The Compliance Committee of the Aarhus Convention
– An Overview of Procedures and Jurisprudence –

by Veit Koester*

1. Introduction
The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) entered into force on 30 October 2001. The Convention has, as of July 2006, 39 Parties, among them most of the 25 EC countries as well as the EC. Remaining parties are Central and East European countries.

The Protocol to the Convention on Pollutant Release and Transfer Registers (2003 PRTR Protocol) was adopted in May 2003, but as of July 2006 had not entered into force. Equally, an amendment to the Convention on Genetically Modified Organisms (GMOs), adopted at the Second Meeting of the Parties (MOP) in Almaty, Kazakhstan, in May 2005, has not yet entered into force.

Articles 1, 2 and 3 of the Aarhus Convention contain provisions on objective, definitions and general obligations, while articles 4–9 regulate in a detailed manner the three pillars of the Convention: (1) access to environmental information; (2) public participation in decision on specific activities; (3) public participation concerning plans, programmes and policies relating to the environment; and public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments; and (3) access to justice.

The remaining articles, Articles 10–22, contain provisions on, inter alia, convention organs, amendments, settlement of disputes and final clauses.

The Convention does not deal with the protection of the environment per se but with the procedural rights of civil society in respect of the environment by imposition of obligations on states.

2. The Compliance Mechanism
At the first MOP in October 2002 the Meeting adopted a decision on review of compliance (Decision I/7). The compliance mechanism (CM), based solely on the article on compliance review, establishes a Compliance Committee (CC), constitutes the Committee and the MOP as the main bodies for review of compliance, and sets out in an annex the structure and function of the Committee as well as the procedures for reviewing compliance with the Convention.

The nature of the Convention and the provision of the Convention on review of compliance include a number of features which, compared to the compliance mechanisms of (other) MEAs, are unique. These features, one of the most prominent of which being the composition of the Compliance Committee, have to a large extent influenced the procedures of the CC. The nature of the Convention and triggering of the CM by complaints of members of the public (communications) have, of course, also influenced the substantive findings of the CC.

The CC held its first meeting in March 2003 and became operational with regard to communications in October 2003. The CC has, as of November 2006, held thirteen meetings (most of them being three-day meetings), i.e., on average four meetings annually, and has, in addition to four cases which were found inadmissible by the CC, concluded nine cases (the average time from the date of a submission of a complaint until the CC’s conclusion of the file being approximately 389 days; see Table 1). Therefore, it seems feasible and appropriate to present the outcome of the work of the CC during its first three to four years of existence in the form of a provisional status of decisions of the CC.

Section 3 of this article presents the general procedures of the CC focusing on features which probably distinguish the procedures from, or are more elaborate than, those of most other CMs. Section 4 highlights some procedural

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### Table 1: Dates of submissions to the compliance committee and dates of findings and recommendations of the compliance committee.

<table>
<thead>
<tr>
<th>Communicant</th>
<th>Date of Submission</th>
<th>Date of Findings or Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>ZEV (Belgium) / Belgium</td>
<td>16/6/2006</td>
<td>3/1/2005</td>
</tr>
<tr>
<td>Society / Amsterdam</td>
<td>3/1/2006</td>
<td>20/9/2004</td>
</tr>
<tr>
<td>Brosio (Moldova)</td>
<td>8/2/2005</td>
<td>10/5/2004</td>
</tr>
<tr>
<td>Romanian Society for Law (Lithuania) and Romanian Society for Law (Lithuania)</td>
<td>18/2/2005</td>
<td>7/6/2004</td>
</tr>
<tr>
<td>Green Salvation (Kazakhstan) / V. ACCOC/2004/2</td>
<td>18/2/2005</td>
<td>1/2/2005</td>
</tr>
<tr>
<td>Green Salvation (Kazakhstan) / V. ACCOC/2004/2</td>
<td>18/2/2005</td>
<td>7/2/2004</td>
</tr>
</tbody>
</table>

Notes:

1. The table does not contain submissions which were found to be inadmissible by the Compliance Committee.
2. Calculated on the basis of 360 days or 1 year.
3. The "v/" only indicates the communicant as opposed to the Party alleged to be non-compliant.
4. See note 48.
5. See notes 22 and 59.
decisions relating to deliberations of the CC, and section 5 focuses on some substantive findings of the CC. Section 6 contains some concluding remarks.

3. Procedures of the Compliance Committee

3.1 General comments

Decision I/7 contains some procedural provisions, the provisions on handling communications from members of the public being more elaborate than those on handling submissions (from Parties vis-à-vis themselves or other Parties) or referrals by the Secretariat. Decision I/7 also contains provisions on information gathering, confidentiality, entitlement to participate, committee reports and considerations by the CC. The CC has decided as a general rule that even if the CC is not a subsidiary body to the MOP, the rules of procedure of the MOP can be applied mutatis mutandis. In practice, however, this decision has never played any role, inter alia because the CC has been able to make almost all decisions, procedural as well as substantive, by consensus.

The above provisions provided a kind of procedural skeleton not sufficient to serve as a suitable procedural framework for the work of the CC. Procedures developed under other mechanisms, e.g., the former Human Rights Committee, provided little guidance taking into account the unique nature of the Aarhus Convention CM. So, the CC in many ways had to start from scratch in developing its procedures and other working methods. In addition it has, as necessary, expanded some of the procedural rules in Decision I/7 by interpretation. Main procedures developed by the CC, including interpretation of existing rules, have been recorded in its meeting reports and were summarised in the report of the CC to MOP-2. A compilation of procedures has been elaborated and is regularly updated. The compilation includes the composition, functions, powers of the CC; issues related to the modus operandi of the CC, such as general principles, procedures for handling submissions, referrals and communications, information gathering and on-the-spot appraisals; the relationship between the CC and NGOs; and an information paper on communications from the public (the compilation is referred to below as Modus Operandi).

The way in which the CC had been working and the procedures that it had developed, as reflected in the reports of its meetings, were welcomed by MOP-2, including the observation that the CM is not a redress mechanism. However, procedures are still being developed, and previously adopted procedures are sometimes modified in light of experience gained.

The following review of the Modus Operandi of the CC does not pretend to be exhaustive. Rather, it focuses on some main issues emphasising what may be characterised as unique features. Thus, the review does not reflect all the procedural provisions of Decision I/7, e.g., the procedural safeguards, most of which are, compared to other CMs, relatively traditional.

3.2 Openness of Compliance Committee meetings.

Generally speaking, all meetings of the CC are open to anyone wishing to attend the meeting, while the requirement of Decision I/7 only provides for participation of “concerned parties” (communicants and Parties in respect of which submissions, referrals or communications are made or which make submissions). Participation by concerned parties entails, by decision of the CC, the right to comment, to be heard, and to have comments taken into account by the CC. Others, attending meetings as observers, may be given the floor for information or comments. Such opportunities are provided upon request. The openness of meetings also includes deliberations of the CC on its preliminary determination on the admissibility of a communication and which points to raise with the parties concerned. Questions to be raised may, however, be decided by electronic decision-making and subsequently recorded in the meeting report. Furthermore, also meetings where the CC is entering into formal discussion of the merits of a communication with the parties concerned, usually making at the same time a final determination on admissibility, are open to the public. Under Decision I/7 parties concerned (and consequently also observers) are not entitled “to take part in the preparation and adoption of any findings, any measures or any recommendation of the Compliance Committee,”. Communications (and submissions) are discussed formally with parties concerned, following a specific procedure which also provides an opportunity for observers to comment before decisions are made. Since such discussions are open, “preparation” of findings has been interpreted rather narrowly by the CC. The discussion with parties concerned is not considered by the CC as a “hearing”, which the CC may hold, under Decision I/7, but has in practice made hearings more or less superfluous. In any event, the CC has never held a hearing.

3.3 Transparency in respect of documents

Meeting documents are made available on the website of the CC. This does not include discussion papers prepared by the Secretariat, although such papers are available upon request. Summary information enabling the public to track the proceedings of communications (and, if relevant, submissions and referrals), including communications that are determined to be admissible, and significant related documentation is published on the website of the CC when they have been sent to the Party concerned. At the same time a data sheet containing information on the communication and its content is published on the website. It goes without saying that decisions of the CC (“findings and recommendations”) in specific cases are made available to the public (through their publication as addenda to reports on meetings where decisions were made). However, at its tenth meeting the CC decided that draft findings and recommendations would also be available upon request once they had been transmitted to the parties concerned. Similarly, any comments provided by the parties concerned are publicly available upon request, unless the body submitting the comments requests that they remain embargoed up to the end of the commenting period, in which case they would not be available during that period. At the end of the commenting period both the drafts and the comments enter the public domain.
Contributions, information, positions and requests from NGOs and members of the public are officially registered with a view of spreading the information and giving everyone a chance to participate with the same level of information.

### 3.4 Conflicts of interest, etc.

The unique nature of the CC has entailed a number of procedural decisions, the main decision being that if a member of the CC considers himself to have a possible conflict of interest, he would be expected to bring the issue to the attention of the CC. Being a citizen of a state whose compliance is to be discussed does not in itself constitute a conflict of interest. Conflict of interest has been declared five times by members. Such member is not to be present in the preparation or adoption of findings, measures or recommendations with respect to the case in question.

Members of the CC are not excluded from but should avoid providing advice in response to requests from NGOs, which could, in some cases, lead to a conflict of interest. Equally, members may deal with requests for information about specific cases where such information is already in the public domain. However, channelling such requests to the Secretariat is advisable.

Members may accept invitations to present the CM at appropriate events but should not represent NGOs or be present in any other capacity than as members of the CC in any official meeting related to the Aarhus Convention.

Unless specifically mandated by the CC to collect information, meetings of members of the CC (and of the Secretariat) with the parties concerned do not constitute information-gathering under the provisions of Decision I/7. Information should be formally addressed to the Committee, through the Secretariat.

### 3.5 Curatorship

The CC has developed a practice according to which a member of the CC may agree to provide assistance in respect of a specific communication. The main reason for this system is that the workload related to communications is considerable. It is usually difficult to assess the information provided and to evaluate the legal background. Curatorship includes presentation of the communication and recommendations to the CC with regard to the preliminary determination on admissibility and questions to be raised with the parties concerned; a leading role at the formal discussion of the merits of the communication with the parties concerned, and elaboration of the first draft findings and recommendations (an outline of which should normally be available only to members of the CC before the formal discussion), inter alia in order to provide a better understanding of the case and to help identify further information needed. The curator continues to serve as such after the formal discussion of the file has taken place, if the CC does not manage to conclude the case at that meeting, but works in close collaboration with the Chair and the Secretariat, until a (new) draft can be presented to the CC.

### 3.6 Information gathering and relationship with NGOs

In respect of information gathering, suffice to state that the CC has by virtue of Decision I/7 an almost unlimited power to gather information and to consider information submitted to the CC. This has entailed a number of decisions related to inter alia various types of information, sources of information, motivations of information providers etc., due to the fact that information to be taken into account should be relevant, reliable and available to everyone.

The NGO community plays a significant and special role in the context of the Aarhus Convention CM, partly reflected in *Modus Operandi.* This role belongs to the broader issue of the role of NGOs with regard to MEAs in general and more specifically with respect to compliance/enforcement. Due to the role of NGOs in the context of the Aarhus Convention CM, including the entitlement of NGOs to attend meetings of the CC, there has been no need to develop *amicus curiae* arrangements.

### 3.7 Interpretative decisions relating to the provisions of Decision I/7

Procedures with respect to submissions by Parties concerning other Parties under Decision I/7 are not detailed. In addition, they are to some extent not logical. For example, understood literally, the CC has to be informed about a party-to-party submission only after the expiry of the period which the Party whose compliance is at issue has at its disposal for responding to the submission (i.e., three to six months after the Party has been informed about the submission). The CC has, therefore, developed more extensive procedures in that regard which are included in *Modus Operandi*.

In view of the importance of protecting the interests of third parties, the CC has constructed a provision of Decision I/7 to apply to information which the communicant has requested be kept confidential, not only out of the communicant’s concern “that he or she might be penalised, persecuted, or harassed”, but also of his or her concern that another person or persons might be so treated.

Decision I/7 provides a list of non-compliance response measures available to the MOP upon consideration of a report and any recommendations of the CC. The CC has decided that the relevant provisions should not be interpreted as requiring a specific sequence in which these measures could be recommended or undertaken.

If the CC finds that the Party in question is not in compliance it should under Decision I/7 agree upon possible “measures” or “recommendations”. The CC has understood “measures” to refer to measures which the CC is entitled to take in accordance with the relevant provisions of Decision I/7 pending consideration by the MOP (and which may include recommendations to the Party concerned). “Recommendations” are understood to refer to recommendations to the MOP (and which may include recommendations to take one or more of the measures listed).

Other interpretative decisions relate to the admissibility criteria which have been interpreted in a rather broad
manner and the requirement that the CC should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress. According to the interpretation of the CC this requirement does not mean that failure to exhaust or sufficiently explore the possibilities for resolving the issue through national administrative or judicial review procedures renders a communication inadmissible.

The powers of the CC to act during the intersessional periods between MOPs are rather limited (Parties have opted for a three-year interval between MOPs). In particular, some of the measures available to the CC may only be taken with the “agreement” of the Party concerned, leading to a delay in addressing non-compliance of possibly years. The CC has so far been able to overcome this problem by “mildly” persuading Parties whose compliance is at issue to accept recommendations, arguing that non-acceptance might force the CC to submit its findings and recommendations for a final decision by the MOP. Thus, by accepting the recommendations of the CC, and provided that some progress has been made in the meantime, the relevant Party might only be included for reference in the report of the CC to the MOP.

4. Procedures related to the preparation and adoption of findings and recommendations

4.1 Some general remarks

In addition to the general procedures the CC has developed some procedures or made concrete procedural decisions which are closely related to its deliberations when preparing and adopting findings and recommendations in specific cases. Some of these are included in the Modus Operandi while others are reflected only in meeting reports or included in findings and recommendations in individual files. It might be assumed that concrete procedural decisions will be applied by the CC in other cases if circumstances are alike.

The overview below of such procedures or procedural decisions does not pretend to be exhaustive. Furthermore, some decisions referred to may belong to the interface between procedural and substantive decisions. Finally, it should be kept in mind that the CM is designed to improve compliance and is not a redress procedure for violations of individual rights. This has influenced some of the procedural decisions.

4.2 The framework for the deliberations of the CC

As a rule, any substantial new information should be presented to the CC by either party at least two weeks in advance of the formal meeting with the parties concerned preceding the deliberations of the CC in closed session. However, the CC is not constrained to take account of any such information submitted after the deadline.

The CC is not restricted to the consideration of legal or factual arguments presented by the parties concerned and considers itself free not to address all the arguments and assertions presented in communications (submissions or referrals) in order, inter alia, to focus upon what it considers most relevant. If the CC does not explicitly refute an assertion or argument, it does not imply an endorsement, and lack of explicit endorsement by the CC of an argument does not imply that it has rejected it.

4.3 The mandate of the CC

The CC has in some cases stated that it considers itself to be beyond the scope of its mandate to examine a claim by a communicant that specific regulations were breached because such regulations were not relevant in the context of the Aarhus Convention. On the other hand, the CC has also stated that it “does not exclude the possibility when determining issues of non-compliance to take into consideration general rules and principles of international law, including international and human rights law”.

Having regard to the non-confrontational, non-judicial and consultative nature of the CM, the CC has considered that the fact of a matter being under consideration by another international review procedure would not in itself prevent the CC from dealing with the matter.

With respect to national decision-making processes which began before the Convention entered into force, or started before the Convention entered into force for a Party whose compliance is at issue or during the “grace period” of one year (see endnote 18 in section 2 above), the CC has decided that it is not precluded from considering communications submitted after the “grace period” if the significant events occurred after the entry into force of the Convention in that state Party.

In a case dealing with access to justice and the issue of standing, the CC found, that “[s]ince all the court decisions submitted by the communicant refer to cases initiated before the entry into force of the Convention for …, they cannot be used to show that the practice has not been altered by the very entry into force of the Convention”. So, in this regard, the initiation of a court case was considered as the most significant event.

The mandate of the CC does not include a possibility of revisiting an earlier decision of the CC which has been submitted to and endorsed by the MOP.

In respect of the mandate of the CC, a specific case is noteworthy. The CC had in a previous case concluded that an act did not constitute non-compliance with the Convention. Due to an amendment of the act the communicant submitted a new communication alleging that the act was (now) in non-compliance with the Convention. After having submitted the communication the communicant requested an extension of the fact-finding period of consideration of the communication and to refrain from preparing findings and recommendations until practical experience with the application of the amendment had accumulated. The Party concerned indicated its opposition to such a deferral. The CC did not accept the communicant’s argument for deferring discussion, as it considered that this could set a bad precedent. In this connection the CC also decided that in the event that a communicant withdrew its communication, the CC would have the option...
Table 2: Provisions of the Convention alleged or found not to have been complied with.

| Country | Article | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 |
| Canada  |         |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| US      |         |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| France  |         |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Germany |         |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Italy   |         |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Spain   |         |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Portugal|         |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |

either to proceed with consideration of the communication, or not to do so, and that the choice would depend upon the extent to which it considered that the compliance issues raised were important. The opinion of the Party would not be decisive, since communications serve as a trigger for a review of compliance. Furthermore, the role of the CC is not to provide a redress procedure, and the CC has a broad mandate to look into compliance issues on its own initiative, including under Decision I/7.

### 4.4 Some other (procedural) decisions

The CC has not made any decision as a matter of principle on burden of proof but has in some cases indirectly referred to this issue. The CC has in one case referred to the fact that the communicant “did not substantiate [a] claim with specific arguments” and to “inconclusive evidence that the public lacked access to justice”, in another case “to sufficient evidence that the... authorities were well aware of ...”, and in yet a further case to “no sufficient evidence”. All findings address evidence presented by the communicant, demonstrating that the communicant initially has to substantiate allegations. The form that the CC “is not convinced” about failure to comply is also applied.

However, the CC has also applied a reversed burden of proof approach where this seemed appropriate, taking into account the specific circumstances. Thus, the communicant in another case claimed that she was not properly notified about a court hearing. The CC concluded that the Party had to present evidence that notification had been made (which the Party, however, did not do). In another case the CC found that it was up to the Party concerned to present evidence that the decision-making on the activity at issue was still at a stage where all options remained open. Since the Party concerned failed to present this evidence, the CC concluded that the decision-making did not comply with the requirements of Article 6 (1) (b) and in conjunction with Articles 6 (2)–(9). So, generally speaking, practice of the CC in respect of burden of proof has followed expected patterns.

Two further specific procedural decisions should be mentioned. In the case that represented a continuation of a previous case, referred to in section 4.3 above, the CC, after formal discussion of the case with the parties concerned and after having deliberated the case in closed session, presented its conclusions (no non-compliance as in the previous case) in an open session with the parties concerned present. The chairperson proposed that, in the interest of making the most effective use of the CC’s time and given the similarities of its findings with respect to the findings in the previous case, the review of the communication be limited to the reflection of the findings in the report of the meeting instead of developing a formal paper with evaluations and findings. The parties concerned agreed with this approach, including the recommendation of the CC to the Party concerned to keep the matter under review, because the consequences of the changes in legislation for compliance with the Convention might depend on their practical application. The way of dealing with this case has no explicit basis in Decision I/7, and the manner in which the case was resolved could be considered as a result of the CC acting as mediator. This seems to be fully in line with the nature of the CM.

In another case where the communicant alleged non-compliance with some provisions of Article 6 in the decision-making on EIA, in particular at the scoping stage of the procedure, the CC decided, after formal discussion with the parties concerned, not to proceed with the development of findings and recommendations until the environmental agreement procedure had been completed. The CC, however, upheld its preliminary determination on admissibility. The decision probably reflects some kind of reluctance of the CC to interfere with a process still underway.

### 5. Jurisprudence of the Compliance Committee

#### 5.1 Introductory remarks

Through its findings and recommendations in eight cases the CC has addressed several interpretative issues. Findings and recommendations with regard to four of the five cases submitted to MOP 2 were endorsed by MOP 2 while the conclusions in the fifth case were taken note of by the MOP and, in particular, that the Party concerned was in compliance with its obligations under the Convention. Although the interpretations of various provisions of the Convention provided by the CC via its findings in these cases have been “taken over” by the MOP, they are considered below as belonging to the jurisprudence of the CC.

As part of its findings and recommendations regarding the five cases the CC also identified some lacunae in the provisions of the Convention, which could not be resolved by interpretation.

Article 6 on public participation in decisions on specific activities contains inter alia provisions for notification of the public concerned which may include the public in another country, e.g., if the activity is close to the border, but there are no provisions or guidance in or under Article 6 on how to involve the public in another country. The CC, therefore, recommended to MOP-2 that the Working Group of the Parties should be mandated to develop guidance on implementing the provisions with respect to decision-making on projects in border areas that affect the public in other countries but do not require transboundary EIA under the Espoo Convention, which includes procedures for public participation.

Article 6 does not contain a definition of the environment in the context of “environmental decision-making procedure”. Hence, the CC recommended to MOP-2 that the Working Group of the Parties should be mandated to develop guidance on the scope of the permitting processes set out in Article 6, i.e., the extent to which such processes should be environmental in character and what “environmental” means in this context.

None of the recommendations were, however, addressed by MOP-2, the reasons for this being unknown to the author of this article.

Included in the overview below are also some interpretations provided by the CC in findings and recommen-
ations in three further cases concluded by the CC after MOP-2. Provided that sufficient progress has been achieved before MOP-3 regarding the recommendations of the CC in these cases, the report of the CC to MOP-3 is probably going to concentrate on progress made. Hence, findings and recommendations would not be submitted formally for endorsement by the MOP (see section 3.7 above).

The survey below of jurisprudence of the CC is not exhaustive. The average time of the CC for reaching its findings and recommendations in the cases dealt with in the survey was approximately one year after the submission (see Table 1).

5.2 “The public”, “the public concerned” and non-discrimination

According to Article 3 (1) Parties shall take the necessary legislative, regulatory and other measures “to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention”.

The CC has in three cases found that this provision has only been considered in one case (see Table 2).

Findings of the CC regarding these provisions include that foreign or international NGOs that have expressed an interest in or concern about a procedure under Article 6 on public participation in decisions on specific activities would generally fall under definitions of “the public” and “the public concerned” which include non-governmental organisations promoting environmental protection and meeting any requirements under national law. Article 3 (9) prohibits discrimination on the grounds of citizenship, nationality or domicile and, in the case of a legal person, discrimination as to where it has its registered seat or an effective centre of its activities. The CC has addressed the interpretation of these provisions in two cases.

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5.3 A “clear, transparent and consistent framework”

According to Article 3 (1) Parties shall take the necessary legislative, regulatory and other measures “to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention”.

The CC has in three cases found that this provision was not complied with. In this respect the three cases also constitute examples of a practical implementation of the procedural rule of the CC not being restricted to the consideration of legal (and factual) arguments presented by the parties concerned, since the communicants in none of the cases alleged non-compliance with Article 3 (1) (see section 4.2 above). In another case the communicant did in fact claim that Article 3 (1) was not complied with. However, the CC only addressed the requirements of Article 3 (1) in general terms, but not the specific allegation, thus demonstrating that the CC considers itself free not to address all assertions presented in a communication (submission or referral) (see section 4.2 above).

Findings with respect to non-compliance with Article 3 (1) relate to:

- no proper transposition into national legislation of Article 9 (1) on access to justice in respect of request for information under Article 4;
- lengthy appeal processes primarily due to different interpretations of domestic legal provisions by various judicial instances;
- lack of clarity or detail in domestic legislative provisions, in particular with regard to time frames and procedures for commenting under Article 6 and possession of public authorities of information relevant to their functions; and
- enacting provisions not being in compliance with Article 3 (9) on non-discrimination (see section 5.2 above) and Article 3 (4) on appropriate recognition of associations, organisations or groups promoting environmental protection.

The issue of non-compliance with Article 3 (1) was raised by the CC as a general compliance issue in its report to MOP-2. The report refers to the fact that some Parties, in particular those with legal systems that allow for ratification of a treaty without prior transposition into the domestic system relying on the direct applicability of the Convention, sometimes fail to adopt or adopt only parts of their legislation, while the Convention, although a part of domestic legislation, remains a framework. Such framework legislation fails to provide clear requirements, standards and guidance for those who implement and enforce it and for civil society. All cases referred to concern East European countries which are the USSR’s successor states, and which apply a monistic principle with regard to the legal effect of treaties they have ratified.

5.4 Public participation in decision-making

Articles 6, 7 and 8 of the Convention deal with public participation relating to specific activities, plans/programmes/policies and preparation of executive regulations, respectively. While non-compliance with various provisions of Article 6 has been at issue in a number of cases, compliance with Articles 7 and 8 has only been considered in one case (see Table 2).

Findings of the CC in respect of Article 6 include inter alia:

- It is a moot point whether the fact that an EIA process is limited to the consideration of waste and pollution issues constitutes non-compliance with Article 6, but restricting the scope of the process to just some types of environmental effects could seriously undermine the efficacy of that article;
5.5 Access to justice

Articles 9 (1) and (2) contain provisions on access to justice with regard to requests for information under Article 4 and the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6, respectively. Article 9 (3) concerns access to justice to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment. Finally, under Article 9 (4) procedures referred to in Articles 9 (1) to (3) shall provide adequate and effective remedies, and be fair, equitable, timely and not prohibitively expensive. These provisions have been addressed in a number of communications, and the CC has concluded non-compliance with various provisions of Article 9 in three cases as well as potential non-compliance in one case (see Table 2).

Findings of the CC with respect to Article 9 include the following points:

- taking a final siting decision by a ministerial decree limits the possibilities of appealing against these decisions under Article 9 (2). However, the CC “does not believe that such a system necessarily conflicts with Article 9 (2), as long as there are appeal possibilities with regard to the environmental part of the decision”;
- a procedure “which allows for a court hearing to commence without proper notification of the parties involved …, cannot be considered a fair procedure in the meaning of Article 9 (4)”; “failure to communicate court decisions to the parties constitutes a lack of fairness and timeliness in the procedure”; a “general failure by public authorities to implement and/or enforce environmental law would constitute an omission in the meaning of Article 9 (3)”; judicial independency, both individual and institutional, is one of the preconditions in ensuring fairness in the access to justice process, but such independence can only operate within the boundaries of law. The three branches of power each need to make an effort to facilitate compliance with an international agreement. Judicial bodies “might have to carefully analyse [their] standards and tests in the context of the Party’s international obligations and apply them accordingly”;
- the CC “acknowledges that national legislation, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what are known as ouster clauses in laws”, but “to regulate matters subject to Articles 6 and 7 exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions.” Where the legislation gives the executive a choice, “public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law”;
- in a case concerning standing before the judicature where the CC was “not convinced” that the Party failed to comply with the Convention (section 4.4 above), but nevertheless concluded that if the jurisprudence of the court (Council of State) was not altered the Party would fail to comply with Article 9 (2) to (4), the CC made a number of observations, including:
  - when determining how to categorise a decision under the Convention its label in the domestic law of the Party is not decisive. Rather, “whether the decision should be challengeable under Article 9 (2) or (3) is determined by the legal functions and effects of the decision …”;
  - although what constitutes a sufficient interest and impairment of a right under Article 9 (2) shall be determined in accordance with national law, it must be decided “with the objective of giving the public wide access to justice” within the scope of the Convention;
  - when assessing “the criteria for access to justice for environmental organisations” under Article 9 (3) the provision should be read in conjunction with Articles 1 to 3 of the Convention, and in light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced”;
  - Parties “may not take the clause in Article 9 (3) relating to standing” to the effect that members of the public “meet the criteria, if any, laid down in … national law as an excuse for introducing or maintaining so strict criteria that they bar all or almost all environmental organisations from challenging acts or omissions that contravene national law”;
  - access to justice should be the presumption, not the exception, and the application of some sort of criteria should not bar effective remedies for members of the public;
  - if standing is not granted to federations of environmental organisations it is possible that, to the extent that member organisations of the federation
have standing under Article 9 (3), this may suffice for complying with the provisions;

• should “legislation be the primary means for bringing about compliance, the legislature would have to consider amending or adopting new laws to that extent. In parallel, however, the judiciary might have to carefully analyse its standards in the context of a Party’s international obligations, and apply them accordingly”.

Some of the findings are probably to some extent self-evident, while others may have more far-reaching interpretations. However, the full implications of the above citations can, of course, only be assessed if they are examined in the context of which they appear. This observation applies equally to other quotations of the findings of the CC in this article.

The relatively high number of cases related to Article 9 probably reflects that some of the provisions of Article 9 are rather difficult to implement _inter alia_ due to a combination of the independency of courts and that standing in a number of States is decided mainly in accordance with traditions, including jurisprudence. The fact that it has not yet been possible to conclude the proposed directive on access to environmental matters demonstrates the difficulties involved. Not surprisingly, some of the provisions of Article 9 are results of long and difficult negotiations.

Cases related to Article 9 concluded before MOP-2 entailed a general recommendation of the CC to MOP-2 to consider measures to raise awareness among the judiciary. This recommendation, however, was only taken note of by the MOP.

### 5.6 Some findings of a general nature

One of the cases concluded by the CC relates to an act which established a special decision-making procedure for the construction of expressways, thereby reducing existing domestic rights of the public to participate in decision-making procedures. The Convention contains, however, a provision demonstrating that the negotiation process considered the issue of the relationship between existing rights and the rights provided by the Convention itself. According to this provision, the possibility of reducing existing rights is not excluded. The CC, therefore, did not accept the argument of the communicant that the reduction of existing rights was in conflict with international human rights law and the principle of non-retrogression.

In the case about standing referred to in section 5.5 above, the Party made some points concerning its internal law and constitutional structure relating to its obligations under international law to observe and comply with the Convention. The CC, therefore, stressed, “that its review of Parties’ compliance with the Convention is an exercise governed by international law”, and that, “as a matter of general international law of treaties, codified by Article 27 of the 1969 Vienna Convention on the Law of Treaties, a state may not invoke its internal law as justification for failure to perform a treaty”.

### 6. Concluding remarks

The experience of the CM of the Aarhus Convention so far demonstrates that it is possible to deal with compliance issues in an open and transparent manner. It seems to have been the right approach to set out in the “founding decision” of the MOP relatively few, not very detailed, rules of procedure for the CC, leaving it to the CC itself to develop its procedures. This has enabled the CC to work out its procedures step by step and in a pragmatic manner building on its own experience. The fact that rules of procedure do not need any approval by the MOP provides more freedom of the CC to amend its procedures in light of experience gained.

Experience also shows that public involvement in the process does not cause any problems. The opportunity provided to the public to complain (communications) has been used, but not misused, and communications have usually been well prepared and well reasoned. Out of seventeen communications only four were found to be inadmissible.

Parties whose compliance has been at issue have cooperated, however, sometimes slowly or even extremely slowly, not respecting the relevant deadlines set out in Decision I/7, but none of the Parties have completely ignored the requests of the CC. Findings and recommendations of the CC in a case about standing of NGOs in Belgium immediately entailed a “Proposition de loi modifiant le code judiciaire en vue accorder aux associations le droit d’introduire une action d’intérêt collectif” to the “Chambre des Représentants” by two parliamentarians. The purpose of the proposal is explicitly to “donner suite aux recommandations du Comité d’examen du respect des dispositions de la Convention d’Aarhus”.

Parties have also accepted invitations of the CC to discuss formally the merits of communications with the CC, not only in the presence of NGOs as observers but also with the participation of communicants in the discussion.

It is probably too early to fully assess the impact of the findings and recommendations (as adopted by the MOP) of the CC, but there are certainly, as pointed out, some indications that they might lead to improved compliance. In this regard, it is noteworthy that the first MOP (MOP-2)
which was confronted by the findings and recommendations of the CC did not exercise any kind of censorship with regard to the findings. On the contrary, MOP-2 protected the integrity of CC by endorsing its findings in addition to welcoming the way it had been working and the procedures it had developed. The MOP also accepted most of the recommendations of the CC relating to concrete cases by turning them into recommendations of the MOP to the Parties concerned. Also, the Parties whose compliance was the subject of findings and recommendations of the CC and who participated in MOP-2 accepted the decisions of MOP-2 in this regard, since the decisions of the MOP were made by consensus. Even a couple of relevant Parties who did not participate in MOP-2 later responded to the request of the CC concerning cooperation with a view of implementing the recommendations.

It still remains to be seen to what extent recommendations will be implemented in practice. However, there is nothing to indicate that the critical observations of the United States, inter alia about the efficacy of the CM and the role of NGOs, made at the occasion of the adoption of the CM at MOP-1, have any relevance.

Notes


2 ECE/MP/PP/7 rooted in the Aarhus Convention Articles 5, 9 and 10 (2)(i)

3 Decision I/1 on Genetically Modified Organisms, doc. ECE/MP/PP/2005/2, Add 2 Annex, amending Article 6 (11) and inserting a new Article 6 bis as well as a new Annex 1 bis to the Convention, re Elsa Tsionumai, “Aarhus Convention: Second Meeting of the Parties”, in Environmental Policy and Law Vol. 35/4–5, 2005 p. 163.

4 Article 4.

5 Article 5.

6 Article 6 and Annex I.

7 Article 7.

8 Article 8.

9 Article 9.

10 Articles 10 (MOP) and 12 (Secretariat).

11 Article 14.

12 Article 16 and Annex II.

13 Decision I/7, doc. ECE/MP/PP/2002/2 (Add.8) consisting of a decision with a few operative provisions while the annex to the decision contains the main body of provisions relating to the compliance mechanism (hereinafter Decision I/7). References in the paper to Decision I/7 are references to provisions of the annex. Specific references to relevant provisions of the annex are provided in the footnotes. The decision as a whole is referred to below as the compliance mechanism (CM), while the Compliance Committee is referred to as CC. On the negotiation history of Decision I/7, see Veit Koester, “Review of Compliance under the Aarhus Convention: A Rather Unique Compliance Mechanism” in Journal for European Environmental and Planning Law (JEEPL) 2005, Vol. 2/1, p. 33.

15 Article 15, “Review of Compliance. The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.”

16 See, generally, Koester (2006), supra note 1 and Koester (2005), supra note 14, inter alia with specific references to CMs of other MEAs; Ulrich Beyerlin, Peter-Tobias Stroll and Rüdiger Wolfrum (eds), “Ensuring Compliance with Multilateral Environmental Agreements: A dialogue between Practitioners and Academia”, Martimus Nijhoff Publishers, 2006, Making Treaties Work, supra note 1, and Durwood Zaкле, Donald Kaniaru and Eva Kruzková (eds), Making Law Work: Environmental Compliance and Sustainable Development, Vols 1 and 2, Cambridge 2005, when making contributions on compliance issues by referring to the unique features of the Aarhus Convention CM. I am only stating a fact. This does not imply that I agree with the usual argument that every CM has to be designed in order to meet the requirements of the specific instrument at hand. There are, in my opinion, no convincing arguments to justify that all CMs differ from each other. Almost all features characteristic of the Aarhus Convention CM could be applied to almost all other CMs. Only with regard to non-compliance response measures might there be valid reasons for some kind of differentiation, and it is also, to some extent, understandable that the CM of the Kyoto Protocol is of a rather specific nature. By and large, the explanation of the differences of the CMs of MEAs is embodied in human nature: the ambition of negotiators to leave their imprint.

17 The CC consists of eight members (by Decision I/5 ECE/MP/PP/2005/2 Add. 6, 13 June 2005, para. 12, increasing to nine members with effect from the third ordinary MOP) serving in a personal capacity (Decision I/7, Annex, para. 1). However, in Koester (2005), supra note 13, p. 33, I have argued that the negotiation history of Decision I/7 as well as the practice of Parties demonstrate that members should be independent, i.e., not be part of or represent the executive branch of the government of a Party. Similarly, members of the CC who have been nominated by the NGO community cannot represent an executive branch of a NGO. The latest practice underlines these observations. In May 2006 a member of the Committee resigned because she had accepted a position in the Environmental Ministry of her country and was replaced by the Bureau of an independent person; see Report on meeting of the working group of the Parties, doc. ECE/MP/PP/WG.1/2006/2, June 2006, para. 55: “...one of the members of the Compliance Committee, Ms. … had recently accepted a position in the … Environment Ministry and, mindful of the fact that Committee members are required to serve in their personal capacity and should be independent, had given notice of her intention to stand down from the Committee”.

18 As a consequence of Decision I/7, Annex, para. 18 the CC may not consider communications from members of the public during the first year after the entry into force of the Convention for a state Party. No Party has exercised its rights under para. 18 out (for a period of not more than four years) of the provisions concerning communications from the public.

19 Decision I/7, Annex, paras 15–16 (submissions), para. 17 (referrals) and paras 19–24 (communications).

20 Decision I/7, Annex, sections VII–XI.


Addendum 1, Findings and recommendations with regard to compliance by Kazakhstan, communication ACCC/C/2004/01 by Green Salvation, Kazakhstan (referred to below as C/01, Kazatopron); Addendum 2, Findings and recommendations with regard to compliance by Kazakhstan, communication ACCC/C/2004/02 by Green Salvation, Kazakhstan (referred to below as C/02, High-Voltage Power Line); Addendum 3, Findings and recommendations with regard to compliance by Ukraine, submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv, Ukraine (referred to below as S/01 and C/03, Danube Delta); Addendum 4, Findings and recommendations with regard to compliance by Hungary, communication ACCC/C/2004/04 by Clean Air Action Group, Hungary (referred to below as C/04, Expressway Network Act 1); and Addendum 5, Findings and recommendations with regard to compliance by Turkmenistan, communication ACCC/C/2004/05 by Biotica, Moldova (referred to below as C/05, Public Associations Act); Report on eighth meeting, ECE/MP.PP.1/2005/4, July 2005; Report on ninth meeting, ECE/MP.PP.1/2005/6, October 2005; Report on tenth meeting, ECE/MP.PP.1/2005/8, December 2005; Report on eleventh meeting, ECE/MP.PP.1/2006/2, May 2006 with Addendum 1, Findings and Recommendations with regard to compliance by Armenia, Communication ACCC/C/2004/08 by the Centre for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Centre and the Armenian Botanical Society, Armenia (referred to below as C/08, Dalno Orten); Addendum 2, Findings and recommendations with regard to compliance by Latvia, communication ACCC/C/2004/09 by the Centre for Environmental Law, Latvia (referred to below as C/09, Environmental Law); Addendum 3, Findings and recommendations with regard to compliance by the Melilla Autonomous Region/Spain, Communication ACCC/C/2004/10 by the Federation for Environmental Defense, Spain (referred to below as C/10, Federation for Environmental Defense); Addendum 4, Findings and recommendations with regard to compliance by Belgium, Communication ACCC/C/2004/11 by Bond Beter Leefmilieu Vlaaderen VZW, Belgium (hereinafter C/11, Standing before Belgian Judiciary). All reports with addenda are available at the website; see note 24.

23 Section I of Report of the Compliance Committee, ECE/MP.PP/2005/13, March 2005 with addenda 1, 2, 3, 4 and 5.
environmental and administrative legislation of the Party when it falls outside the Convention.

47 Supra note 22, C/04 (Expressway Network Act 1) para. 18 and infra note 53.

48 Report of the Compliance Committee to MOP 2, doc. ECE/MP/PP/2005/13, 13 March 2005, para. 16 relating to S/01 and C/03 (Danube Delta) para. 8 on an inquiry commission under the Espoo Convention aimed at determining whether the activity (construction of a navigation canal) was likely to have a significant transboundary environmental impact, and the decision of the Aarhus Convention CC to consider that aspect of the communication related to Article 6 (2) (e) in the light of the findings of the inquiry procedure when the findings are available (because the findings might provide useful guidance on the issue of alleged transboundary effects).

The report of the Inquiry Commission was published in July 2006 (see UNECE press release ECE/ENV/INQ/2006/1) concerning the inquiry into the building of the navigation canal with a number of significant adverse transboundary impacts; see http://www.unece.org/env/ia/inquiry.htm. The CC of the Aarhus Convention considered the implications of the outcome of the inquiry procedure in respect of compliance issues under the Aarhus Convention at its thirteenth meeting, ECE/MP/PP/C. 1/2006/6, November 2006, paras 11–14. The CC noted that the findings of the Inquiry Commission raised a question of interpretation of the concept of being “subject to a transboundary environmental impact procedure” in Art. 6, para. 2 (e), i.e., whether the failure to include information in a notification that an activity was subject to a transboundary environmental impact procedure represented a breach of Art. 6, para. 2 (e), where such procedure was required, but was not undertaken. However, the CC considered that it was neither necessary nor constructive to attempt to resolve this question in the present context. Rather, the party should be for Ukraine to ensure that the public concerned was notified of the forthcoming transboundary impact procedure required under the Espoo Convention. This priority should be taken into account in the strategy developed by Ukraine to fulfill the recommendations of Decision II/5 (b) on compliance by Ukraine with its obligations under the Aarhus Convention. The strategy was discussed at the same meeting with a representative of the government of Ukraine who presented the draft elements of the strategy that was developed by Ukraine pursuant to Decision II/5 b.

On the issue of “(competing CMs), see Koester (2006) supra note 1 at 95. S/01 and C/03 (Danube Delta) is remarkable, because it involved in addition a communication, a party-to-party submission (Romania v Ukraine). This submission is noteworthy for two reasons. First, the submission is complaining not only about the lack of proper involvement of Romanian citizens and NGOs in the decision-making process concerning the construction of a navigation canal in the Ukrainian part of the Danube Delta), but also about the lack of public participation in Ukraine. Second, party-to-party submissions are extremely rare. Maybe the Danube Delta case is the example not only in respect of the Aarhus Convention CM, but also with respect to all other existing CMs. This pattern follows the pattern of formal MEA dispute settlement mechanisms, which have hardly ever been invoked in a party-to-party context. See, with regard to the only existing example, Jutta Brunnée, “Enforcement Mechanisms of International Law and International Environmental Law” in “Enforcement Compliance with Multilateral Environmental Agreements, supra note 16, at note 62 (p. 14).

49 Supra note 22, C/02 (High-Voltage Power Line) para. 4: “...[the Committee] took note of the ... reservations of the Party concerned but considered that significant changes had taken place since the entry into force for Kazakhstan”, and that the Committee “will only address activities that took place after the entry into force of the Convention for Kazakhstan”.

50 Supra note 22, C/11 (Standing before Belgian Judicature), para. 45. Of the eleven cases decided by various courts referred to by the communicant, none was initiated after the entry into force of the Convention for Belgium. Only two cases were finally dismissed after the entry into force of the Convention for Belgium, but even these cases were initiated before the entry into force of the Convention for Belgium (para. 20).


52 Report on ninth meeting, supra note 22, para. 2. See also infra note 84.

53 Report on tenth meeting, supra note 22, paras 16–19 concerning C/03, C/05 (Cement Storage Facility) para. 21. The CC notes “that some of the activities described in the communication took place prior to the Convention’s entry into force for Kazakhstan”, and that the Committee “will only address activities that took place after the entry into force of the Convention for Kazakhstan”.

54 Decision I/7, Annex, para. 14.

55 Supra note 22, see, respectively, C/02 (High-Voltage Power Line) paras 26 and 27; S/01 and C/03 (Danube Delta) para. 28; C/05 (Public Associations Act) para. 19; C/11 (Standing before Belgian Judicature) para. 45; C/04 (Expressway Network Act 1) para. 14; C/06 (Cement Storage Facility) para. 28; and C/08 (Danube Orichards) para. 32.

56 Supra note 22, note 54.

57 Report on eleventh meeting, supra note 22, paras 18–22.

58 Report on twelfth meeting, supra note 22, paras 16–19 regarding ACCC/C/15, communication by Alburnas Maior, Romania. The meeting report, however, also reflects that some members had concerns about the issue of admissibility and some other members about the level of public participation. See also report on thirteenth meeting, supra note 48, at para. 21.
The CC made a general recommendation to MOP-2 in its report (supra note 23), para. 39 to the effect that derogations from existing rights decreasing those rights would generally not be in line with either the objective or the spirit of the Convention, and that Parties, therefore, should be urged to refrain from granting derogating rights. This recommendation was, however, not addressed by MOP-2 (see also section 5.1 above on some other recommendations on general issues of compliance that were not addressed by MOP-2).
discussions” (Decision I/7, para. 37 (e) and (f)), the consistency of which with the enabling provision (Art. 15) is being questioned. Reference is made to the nature of the CM calling for non-confrontational, non-judicial and consultative arrangements (Statement para. 10). This part of the statement overlooks completely that some comparable CMs include the very same non-compliance response measures (see Koester (2005), supra note 14, at note 59). Furthermore, the Statement (para. 11) raises “serious questions” about the legal basis for the measure related to suspension of rights and privileges (Decision I/7, para. 37 (g)). This part of the Statement, however, seems to ignore the fact that the CM of the Montreal Protocol to which the US is a Party contains a comparable measure (see Koester (2006), supra note 1, at section 7.5). In addition, the Statement does not, in the opinion of the present author, interpret the relevant provision of Decision I/7 correctly; see Koester (2006), ibid.

Discussion of Cluster 2: Compliance

Alex Kiss, referring to Patrick Széll’s presentation, said that international jurisdiction in environmental matters was not easy, which could arise from the problem of scientific expertise. In a specific case he could see how judges could be troubled by the scientific aspects of the problem when, of course, each party had its own scientific experts and judges had to make their decision between those, which was not easy.

Another point was that there were frequently – in the supervising of compliance procedures – reporting systems which had come from the Human Rights treaties, which originally started with this system and then increasingly more international environmental agreements had incorporated them into the treaty. The system functioned, but not always very well. He had asked himself why it did not function in all of the cases and had come to the conclusion that the reporting system was not a simple one – especially for small States and developing countries. That is to say, they must have experts on all the problems and they did not always have them. So he came to the personal conclusion that perhaps the best thing would be to centralise the multilateral environmental agreements (MEAs) and to ask them to prepare a general statement on this. It was understood that, in particular cases of different MEAs, some precise details could be given, which would include that there should be a central organism, such as UNEP, to receive the country reports and then the different organs could ask for details on the basis of the general country report. This would be with the understanding that developing countries and smaller States could request the help of experts in preparing the reports.

Henri Smets explained that within the Organisation for Economic Cooperation and Development (OECD) with its now larger number of States, every year four or five countries were reviewed with regard to their environmental performance. The procedure is as follows. A country presents a report, which is used as a basis for information and is reviewed by a team of usually five to ten people, made up of independent experts, originating in Member countries and from the OECD Secretariat. The procedure is carried out totally behind closed doors but as everything is published later, there is transparency. It is important that the meetings are held behind closed doors without anyone present except the Member State representatives, the secretariat and the State focused on, which is usually represented at a very high level. Many ministries are present at the same time, because a State is being reviewed on all aspects and integration is very important. It is more policy review than legal review but it incorporates a lot of legal aspects.

Henri Smets felt that this was being carried out with some measure of success, in that it was being done seriously, followed by conclusions and good advice which were not without use.

There is then a second “review” round four or five years later he said, at which the States are informed whether or not they have followed the advice given during the first review, and if not, why not. All this is published. At the third round, the conclusions of the first two reviews are put on the table and the States are again informed of what they have not done. Some of the recommendations may be no good at all. They represent the OECD “leitmotiv” with a certain type of economic instruments. However, there is an ongoing skirmish between the economic directorate, whose views are ultra-liberal, and the views of the environment directorate, which are more balanced with social considerations.

He said that the system has operated so well that it is now being used on non-OECD States. For example, Russia, China and Chile had all been reviewed at their own request. This will go further, and the system is being transferred as a mechanism for review on the environment to other international organisations such as the United Nations Economic Commission for Europe (UN/ECE) in Geneva and the Economic Commission for Latin America and the Caribbean (ECLAC). They are using the system and learning how to use the procedures and adapt them for their own. So it might be that Brazil, for instance, among the candidates for review, could be reviewed by OECD or by ECLAC.

The speaker had the opportunity to be on the review team for about 29 countries, where he was mostly concerned with issues of economics or international environmental law. Veit Koester confirmed that when his country (Denmark) was reviewed by OECD, there was a huge delegation.

Johan Lammers asked Henri Smets why an OECD team would review the activities of Brazil and China, non-OECD members. Henri Smets replied that it was at the request of the country in question. For example, when Russia wanted to improve its international image, he said, it could have asked the UN/ECE. But it specifically requested the OECD to review Russian policy, which for the OECD was completely new, although it should be noted that OECD did carry out a lot of non-OECD work in the environment directorate.

Eckard Rehbinde asked Patrick Széll how he assessed the potential of third-party litigation based on the alleged violation of international agreements and noted that in some countries it is quite common to invoke the violation of international agreements.

Bo Kjellén said his question to Patrick Széll was linked to compliance procedures in general and in particular to what