCC/C/2004/08).

[60] F&R with regard to Compliance by BG (ACCC/C/2011/58).

[61] F&R with regard to Compliance by KZ (ACCC/CC/2004/06). The communication concerning Kazakhstan highlighted the absence of 'effective remedies in a review procedure concerning an omission by the public authority to enforce environmental legislation as well as failure to ensure that courts properly notify the parties of the time and place of hearings and of the decision taken'.

[62] F&R with regard to Compliance by the EU (ACCC/C/2008/32).

[63] F&R with regard to Compliance by AT (ACCC/C/2010/48). Non-compliance by Austria was a result of having no 'access to a timely review procedure' (Art. 9(4)), and 'no standing of environmental non-governmental organizations (NGOs) to challenge acts or omissions of a public authority or private person in many of its sectoral laws' (Art. 9(3)). In a later communication the Committee reiterated the failure of

Fourthly, lack of adequate remedies (including injunctive relief), untimely and ineffective remedies for review procedures, and prohibitively expensive proceedings were the main reasons for non-compliance with Article 9(4) by Bulgaria,[64] Romania,[65] Spain,[66] Denmark,[67] and the UK.[68] The absence of appropriate assistance mechanisms to remove or reduce financial barriers in Spain[69] and prohibitively expensive costs in the UK[70] resulted in non-compliance with Article 9(4) and (5).

6. THE IMPACT OF THE COMPLIANCE COMMITTEE

Of the 19 communications on non-compliance, the impact of two was impossible to assess. Evaluation of communication ACCC/C/2008/24 concerning compliance by Spain was impossible to assess because the follow-up on progress was merged with communication ACCC/C/2009/36/ES, also relating to Spain. With regard to communication ACCC/C/2008/32 concerning compliance by the EU, the sixth MoP failed to reach a consensus and the decision was deferred for consideration by the next MoP.

6.1. *Quantitative Evaluations*

As of June 2019 parties remained in a state of non-compliance with nine communications out of 17 (distributed across 11 parties). Minor compliance is recorded under one communication, partial compliance with regard to three communications, and full compliance under four communications (see Table 3).[71] Overall, in 59% of the cases, parties have remained non-compliant, whereas in 41% they have recorded

Austria to comply with Art. 9(3)–(4) on finding the public to have no means of access 'to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection': see F&R with regard to Compliance by AT (ACCC/C/2011/63).

64 F&R with regard to Compliance by BG (ACCC/C/2012/76) (inadequate and ineffective remedies to prevent environmental harm in Bulgaria).

65 F&R with regard to Compliance by RO (ACCC/C/2012/69) (untimely and ineffective remedies of the review procedures for information requests under Art. 9(1)).

66 F&R with regard to Compliance by ES (ACCC/C/2008/24) (a finding of no adequate remedies (i.e. injunctive relief)).

67 F&R with regard to Compliance by DK (ACCC/C/2011/57).

68 F&R with regard to Compliance by DK, ibid.; F&R with regard to Compliance by the UK (ACCC/C/2008/27); F&R with regard to Compliance by the UK (ACCC/C/2012/77) (prohibitively expensive proceedings).

69 F&R with regard to Compliance by ES (ACCC/C/2009/36): Spain had no appropriate assistance mechanisms to remove or reduce financial barriers to access to justice to a small NGO (Art. 9(5)) and no system of fair and equitable remedies (Art. 9(4)).

70 F&R with regard to Compliance by the UK (ACCC/C/2008/33). In this early case on compliance by the UK the reason for non-compliance was the prohibitively expensive cost (Art. 9(4)). The Committee also found that the system as a whole is not such as 'to remove or reduce financial … barriers to access to justice', as Art. 9(5) of the Convention requires parties to the Convention to consider that 'by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement [Art.] 9(4) of the Convention, the Party concerned also fails to comply with [Art.] 3.1'.

71 Appendix 1 contains a per-case evaluation of the impact based on the adopted methodology.

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Table 3 Scoring of Compliance Impact

No.	Case Number	Year of MoP Decision	Non-Compliance (0)	Minor Compliance (1)	Partial Compliance (2)	Full Compliance (3)	
1.	ACCC/C2004/01/KZ	2005				X	36
2.	ACCC/C/2004/06/KZ	2008				X	72
3.	ACCC/C/2004/08/AM	2008			X		96
4.	ACCC/C/2008/27/UK	2011	X				72
5.	ACCC/C/2008/30/MD	2011				X	36
6.	ACCC/C/2008/31/DE	2014	X				36
7.	ACCC/C/2008/33/UK	2011		X			36
8.	ACCC/C/2009/36/ES	2011	X				72
9.	ACCC/C/2010/48/AT	2014			X		36
10.	ACCC/C/2010/50/CZ	2014			X		36
11.	ACCC/C/2011/57/DK	2014				X	36
12.	ACCC/C/2011/58/BG	2014	X				36
13.	ACCC/C/2011/62/AM	2014	X				36
14.	ACCC/C/2011/63/ AT	2014	X				36
15.	ACCC/C/2012/69/ RO	2014	X				36
16.	ACCC/C/2012/76/ BG	2014	X				36
17.	ACCC/C/2012/77/UK	2014	X				36

some degree of compliance. The detailed evaluation under each communication and the respective scoring are presented in Appendix I at the end of this article.

Table 3 reveals that compliance by parties in earlier cases is higher than appears in later cases. Whether this is because in earlier cases parties had more time to improve their compliance is tested by contrasting the timing with the degree of compliance/non-compliance for each case (see Figure 3).

As is evidenced by Figure 3, after 2011 the level of compliance with access to justice provisions declined. For communications submitted before 2011, various degrees of compliance are observable within 36 months (with the exception of communications ACCC/C/2008/27/UK, ACCC/C/2008/31/DE,[72] and ACCC/C/2009/36/ES). Communication ACCC/C/2004/08/AM regarding compliance by Armenia is an exception, as it was only after 96 months that the party achieved some degree of compliance. That being said, in the majority of instances improvements were recorded in approximately three years.

The picture is slightly different for communications submitted after 2011. Among those cases, in only one instance – ACCC/C/2011/57/DK – was full compliance recorded in 36 months. In the remaining six instances parties remained non-compliant during the following intersessional period of 36 months. It is therefore evident that, from a timing point of view, parties performed better for communications submitted before 2011 than for those submitted from that date. The next MoP, in 2020, will be essential for gaining a more complete picture of the degree and depth of parties' performance.

[72] With regard to compliance by Germany under this communication (ACCC/C/2008/31/DE), the MoP issued its decision only in 2014. This explains why the non-compliance period is only 36 months when the communication was submitted in 2008.

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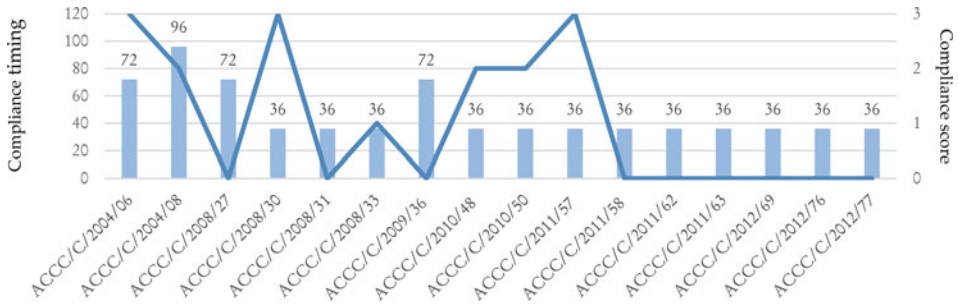

Figure 3 Per Case Timing and the Rate of Compliance

There are probably several reasons for such a time lag, which include the gravity of issues relating to compliance, the degree of change in the domestic legal culture and practices required by the recommendations of the Committee. The time lag could also relate to a possible decline in the Committee's authority or of NGOs within the national legal orders, or the politics of compliance supported by various stakeholders (including financial support mechanisms and capacity-building activities). These all require in-depth and separate statistical enquiries that are beyond the scope of this article.

6.2. *Qualitative Evaluations*

The impact of the Committee, considered in the context of existing literature on access to environmental justice, is indicative of an emerging and consistent practice of access to justice across the UNECE region. The Committee's communications with parties over the eight-year period have resulted in:

- reasonable time limits for judicial review in England, Wales and Scotland;
- access to courts for NGOs in Armenia to challenge environmental decisions under Article 6;
- an opportunity to challenge the acts and omissions that contravene environmental laws relating to urban planning and land use in the Czech Republic;
- improved execution of final court decisions in Moldova with regard to access to information cases;
- the establishment of timely and expeditious review procedures in Austria;
- the provision of less costly access to review procedures in Denmark; and
- standing for NGOs in access to information cases and the availability of effective remedies in a review procedure concerning omissions by public authorities to enforce environmental legislation in Kazakhstan.

Despite these positive indications, it is disquieting that the practices, policies or legislation of some parties have remained unchanged for more than six years. These instances of long-lasting non-compliance raise a legitimate concern over whether, for these parties, the compliance process serves to legitimize domestic inaction. For almost 10 years, the UK has been expected to change its costs system to prevent litigation from becoming

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prohibitively expensive.[73] Some eight years later, Austria still has no clear criteria for NGOs to challenge acts or omissions that contravene national laws. Inadequate and ineffective review procedures in Bulgaria have continued for seven years; and in Armenia standing criteria for NGOs, which are inconsistent with the Convention, have existed for almost 14 years. The non-availability of legal aid in Spain has lasted for approximately 10 years. Romania's untimely and ineffective remedies for review procedures concerning information requests have been on the Committee's agenda for approximately six years.

7. THE SOFT AND THE HARD CORNERS OF THE COMMITTEE'S PRACTICE

Besides offering an empirical insight into the performance of this unique treaty mechanism, the assessment of the Committee's impact in relation to Article 9 may also have implications for a number of academic debates, covering questions from the status of non-state actors in international law[74] and the impact of judicial review on bureaucratic decision making[75] as well as on domestic and international politics,[76] to the role of courts in maintaining the environmental rule of law.[77] However, the purpose of the assessment in this article is to build a solid empirical ground to examine the relationship between the normative characteristics of the rulings of the Committee and the decisions of parties to comply with them.

7.1. *The Binding Nature of the Rulings of the Committee and their Impact*

In the debate concerning the binding nature of the rulings of the Committee, two key propositions emerge. According to the first of these, nothing that the Committee does by itself may be legally binding. However, the latter can be remedied,[78] or the rulings may become binding,[79] once they are endorsed by the MoP as authoritative interpretations of the Aarhus Convention (Article 31(3) VCLT).[80] The second proposition suggests that the endorsement of the rulings by the MoP, the application of the domestic remedies rule,[81] and the procedure for considering communications are evidence that the Committee offers not just a soft remedy but is already a judicialized institution

[73] Out of 10 non-compliance cases four relate to the UK.

[74] A. Clapham, *Human Rights and Non-State Actors* (Edward Elgar, 2013).

[75] M. Hertogh & S. Halliday, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004).

[76] K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014).

[77] C. Voigt & Z. Makuch, *Courts and the Environment* (Edward Elgar, 2018).

[78] Koester, n. 28 above.

[79] Fasoli & McGlone, n. 6 above.

[80] Ibid., pp. 36 and 45.

[81] 'In considering any communication from the public, the Compliance Committee will take into account the extent to which any domestic remedy (i.e. review or appeals process) was available to the person making the communication, except where such a remedy would have been unreasonably prolonged or inadequate. Before making a communication to the Committee, the member of the public should consider

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capable of generating decisions with legal effect.[82] While, in principle, this article is not opposed to these ways of thinking about the Committee and its output, some aspects of such reading are still open to dispute.

Firstly, the binding effect of decisions of the MoP cannot be inferred from their status as subsequent agreement or subsequent practice. As subsequent agreement or practice, MoP decisions are merely to be taken into account in interpreting the Aarhus Convention (Article 31(3) VCLT), together with the context (Article 31(2) VCLT), and in addition to the legally binding text of the Aarhus Convention (Article 31(3) VCLT).[83] The recommendations of the Committee endorsed by the MoP advise the party concerned about possible ways[84] of improving compliance, but are not part of the binding text of the Convention. In this respect the International Court of Justice (ICJ) has held, with regard to the International Whaling Commission (IWC), a similar treaty institution, that its non-binding recommendations, issued for the application and interpretation of the International Convention for the Regulation of Whaling (ICRW),[85] may 'be relevant [only] for the interpretation of the Convention or its schedule'.[86] Overall, and with few exceptions,[87] the decisions of the highest political and governing bodies of treaties are still deemed an 'orientational aid to interpretation'[88] and outside the scope of legally binding sources of international law.[89]

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whether the problem could be resolved by using such domestic remedies': UNECE, Guidance Document, n. 21 above, p. 34.

82 Fasoli & McGlone, n. 6 above.

83 O. Dörr & K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018), pp. 579–614.

84 The recommendations do not purport comprehensively to list all actions required for full compliance and the party concerned may take alternative actions: Fasoli & McGlone, n. 6 above, p. 42.

85 Washington DC (US), 2 Dec. 1946, in force 10 Dec. 1948, available at: https://iwc.int/convention.

86 *Whaling in the Antarctic* (*Australia* v. *Japan: New Zealand* intervening), Judgment, 31 Mar. 2014, *ICJ Reports (2014)*, p. 46.

87 Jutta Brunnée claims the development of a significant 'grey zone' with regard to the lawmaking power of Conferences of the Parties (COPs). This 'grey zone' is as a result of COP decisions the adoption of which is authorized explicitly by or can be implied from the underlying treaty. For example, Art. 2.9 of the Montreal Protocol (n. 1 above) explicitly authorizes the COP to change the ozone depleting potential of substances or their phase-out schedule; the Kyoto Protocol (Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf) charges the COP to the UN Framework Convention on Climate Change (New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int/resource/docs/convkp/conveng.pdf) with elaborating the terms that are needed to flesh out several of the Protocol's key provisions (i.e., Art. 6.2): J. Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15(1) *Leiden Journal of International Law*, pp. 1–52, at 21–33. The provisions of the Aarhus Convention do not fall within any of the mentioned exceptions in terms of the powers of the MoP to act as a lawmaker.

88 D. Thürer, '"Soft Law": Eine neue Form vom Völkerrecht' (1985) 104 *Zeitschrift für schweizerisches Recht*, pp. 429–45, at 445.

89 According to Daniel Bodansky, '[i]n general, decisions by international institutions such as the COP are not legally binding unless their governing instrument so provides': D. Bodansky, 'Legally Binding versus Non-legally Binding Instruments', in S. Barrett, C. Carraro & J. de Melo (eds), *Towards a Workable and Effective Climate Regime* (CEPR Press, 2015), pp. 155–65, at 157. Jutta Brunnée suggests an interaction perspective towards international law which embraces the entire normative continuum, where through the process designed to promote compliance, including MoP decision making, the law is remade as the scope or the content of norms shift and give rise to new normative understanding. This understanding of international law eschews the notions of 'soft' and 'hard' as meaningful categories, and the legal norms are distinguished from non-legal norms by internal characteristics (compatibility of the rules,

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Secondly, the claims that the Committee offers not 'just a soft remedy' and has become a more judicialized institution the rulings of which, as authoritative interpretations, have the capacity to generate legal effects[90] does not find full support either in the epistemic discourse or in the evidence of the actual impact of those rulings on state practice.

In relation to the epistemic discourse, it is notable that in 14 years only two parties – Bulgaria (ACCC/C/2011/58)[91] and the EU (ACCC/C/2008/32)[92] – explicitly disputed their obligation to implement the Committee's recommendations.

The progress report for Bulgaria under communication ACCC/C/2011/58 stated that the ongoing consultations between the various national authorities will address the Committee's recommendations, 'taking into account not only the concerns related with compliance by Bulgaria with the provisions of the Convention, but also socio-economic and administrative aspects'.[93] On this basis, the Committee concluded that 'the Party concerned seems to maintain the position that implementing the recommendations of the Committee is not required for its full compliance with [Article 9(2)–(3)]'.[94]

The second instance is the much-discussed denial by the EU of certain parts of the Committee's reasoning under communication ACCC/C/2008/32. At the core of this denial was the EU's disagreement with the Committee's finding that the party had failed to comply with Article 9(3)–(4) because neither the EU Aarhus Regulation[95] nor the jurisprudence of the Court of Justice of the European Union (CJEU) complies with the obligations arising under those paragraphs.[96] The EU view is that the Committee's finding that the jurisprudence of the EU courts should take a certain direction in order to comply with the Aarhus Convention amounted to unwarranted instructions to the European Court of Justice or to the General Court regarding their judicial activities.[97] The European Council refused to accept recommendations of the draft Decision VI/8f. In the view of the European Council, the principle of separation of powers in the EU prevents the Council from giving instructions or making

reasonable requirements of the rules, and congruence of official actions with the rules, transparency and relative predictability of the rules): Brunnée, n. 87 above, pp. 33–7. See also A. Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements' (2009) 31(1) *Michigan Journal of International Law*, pp. 232–87.

90 Fasoli & McGlone, n. 6 above.

91 F&R with regard to Compliance by BG (ACCC/C/2011/58).

92 F&R with regard to Compliance by the EU (ACCC/C/2008/32).

93 Progress report by BG, Sept. 2013, available at: https://www.unece.org/env/pp/compliance/compliancecommittee/58tablebg.html.

94 Fifth MoP to the Aarhus Convention, Report of the Compliance Committee: Compliance by BG, ECE/MP.PP/2014/13, 2 July 2014.

95 Regulation (EC) No. 1367/2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L 264/13.

96 F&R with regard to Compliance by the EU (ACCC/C/2008/32).

97 Sixth MoP to the Aarhus Convention: Agenda Item 7(b): Compliance Mechanisms. Statement by the EU with Respect to the Draft Decision VI/8f concerning Compliance by the European Union with Its Obligations under the Convention, ECE/MP.PP/2017/25, 14 Sept. 2017.

recommendations to the CJEU concerning its judicial activities.[98] Hence, the European Council considered that it was not in a position to act upon recommendations of the Committee and to give them legal effect. At the Sixth MoP, the EU proposed that the MoP take note rather than endorse the findings of the Committee, as it normally does according to established practice. The latter suggestion was deemed unacceptable by some parties and non-state actors,[99] including Norway[100] and Switzerland,[101] as it imperilled the long-standing practice of endorsement of the findings of the Committee by consensus. As the MoP did not reach a consensus, it deferred the adoption of the decision until the next MoP.

Considering both cases together, it appears that in its written submissions Bulgaria never raised the question of the binding effect of the rulings of the Committee. Bulgaria considered its compliance with the recommendations of the Committee possible to the extent that they do not compromise domestic socio-economic and administrative considerations. In the EU case, the position proposal drafted by the EU Commission concluded:

> The Committee's findings will be submitted for endorsement to the sixth session of the Meeting of the Parties to the Aarhus Convention, which will take place 11 to 14 September in Budva, Montenegro, whereby they would gain the status of official interpretation of the Aarhus Convention, therefore binding upon the Contracting Parties and the Convention Bodies.[102]

This proposal was eventually rejected by the European Council. Even the draft of the document that describes the rulings of the Committee as official interpretation[103] provides no substantiation of the reasons why adoption by the MoP would make the findings of the Committee binding upon the contracting parties and convention bodies. The EU Commission explains its position firstly on the findings of the Committee (matters of substance) and implications of the findings, and only then turns to the question of binding effect.[104] Arguably, had the EU Commission agreed with the substantive conclusions of the Committee, the argument relating to binding effect would not have been invoked. It is notable in this context that, as of 2019, the CJEU has never cited the

[98] Council Decision (EU) 2017/1346 of 17 July 2017 on the Position to be Adopted, on behalf of the European Union, at the Sixth Session of the Meeting of the Parties to the Aarhus Convention as regards Compliance Case ACCC/C/2008/32 [2017] OJ L 186/15.

[99] Statement of European Ecoforum under the Agenda Item 7(b): Compliance Mechanism, Sept. 2017, available at: https://www.unece.org/fileadmin/DAM/env/pp/mop6/Statements_and_Comments/MOP_6_7b_Eco_Forum_Compliance.pdf.

[100] Statement of Norway under Agenda Item 7(b): Draft Decision VI/8f concerning Compliance by the European Union with Its Obligations under the Convention, Sept. 2017, available at: https://www.unece.org/fileadmin/DAM/env/pp/mop6/Statements_and_Comments/MOP-6_7b_Compliance_General___EU_-_Norway_statement_1.pdf.

[101] Statement of Switzerland under Agenda Item 7(b): Report of the Sixth Session of the Meeting of the Parties of the Aarhus Convention, ECE/MP.PP/2017/2, Sept. 2017.

[102] Proposal for a Council Decision on the Position to be Adopted, on behalf of the European Union, at the Sixth Session of the Meeting of the Parties to the Aarhus Convention regarding Compliance Case ACCC/C/2008/32, COM(2017) 366 final.

[103] The draft of the EU Commission refrains from using the term 'authoritative interpretation'.

[104] Proposal for a Council Decision, n. 102 above, pp. 4–7.

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Committee's rulings as sources of law.[105] The opinions of the Advocates General, in contrast, are comparatively generous in their engagement with the Committee's practice.[106]

The above two instances indicate that in the decision of parties to accept or to comply with the rulings of the Committee, the question of binding effect is auxiliary. At the core is the (at times gradual) acceptance of the substance of the findings and the recommendations.

In relation to the actual impact (legal effects) of the rulings, the Committee has been able to ensure that in 41% of cases the parties improved their compliance record through its advisory procedure and through consistent communication, which relies on the parties' good faith in seeking future compliance. In the remaining 59% of the cases improvements are still in progress. Against this empirical background, can we actually claim that the binding effect of the rulings is what has determined the observed impact? Would the impact have been higher than 41% had the parties perceived the Committee as a fully fledged judicial institution and its rulings as legally binding authoritative interpretations rather than non-binding recommendations? The influence of the Committee in relation to Article 9 communications neither confirms nor rejects the impact of binding effect. However, it provides insights that caution against a position which attaches overwhelming importance to the role of binding effect in ensuring compliance of the parties.

First and foremost, the MoP and the Committee rely on a range of measures to ensure compliance of the parties (Decision I/7 (37)). While the MoP is vested with the power to deploy the full complement of the measures available under the Aarhus Convention,[107] pending consideration by the MoP the Committee may, with a view to addressing the compliance issue without delay, provide advice or facilitation. Additionally, with the agreement of the party concerned, the Committee may (i) make recommendations to the party concerned; (ii) request the party concerned to submit a strategy, including a time schedule, to the Committee regarding achieving compliance with the Convention and to report on the implementation of this strategy;

[105] In its argumentation the CJEU relied on the *Implementation Guide*, n. 16 above, which, in turn, refers widely to the Committee's interpretations of the Aarhus provisions.

[106] See, e.g., Case C-260/11, *The Queen, on the Application of David Edwards and Another* v. *Environment Agency and Others (Reference for a Preliminary Ruling from the Supreme Court (United Kingdom))*, Opinion of Advocate General Kokott, Oct. 2012, ECLI:EU:C:2012:645; and Joined Cases C-401/12P to C-403/12P, *Council of the European Union, European Parliament, European Commission* v. *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Opinion of Advocate General Jääskinen, May 2014, ECLI:EU:C:2014:310.

[107] The measures are: (a) Provide advice and facilitate assistance to individual parties regarding the implementation of the Convention; (b) Make recommendations to the party concerned; (c) Request the party concerned to submit a strategy, including a time schedule, to the Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; (d) 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; (e) Issue declarations of non-compliance; (f) Issue cautions; (g) 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; (h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

and (iii) 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.

The main measure used by the Committee and the MoPs to ensure improvement in compliance in 41% of the cases was the recommendation (paragraph 37(b)). In its entire practice, the MoP has issued a caution (paragraph 37(f)) – which, together with suspension (but not withdrawal) of special rights and privileges, is considered a more confrontational means of enforcing compliance[108] – to only four parties in response to long-lasting inaction in implementing the recommendations: Ukraine,[109] Kazakhstan,[110] Turkmenistan,[111] and Bulgaria.[112] It is to be noted that the binding status of the Committee rulings, or the lack thereof, has no impact on the range of measures the Committee may take in order to influence the behaviour of the parties.

The empirical data in this article also indicates that the same party may react differently to various rulings, or even to different parts of the same ruling. For example, the UK has managed to establish reasonable time limits for judicial review in England, Wales and Scotland, whereas for almost ten years it has taken insignificant steps to change its costs orders to prevent environmental litigation from becoming prohibitively expensive. Armenia was able to open the doors of its judicial system to NGOs to challenge decisions under Article 6 of the Aarhus Convention, but the criteria for NGO standing have remained inconsistent with the Convention for years. Similarly, Austria has introduced timely and expeditious review procedures, but it has still to establish clear criteria for NGOs to challenge acts or omissions that contravene national laws.

The choices made by the parties in the above instances could be explained by a number of reasons, which include an unfavourable cost–benefit analysis of the consequences of less costly access to environmental justice; lack of capacity to address the recommendations as is required by the Committee, and so on. The choice to respond or not is based on the substance of the recommendations, and not on their binding effect. The alternative way of thinking would suggest that parties perceive one ruling or part of the same ruling of the Committee to be binding and have therefore complied, and perceive other rulings, or different parts of the same ruling, as non-binding and not subject to compliance. The latter is legally implausible as recommendations of the Committee are subject to unconditional implementation in their entirety.

The above observations lead to a final point. For all non-compliant states the Aarhus Convention is a legally binding treaty. However, as the practice of the Aarhus

[108] R. Wolfrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law' (1998) 272 *Collected Courses of the Hague Academy of International Law*, pp. 56–8.

[109] Third MoP to the Aarhus Convention: Decision III/6f, Compliance by UA, ECE/MP.PP/2008/2/Add.14, 13 June 2008.

[110] Fourth MoP to the Aarhus Convention: Decision IV/9c on Compliance by KZ, ECE/MP.PP/2011/2/Add.1, 1 July 2011.

[111] Third MoP to the Aarhus Convention: Decision III/6e, Compliance by TM, ECE/MP.PP/2008/2/Add.14, 13 June 2008.

[112] Sixth MoP to the Aarhus Convention: Decision VI/8d, Compliance by BM, ECE/MP.PP/2017/2/Add.1, 14 Sept. 2017.

Convention illustrates,[113] the conclusion of the binding treaty did not constitute the end of the lawmaking process. Only through years of consistent communication, persuasion and additional lawmaking was the Committee able to develop agreed meanings and introduce them into domestic practice. Next to the advisory compliance mechanisms, the international legal order hosts a variety of international courts and tribunals. The binding force is inherent in the decisions of these international courts.[114] However, the process of compliance with the decisions of the ICJ and of the European Court of Human Rights (ECtHR) faces challenges similar to those of the Committee.[115] A number of ICJ judgments remain unenforced.[116] The 11th Annual Report of the Committee of Ministers of the Council of Europe states that, as of 2017, nearly half of the judgments rendered by the ECtHR since its inception 60 years ago[117] (around 7,500[118]) are pending enforcement. It is important to remember that international law has no standing machinery available to enforce the decisions of courts and tribunals except where this is specifically addressed in the constituent instrument of the court or tribunal.[119] In essence, international adjudication relies on a voluntary compliance system and typically has a low level of enforcement authority.[120]

7.2. *The Impact of the Rulings of the Committee as Soft Law*

Within the analytical framework of ICL the rulings of the Committee constitute soft law. They are more than just acts of the application of law as they also create expectations about the future conduct of parties, and interpret or inform our understanding of binding provisions of the Aarhus Convention.[121]

The rulings of the Committee create expectations about future conduct because, next to being acts which determine a party's non-compliance, they also launch a legal process which ceases only when full compliance by the party is achieved.[122] While

[113] As well as the practice of many other MEAs. For more on the effectiveness of other environmental regimes see E.L. Miles et al., *Environmental Regime Effectiveness: Confronting Theory with Evidence* (The MIT Press, 2001).

[114] Rosenne & Ronen, n. 26 above.

[115] See, e.g., H. Keller & A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008); V. Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29(4) *European Journal of International Law*, pp. 1091–125.

[116] C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, 2004).

[117] Fikfak, n. 115 above, p. 1092.

[118] Council of Europe, 11th Annual Report of the Committee of Ministers, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2017', Mar. 2018, available at: https://edoc.coe.int/en/european-convention-on-human-rights/7570-supervision-of-the-execution-of-judgments-of-the-european-court-of-human-rights-2017-11th-annual-report-of-the-committee-of-ministers.html.

[119] Rosenne & Ronen, n. 26 above, p. 195.

[120] Fikfak, n. 115 above, p. 1101.

[121] Guzman & Meyer, n. 31 above, p. 174.

[122] E.g., under communication ACCC/C/2011/63 Austria was declared non-compliant with Art. 9(3) as members of the public in certain cases have no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons that contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment.

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considering cases of non-compliance, the Committee has also been engaged in legal interpretation, at times acting as lawmaker.[123] Following the analytical framework of ICL, under which the Committee develops the provisions of the Aarhus Convention, these new meanings become part of the binding law of the Convention. In fact, the Committee quite consistently applies its previous interpretations of Article 9 provisions in deciding subsequent cases.[124] Meanwhile, determination by the Committee of one party's non-compliance also informs the remaining parties that a particular set of circumstances leads to non-compliance, and parties may thus prevent the occurrence of similar situations within their legal systems.

Potential objections against presenting the rulings of the Committee as soft law may come from those who consider these types of document from international institutions (court rulings, resolutions, and so on) to be an application instead of an interpretation of law. This thinking suggests that the Committee's rulings and MoP endorsements thereof are only legal facts, originating from the pre-existing rule in the system (Aarhus Convention) and not legal acts emanating from the direct will of the international lawmaker – namely, parties to the Aarhus Convention.[125] In the distinction between *legal actum* and *legal factum* in civil law traditions, there can be no soft law Committee rulings because 'softness results from the will of the subjects of the international legal order' (and therefore concerns only legal acts).[126] Hence, even if they have possible legal effects, the Committee's rulings and the MoP's endorsements are not law. Rather, they may be classified as applications of the law.

While remaining open to different perspectives on the rulings of the Committee, it should be acknowledged that when, for example, the Committee declares Austria's non-compliance with Article 9(3)–(4) under communication ACCC/C/2011/63, it goes beyond applying the provisions of the Convention and also launches a compliance assurance process for Austria.[127] In such instances, rulings of the Committee also become future-orientated acts,[128] predominantly dealing with systemic rather than transitory non-compliance issues.[129]

Communication ACCC/C/2011/63 remains open and under review until Austria fulfils the Committee's recommendation to amend its legislation and practice so that members of the public obtain such access.

[123] Various interpretations of the provisions of the Aarhus Convention by the Committee not only clarify or illuminate but also expand the meaning of those provisions: see, e.g., F&R with regard to Compliance by HU, ACCC/C/2004/04 (Art. 6 'Timeframe for decision-making and commenting'), F&R with regard to Compliance by BG, ACCC/C/2011/58 (Art 9(3) 'the criteria, if any, laid down in national law'), F&R with regard to Compliance by LT (ACCC/C/2006/16) (Arts 6 and 7 'permitting decisions in consecutive decision making').

[124] E.g., in communication ACCC/C/2011/63 concerning compliance by Austria the Committee relied on its interpretation of the notion of 'laws related to the environment', which was defined in communication ACCC/C/2005/11 concerning compliance by Belgium.

[125] J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19(5) *European Journal of International Law*, pp. 1075–93, at 1078–9.

[126] Ibid., pp. 1081–7.

[127] Communication ACCC/C/2011/63 concerning compliance by Austria is cited as an example. The observations based on this case though (other than those relating to legal interpretation) are relevant for all remaining communications discussed in this article.

[128] Loibl, n. 30 above, p. 437.

[129] F&R with regard to Compliance by DE (ACCC/C/2008/31); F&R with regard to Compliance by AT (ACCC/C/2010/48).

To summarize, the use of the term 'soft law' in relation to rulings of the Committee denotes meanings and effects (namely, its orientation to the future, expectations about future conduct, informing the understanding of the parties) that are not captured by the term 'act of application of the law'. Defining the rulings as soft law not only signifies that they are non-legally binding recommendations on the application of the law; it also means that the rulings of the Committee are acts that initiate a legal process towards the gradual unfolding of the provisions of the Aarhus Convention into domestic practice, that they give new meaning and further develop the provisions of the Convention, and that they also inform all parties about the kind of domestic practice that may result in non-compliance under the Aarhus Convention.

8. CONCLUSION

Over the course of eight years and throughout the 17 communications relating to access to justice evaluated in this article, in eight instances (41%) the compliance dialogue secured varying degrees of improvement in national practice. Under nine communications (59%), improvements are still in progress.

The emerging picture is subject to various interpretations depending on the position taken. On the one hand, it is hard to imagine a more reasonable regional dialogue towards the establishment of a practice of access to justice in environmental matters than the compliance mechanism. On the other hand, the explicit and long-lasting non-compliance of some parties continues to challenge the authority of the Aarhus Convention, including its institutions. Particularly disquieting is the slowing down of the performance of parties under communications submitted after 2011.

Successful dialogue between the Committee, the parties and non-state actors has begun to foster a fairly new culture of public interest litigation for environmental protection across the UNECE region, whether through the broadening of standing rules, relaxation of costs regimes, or improvement in access to courts. However, for the UNECE region, evidenced by the empirical analysis in this article, public interest litigation for environmental protection has not yet become an established and widespread practice. This is demonstrated by the number and nature of communications submitted to the Committee. Only further influence of the Committee at the same pace and to the same degree may lead to the emergence of a European culture of public interest environmental litigation. However, the Committee's continually high caseload along with a slowdown in the pace of its influence also indicate that it is still too early to declare the internalization of the access to justice provisions by the parties to the Convention.

Despite the more recent claims that portray the Committee as a more judicialized institution and its rulings as binding, this article has demonstrated that the role of normative characteristics of the Committee and its rulings should not be exaggerated in the process of ensuring compliance by parties with their obligations under the Aarhus Convention.

APPENDIX I

THE IMPACT ASSESSMENT

No Compliance (0)

In the sequence of decisions – the Fourth (Decision IV/9i[130]), Fifth (Decision V/9n[131]) and Sixth sessions (Decision VI/8k[132]) – the MoP welcomed the steps taken by the UK[133] but 'expressed its concern at the overall slow progress by the Party concerned in establishing a costs system which, as a whole, meets the requirements of paragraphs 8(a)' of Decision V/9n.[134] The Sixth MoP in 2017 was of the opinion that the UK had not yet established a costs system which, as a whole, is not prohibitively expensive, and hence remains non-compliant with the recommendations issued under four communications.

Under communication ACCC/C/2008/31 with regard to Germany the Committee, in its report before the last MoPs, concluded the party's full compliance with MoP Decision V/9h,[135] saying that it 'is no longer in a state of non-compliance with Article 9(2) and 9(3), of the Convention'.[136] For the reasons detailed in the main body of this article, evaluation of Germany's progress is not based on the conclusion of the MoP.

Austria, under communication ACCC/C/2011/63, has not yet met the requirements of paragraphs 3(a)(iii) and 6 of Decision V/9b[137] (i.e., it has not introduced criteria for NGOs to have standing to challenge acts or omissions by private persons or public authorities that contravene national laws relating to the environment.[138]

Bulgaria, until now, remains non-compliant with the Sixth MoP Decision VI/8d,[139]

[130] Fourth MoP to the Aarhus Convention, Decision IV/9i on Compliance by the UK, ECE/MP.PP/2011/2/Add.1, 1 July 2011, available at: https://www.unece.org/env/pp/mop4/mop4.doc.html.

[131] Fifth MoP to the Aarhus Convention, Decision V/9n on Compliance by the UK, ECE/MP.PP/2014/2/Add.1, 4 July 2014, available at: https://www.unece.org/env/pp/aarhus/mop5_docs.html.

[132] Sixth MoP to the Aarhus Convention, Decision VI/8k on Compliance by the UK, ECE/MP.PP/2017/2/Add.1, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

[133] '(a) Regarding paragraphs 8(a), (b) and (d) of decision V/9n, that: (i) With respect to England and Wales, while the 2017 amendments to the costs protection system in England and Wales introduced some positive improvements, the 2017 amendments overall appear to have moved the Party concerned further away from meeting the requirements of paragraphs 8(a), (b) and (d) of decision V/9n; (ii) Concerning Scotland, the Party concerned has not yet fulfilled the requirements of paragraphs 8(a), (b) and (d) of decision V/9n, though the significant steps taken by the Party concerned to date in that direction are welcome; (iii) With regard to Northern Ireland, the Party concerned has not yet fulfilled the requirements of paragraphs 8(a), (b) and (d) of decision V/9n, though the considerable progress made by the Party concerned to date in that direction is welcome;'.

[134] In this decision the MoP ascertains the UK's failure to comply with Art. 9(4) as declared in communication ACCC/C/2008/27. The decision also endorsed the findings of communications ACCC/C/2012/77, ACCC/C/2013/85 and ACCC/C/2013/86, which in similar vein found the UK to be in non-compliance with Art. 9(4) because of the prohibitively expensive costs order system, particularly in private nuisance proceedings.

[135] Fifth MoP to the Aarhus Convention, Decision V/9h on Compliance by DE, ECE/MP.PP/2014/2/Add.1, 4 July 2014, available at: https://www.unece.org/env/pp/aarhus/mop5_docs.html.

[136] Sixth MoP to the Aarhus Convention, Report of the Compliance Committee: Compliance by DE, ECE/MP.PP/2017/40, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

[137] Fifth MoP to the Aarhus Convention, Decision V/9b on Compliance by AT, ECE/MP.PP/2014/2/Add.1, 2 July 2014, available at: https://www.unece.org/env/pp/aarhus/mop5_docs.html.

[138] Sixth MoP to the Aarhus Convention, Report of the Compliance Committee: Compliance by AT, ECE/MP.PP/2017/34, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

[139] Sixth MoP to the Aarhus Convention, Decision VI/8d on Compliance by BG, 14 Sept.2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

endorsing the findings of communication ACCC/C/2012/76 and reaffirming Fifth MoP Decision V/9d[140] taken with regard to communication ACCC/C/2011/58/, and provides no access to justice for NGOs and to the public in general in respect of certain decisions.

Romania's failure, observed under communication ACCC/C/2012/69, to ensure that the review procedures for information requests referred to in Article 9(1) of the Convention are timely and provide an effective remedy, as required by Article 9(4), still remains unresolved.[141]

The Committee, in its last report to the Sixth MoP, reaffirmed that Armenia, under communication ACCC/C/2011/62, still needs to make sure 'its legislation, including the law on NGOs and administrative procedures, complies with Article 9(2) of the Convention with regard to standing'.[142]

In 2017, eight years after the Committee's findings under communication ACCC/C/2009/36, the MoP reiterated that it is not convinced that Spain was unable 'to overcome remaining obstacles to the full implementation of Article 9(4) and 9(5), with respect to legal aid to non-governmental organizations (NGOs)'.[143]

Minor Compliance (1)

Under communication ACCC/C/2008/33, by Decision VI/8k[144] the MoP confirmed that the UK '(b) has fulfilled the requirements of paragraphs 8(c) and (d) of decision V/9n with respect to time limits for judicial review in England and Wales and Scotland, but that, while welcoming the steps taken, the Party concerned has not yet fulfilled the requirements of paragraphs 8(c) and (d) of decision V/9n with respect to time limits for judicial review in Northern Ireland'. This means that the party complied with only two recommendations, although partially. This amounts to minor compliance.

Partial Compliance (2)

As a result of communication ACCC/C/2004/08 Armenia has made available judicial remedies to the public to challenge the legality of decisions on matters regulated by Articles 6 and 7 of the Convention.[145] Even communication ACCC/C/2011/62 declared non-compliance with the requirements of Article 9(2) in respect of the criteria for NGOs to have access to justice. The country met with the single recommendation of the Committee as such, but in an unsatisfactory manner. Thus its compliance is rated as partial.

During the Sixth MoP, in 2017, it was affirmed that Austria in following the recommendations of communication ACCC/C/2010/48 has made available timely and expeditious review procedures for persons who consider that their request for environmental information under Article 4 has not been dealt with in a due manner.[146] However, it also declared 'the slow progress by the party concerned in addressing the recommendations set out in paragraphs 3(a)(iii) and 6 of decision V/9b' ((iii) Criteria for NGO standing to challenge acts or omissions by private persons or public authorities which contravene national laws relating to the environment under Article 9(3) of the Convention be revised and specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the

[140] Fifth MoP to the Aarhus Convention, Decision V/9d on Compliance by BG, ECE/MP.PP/2017/23, 2 July 2014, available at: https://www.unece.org/env/pp/aarhus/mop5_docs.html.

[141] Sixth MoP to the Aarhus Convention, Decision VI/8h on Compliance by RO, ECE/MP.PP/2017/2/Add.1, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

[142] Sixth MoP to the Aarhus Convention, Report of the Compliance Committee: Compliance by AM, ECE/MP.PP/2017/33, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html

[143] Sixth MoP to the Aarhus Convention, Decision VI/8j on Compliance by ES, ECE/MP.PP/2017/2/Add.1, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

[144] Sixth MoP to the Aarhus Convention, Decision VI/8k on Compliance by the UK, ECE/MP.PP/2017/2/Add.1, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

[145] Third MoP to the Aarhus Convention, Report of the Compliance Committee: Compliance by AM, ECE/MP.PP/2008/5/Add. 2, 13 June 2008, available at: https://www.unece.org/env/pp/mop3/mop3.doc.html.

[146] Sixth MoP to the Aarhus Convention, Report of the Compliance Committee: Compliance by AT, ECE/MP.PP/2017/34, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

	environmental impact assessment, integrated pollution prevention and control, waste management or environmental liability laws).[147] Given that the party met with two out of three recommendations, the compliance is rated as partial.
	The Czech Republic, following recommendations resulting from communication ACCC/C/2010/50, provided the public with access to administrative or judicial procedures to challenge acts of private persons and omissions of authorities which contravene provisions of national law relating to urban and land-planning environmental standards, but not relating to noise. As the party met two out of three required fields of national law it is scored as partially compliant.
Full compliance (3)	In the case of Kazakhstan (ACCC/C2004/01) the finding of non-compliance with Article 9(1) was endorsed by MoP Decision II/5a; the report of the Committee later detailed that the party remains non-compliant only with Article 9(3) and (4) under communication ACCC/C/2004/06, and no longer with Article 9(1).[148] In 2011, under MoP Decision IV/9c, a caution was issued against Kazakhstan because of its slow progress in fulfilling the recommendations of communication ACCC/C/2004/06 for the intersessional period. However, by Decision V/9i, adopted by the fifth MoP in 2014, the Committee's finding on full compliance was endorsed.
	Moldova, in response to the recommendation of communication ACCC/C/2008/30, has achieved better monitoring of the execution by public authorities of final court decisions under Article 9(1); hence it has reached full compliance within one intersessional period.[149]
	Denmark reported to the Committee on 16 Sept. 2013 that a bill was voted by the Danish Parliament (*Folketinget*), according to which the fee for those other than private persons to make a complaint before the Nature and Environmental Appeals Board was reduced from Danish krone (DKK) 3,000 to DKK 500, hence fulfilling the recommendation of communication ACCC/C/2011/57.[150]

[147] Sixth MoP, Decision VI/8b, Compliance by AT, ECE/MP.PP/2017/2/Add.1, 14 Sept. 2017, available at: https://www.unece.org/env/pp/aarhus/mop6_docs.html.

[148] Fourth MoP to the Aarhus Convention, Decision IV/9c on Compliance by KZ, ECE/MP.PP/2011/2/Add.1, 1 July 2011, available at: https://www.unece.org/env/pp/mop4/mop4.doc.html.

[149] Fifth MoP to the Aarhus Convention, Report of the Compliance Committee: Compliance by MD, ECE/MP.PP/2014/18, 2 July 2014, available at: https://www.unece.org/env/pp/aarhus/mop5_docs.html.

[150] Fifth MoP to the Aarhus Convention, Report of the Compliance Committee: Compliance by DK, ECE/MP.PP/2014/15, 2 July 2014, available at: https://www.unece.org/env/pp/aarhus/mop5_docs.html. The case is exceptional in that in a letter in Dec. 2013 the Danish government clarified that the Danish regulation was not amended to comply with the Committee's findings and recommendations. As a result of a change in the political regime in the government, Denmark informed the Committee of its decision to change the legislation before the Committee had issued draft recommendations. Despite these circumstances, the case is included in the pool of non-compliance cases and progress is scored in accordance with the methodological approach of this article. Compliance with the Committee's recommendations may result from different domestic factors. However, such circumstances are part of the domestic socio-political processes the influence of which on the state's decision to comply is subject to separate evaluation.

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