Chapter Twenty-Five

Multiplication and Overlap of Non-Compliance Procedures and Mechanisms: Towards Better Coordination?

Cesare Pitea

1. Overlap of Multiple Non-Compliance Procedures: Examples, Reasons and Risks

International environmental law has developed mainly through the setting up of separate treaty regimes, with a consequent normative and institutional fragmentation. As the first part of this book clearly shows, non-compliance mechanisms established under multilateral environmental agreements (MEAs) do not escape this trend. They are invariably designed as regime-specific institutions and procedures: with some exceptions,[1] each treaty establishes its own compliance mechanism. Therefore, their number has increased dramatically in recent years. The present book covers fifteen existing or perspective mechanisms, but the list might have been longer if broader criteria had been used for the purpose of defining the scope of the research.

This situation raises different issues. One may in fact wonder whether it is rational and cost-effective to maintain such a large number of separate compliance bodies. Indeed, the setting up of a non-compliance mechanism entails time and resource consuming activities by States, which are to provide the necessary financial means directly (when the relevant body is composed of States representatives) or by financing the activities of the various MEAs (when a body of experts sitting in their personal

[1] The Espoo Convention NCP (*Decision II/4 on Review of Compliance*, doc. ECE/MP.EIA/4 (7 August 2001), Annex IV, at 72 revised by Decision III/2 on Review of Compliance, doc. ECE/MP.EIA/6 (13 September 2004), Annex II (consolidated text)) will apply also to the SEA Protocol, which despite its name is a fully self-standing instrument, once this enters into force, see E. Fasoli, "Procedures and Mechanisms for Review of Compliance under the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context and its 2003 Protocol on Strategic Environmental Assessment", *supra* 181–203. In other cases the different instruments to which an NCP apply appear to be parts of a single regime as happens with the LRTAP Convention NCP (*Decision 2006/2 on Implementation Committee, its Structure and Functions and Procedures for Review*, doc. ECE/EB.AIR/89/Add.1 (5 February 2007), at 4) which applies also to the Convention's protocols, see E. Milano, "Procedures and Mechanisms for Review of Compliance under the 1979 Long-Range Transboundary Air Pollution Convention and its Protocols", *supra* 169–180, and the Alpine Convention NCP (*Decision VII/4 Mécanisme de verification du respect de la Convention alpine et de ses protocols d'application* (2002), reprinted in *Envt'l Po'y & L.*, 33 (2003) 179) which applies also to the Convention's Protocols, see L. Pineschi, "The Compliance Mechanism of the 1991 Convention on the Protection of the Alps and its Protocols", *supra* 205–219.

T. Treves et al., eds., Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements

capacity is in place).[2] One may wonder whether arrangements may and should be envisaged to rationalise the system, by avoiding the duplication of efforts and thus saving precious resources.

Further concerns are connected with the possibility that the very same facts may trigger compliance issues under different treaties and that different compliance procedures may come into play. In certain cases, even the obligations whose compliance is challenged in different procedures may be similar, given that an overlap of substantive norms of different MEAs may occur.

One recent case perfectly illustrates the potential for overlap and multiplication of procedures. In 2003 Ukrainian authorities decided to authorize the construction of a canal for navigation connecting the Black Sea and the *Bystroe* arm of the Danube river delta. The Danube delta is internationally recognised as an area of a peculiar environmental importance. A large part of it was designated as a Wetland of International Importance under the Ramsar Convention in 1991,[3] it was inscribed by Romania in the UNESCO World Heritage List in 1991[4] and was recognised as a transboundary Biosphere Reserve under UNESCO's Man and the Biosphere Programme in 1998.[5] It is also the habitat of species protected under the Bern Convention on the Conservation of European Wildlife and Natural Habitats.[6]

Environmental groups and the Romanian Government claimed that Ukraine failed to comply with various protection standards required by the special international status of the area, and with obligations to cooperate with Romania, in particular for not having conducted a proper transboundary environmental impact assessment, as required under the Espoo Convention, and with the obligation to inform and involve the public in the decision-making process, as required by the Aarhus Convention. Control procedures set up under a plethora of different treaties have therefore been set in motion to assess whether Ukraine had indeed failed to respect its international commitments and to induce it to do so.

A second case offers a further variation on the theme. The case concerns the alleged failure by the Albanian authorities to properly inform the public and allow public participation in the planning and realisation of an industrial and energy park near the city of Vlore, in an area of environmental interest protected under national law. International financial institutions (IFIs), including the World Bank, the

---

[2] See F. Romanin-Jacur, "Controlling and Assisting Compliance: Financial Aspects", *supra* 419–437.

[3] According to the Secretariat of the Ramsar Convention "[t]wo adjacent Ramsar Sites cover the main part of the Danube Delta: N°113 Kyliiske Mouth in Ukraine and N°521 Danube Delta in Romania. Four additional Ramsar Sites are linked with the Delta, situated along the Danube in ascending order: N°760 Kugurlui Lake and N°761 Kartal Lake in Ukraine, N°1029 Lower Prut Lakes in the Republic of Moldova, and N°1074 Small Island of Braila in Romania. Further Ramsar Site designations are in preparation", see *Follow Up to Ramsar Advisory Mission 53, Danube Delta / Kyliiske Mouth Ramsar Site, Ucraine, Mission of 26–29 April 2005 by Tobias Salathé, Ramsar Secretariat*, available at <http://www.ramsar.org/ram/ram_rpt_53e_update.pdf> (visited 15 March 2008), note 1. A full list of Ramsar Sites is available at <http://www.ramsar.org/sitelist_order.pdf> (visited 15 March 2008).

[4] See information available at <http://whc.unesco.org/en/list/588> (visited 15 March 2008).

[5] See information available at <http://www.unesco.org/mab/BRs/TBRs.shtml> (visited 15 March 2008).

[6] A list of treaties with full references is provided *supra* at XXXVII.

European Bank for Reconstruction and Development (EBRD) and the European Investment Bank, concurred in the financing of the project, after having subjected it to their internal rules relating to environmental assessment, which include public participation requirements. An Albanian NGO, the Civic Alliance for the Protection of the Vlore Bay, after submitting the case to the Compliance Committee of the Aarhus Convention, requested and obtained an inspection by the Panel of the World Bank,[7] as well as a compliance review under the Independent Recourse Mechanism of the EBRD.[8] In the meantime, the Aarhus Convention Compliance Committee produced its own report, finding that Albania had not complied with certain obligations under Articles 6 and 7 of the Aarhus Convention.[9] Therefore the same facts have been submitted to review to three different international mechanisms in order to assess compliance with largely overlapping international standards.

Faced with this kind of situation, the need to prevent the duplication of efforts and diverging evaluations suggests that arrangements should be established with a view to reducing duplications in fact finding and information gathering activities, avoiding conflicting findings as to compliance with overlapping obligations, and promoting common approaches in tackling non-compliance in specific cases.

2. A Single Non-Compliance Mechanism? An Unrealistic and Unsuitable Perspective

The need to rationalise the functioning of this disordered bunch of international institutions and procedures to deal with non-compliance with environmental treaties should not be misinterpreted as a case for the setting up of a unified "universal" system of compliance review. A number of obstacles oppose its realisation.

From a normative point of view, amendments of the various treaties would probably be necessary, although some could argue that, given the wide discretion given to the relevant COP/MOPs by treaty clauses enabling the establishment of compliance arrangements or on the basis of the doctrine of implied powers, the Parties are not strictly prevented from entrusting compliance functions to a body which is not a subsidiary one, internal to the institutional structure created under the relevant treaty. Practical issues would also emerge, due to the heterogeneous participation of States in the various treaties and to the specific expertise that technical aspects of certain

---

[7] See *Report and Recommendation on "Albania: Power Sector Generation and Restructuring Project (IDA Credit No. 3872-ALB)"*, Report No. 40213-AL (2 July 2007), available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Request_for_Inspection.pdf> (visited 2 March 2008).

[8] Independent Recourse Mechanism (IRM), *Eligibility Assessment Report on complaint "Vlore Thermal Power Generation Project"* (27 September 2007), approved by the EBRD Board on 12 October 2007, documents and information available at <http://www.ebrd.com/about/integrity/irm/register.htm> (visited 2 March 2007). On the IRM see, in this book, F. Seatzu, "In Search of New Ways to Ensure Effective Compliance with Environmental Procedures and Policies: The Experience of the European Bank for Reconstruction and Development with its Internal Recourse Mechanism", *supra* 337–352.

[9] *Findings and Recommendations with Regard to Compliance by Albania* (Communication ACCC/C/2005/12) from the Civic Alliance for the Protection of the Vlore Bay (Albania)), adopted 15 June 2007, doc. ECE/MP.PP/C.1/2007/4/Add.1 (31 July 2007).

treaties require. Also in this case arrangements could be envisaged, but they would probably overcomplicate the functioning of the mechanism.[10]

The main obstacle to an arrangement of this kind seems to be of a political nature. Indeed the political constituencies of the various treaties may vary considerably according to their subject-matter and territorial scope and States have consistently expressed the view that non-compliance mechanisms should be regime-specific. Guidance documents on compliance issues adopted in intergovernmental fora, including the UNEP Guidelines, consistently stress "the importance of tailoring compliance provisions and mechanisms to the agreement's specific obligations."[11] This makes it possible to take fully into account the technical, political and legal dimension of each regime and facilitates a more flexible handling of cases.

Apart from practical issues, also a more theoretical reflection suggests that a unification of non-compliance procedures would not to be welcomed. In fact, institutional fragmentation shall not necessarily be seen as a weakness of international environmental law.[12] Rather, it is a factor enhancing development and innovation. States may be ready to accept and establish some innovative or forward looking arrangements in a certain context, while they might not be willing or able to do so in other contexts. If a certain innovative solution were to be applied in a cross-regime institutional framework, resistance would invariably prevail and progress in cooperation would be slowed down. Conversely, the existence of a plurality of *fora* allows innovative solutions to be experimented in certain contexts and, subsequently, spill over to other contexts, positively influencing their development.

3. Information-Sharing Clauses in Existing and Perspective Non-Compliance Mechanisms

Even though the establishment of a single institutional framework to deal with non-compliance with MEAs is largely undesirable and unfeasible, the need to establish other effective means to coordinate the activities of the various compliance bodies and to enhance synergies between them cannot be overlooked. Such arrangements should consist of more or less institutionalised forms of cooperation and dialogue between compliance bodies. Indeed, this necessity is recognised in most recent

[10] For example by dividing the composition of the compliance body between permanent and variable members. The permanent members could be elected on the basis of a legal expertise by States Parties to any of the covered agreements expressing a vote for each agreement they are a party to. Variable members would be elected only by the States Parties to the agreement concerned on the basis of technical expertise relevant in the field of the instrument concerned, and would sit only for cases in which compliance with that instrument is at stake.

[11] *Draft Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements*, doc. UNEP/GCSS.VII/4/Add.2 (23 November 2001), Annex, adopted by the UNEP Governing Council with Decision *SS.VII/4 on Compliance with and Enforcement of Multilateral Environmental Agreements*, doc. UNEP/GCSS.VII/6 (5 March 2002), Annex I, at 43.

[12] T. Gehring, "Treaty-making and Treaty Evolution", in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) 467–497, at 475.

non-compliance mechanisms. The mechanism established under the Aarhus Convention has played a pioneering role in this respect, being the first to include a clause on "enhancement of synergies", providing that

> "[i]n order to enhance synergies between this compliance procedure and compliance procedures under other agreements, the Meeting of the Parties may request the Compliance Committee to communicate as appropriate with the relevant bodies of those agreements and report back to it, including with recommendations as appropriate. The Compliance Committee may also submit a report to the Meeting of the Parties on relevant developments between the sessions of the Meeting of the Parties."[13]

This provision has been reproduced *verbatim* in other arrangements in the framework of UNECE that have taken inspiration from the precedent set by the Aarhus Convention. These include the non-compliance mechanism of the Protocol on Water and Health[14] and the one adopted, but not yet operational, under the PRTRs Protocol.[15] At the global level similar clauses (although different in wording) have been proposed during the negotiation of the non-compliance procedure for the London Dumping Protocol 1996 amending the Convention on dumping at sea[16] and are under consideration in the process of establishing non-compliance mechanisms under the Rotterdam PIC Convention[17] and the Stockholm POPs Convention.[18] The non-compliance

---

[13] *Decision I/7 on Review of Compliance*, doc. ECE/MP.PP/2/Add.8 (2001, late issued on 2 April 2004) (Aarhus Convention NCP), para. 39, see 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", *supra* 221–249, at 242–244.

[14] *Decision I/2 on Review of Compliance*, doc. ECE/MP.WH/2/Add.3 – EUR/06/5069385/1/Add.3 (3 July 2007) (Protocol on Water and Health NCP), para. 37, see C. Pitea, "Procedures and Mechanisms for Review of Compliance under the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes", *supra* 251–262, at 260.

[15] *Draft Decision on Review of Compliance*, doc. ECE/MP.PP/AC.1/2007/L.10 (18 July 2007) (PRTRs Protocol NCP). See C. Pitea, "Procedures and Mechanisms for Review of Compliance under the 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention", *supra* 263–274, at 272.

[16] See Report of the Twenty-sixth Consultative Meeting, doc LC 26/15 (17 December 2004). Appendix, para. 33. See S. Trevisanut, "The Compliance Procedure and Mechanism of the 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter", *supra* 49–61, at 59.

[17] *Decision RC-3/4 Draft text of the Procedures and Mechanisms on Compliance with the Rotterdam Convention*, doc. UNEP/FAO/RC/COP.3/26 (10 November 2006), Annex, at 27 (Rotterdam PIC Convention Draft NCP). See S. Brugnatelli, "Draft Procedures and Mechanisms on Compliance with the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade", *supra* 85–100, at 99. The agreed text of para. 28 of the draft, under the heading "Information sharing with other relevant multilateral environmental agreements" provides that "[w]here relevant, the Committee may solicit specific information, upon request by the Conference of the Parties, or directly, from compliance committees dealing with hazardous substances and wastes under the auspices of other relevant multilateral environmental agreements and report on these activities to the Conference of the Parties."

[18] *Decision SC-3/20 on Non-Compliance*, doc. UNEP/POPS/COP.3/30 (4 May 2007), Annex, at 57 (Stockholm POPs Convention Draft NCP), see G. Bigi, "Draft Non-Compliance Procedure under the 2001 Stockholm Convention on Persistent Organic Pollutants", *supra* 121–135, at 134. Under the heading "Other multilateral environmental agreements", para. 38 of the draft text provides that "[w]here relevant, the Committee may solicit information, upon request by the Conference of the Parties [or directly,] from compliance

mechanism of the Protocol on Water and Health is, so far, the only one containing some further provisions that will be addressed later.

One may wonder what may be the meaning and purpose of a clause with the standard drafting. Apparently, its introduction in recent texts indicates that States do recognise the need for subsidiary bodies dealing with compliance to exchange information and experiences, but it also stresses their conviction that these activities can take place only if and when duly authorised by the relevant COP/MOP. States have shown their will to maintain a strict control over the relations between compliance bodies, since exchange of information can take place only following a specific request of the COP/MOP and with an obligation to report back on it.

This normative choice evidently frustrates the usefulness of the provisions on enhancement of synergies. Since COP/MOPs may take place once a year or even, depending on the treaty concerned, at longer intervals of two or three years, the procedure envisaged in the clauses appears excessively burdensome and time-consuming, in contrast with the need of a prompt response that is normally expected from non-compliance procedures. States seem to have become aware that coordination clauses as currently drafted establish a complex process of limited use and the texts under negotiation for the establishment of non-compliance mechanisms for the two global conventions on chemicals may finally provide that the compliance body may solicit information "directly" (e.g., without a prior authorisation of the COP/MOP) from other compliance committees dealing with hazardous substances and wastes.[19]

4. The Practice of Synergy Enhancement

4.1 Institutional Synergies: The Role of Secretariats

Given that clauses introduced in texts establishing non-compliance mechanisms are formulated in a way that they are of little (if any) use, other less formal solutions have developed through practice and further ones may be envisaged.

Synergies and information sharing may be realised by allowing members of a compliance body to participate in meetings of other compliance bodies. Occasionally this may happen because some individuals may sit in more committees, as it is actually the case in some instances. The non-compliance procedure of the Protocol on Water and Health explicitly provides that "[t]he Committee may invite members of other compliance committees dealing with issues related to those before it for consultation."[20] The normative function of this provision seems to be rather limited. Indeed, it does not add to powers that the Committee, like almost any other compliance body, already enjoys. Nothing seems to prevent compliance bodies from inviting persons sitting in other compliance committees, in the framework of the broad powers they normally have to gather information, including through inviting

committees dealing with hazardous substances and wastes under the auspices of other relevant multilateral environmental agreements and report on these activities to the Conference of the Parties."

[19] See *supra*, nn. 17 and 18.

[20] Protocol on Water and Health NCP, para. 38.

experts. However, an explicit normative statement may be seen as having the policy objective of encouraging the use of this tool to enhance synergies between compliance bodies.

In practice, however, the exchange of experience seems to take place mainly through other channels, although practice is still scarce. The Aarhus Committee, while considering the case relating to the *Bystroe* project, did consider it necessary to receive information on the ongoing parallel process under the Espoo Convention, but it decided to invite to one of its meetings the Secretary of the Convention rather than a member of the Implementation Committee. Similarly, in the Vlore industrial park case, the same Committee informed the IFIs involved in the financing of the projects of the ongoing procedure and invited them to comment on the issue at stake, including on draft findings and recommendations. More recently, Secretaries of other UNECE conventions having a compliance mechanism have been invited to the first meeting of the Compliance Committee of the Protocol on Water and Health to present their experience and in particular their internal procedures.

These examples bring us to the major trend emerging from practice, which is precisely to leave to Secretariats the task of keeping contacts with other compliance bodies, as a part of their institutional mandate. An example of this trend is given by the ongoing dialogue, triggered by the above-mentioned case of the Vlore industrial park in Albania, between the Secretariat of the Aarhus Convention and IFIs, in particular with the EBRD, on action to be taken to ensure better coordination of the internal rules and compliance procedures of the latter with those of the Aarhus Convention.

The *Bystroe* case offers another example. After it arose, a fact-finding mission to Ukraine was set up, which was led by the European Union and included the Secretariats of the MEAs involved. Quite interestingly, this cooperation took place outside the formal procedures of compliance review. For instance, the Aarhus Convention Compliance Committee did not consider it as on-the-spot information gathering under Decision I/7. This notwithstanding the report of this mission was produced by the communicant and its content was used by the Committee as evidence.[21]

A similar status may in the future be recognised to findings of fact contained in reports of other compliance bodies, when they are publicly available even if they are not submitted by parties to the procedure.

4.2 Procedural Synergies: Taking into Account Procedures under other Compliance Mechanisms and Ensuring Harmonious Jurisprudential Developments

The analysis of how a cross-system exchange of experience and information may take place leaves unprejudiced a central issue: what are the effects for a given procedure relating to a specific case of non-compliance of the existence of a previous or parallel

[21] See *Finding and Recommendations with Regard to Compliance by Ukraine with the Obligations under the Aarhus Convention in the Case of Bystroe Deep-Water Navigation Canal Construction* (submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine)), adopted 18 February 2005, doc. ECE/MP.PP/C.1/2005/2/Add.3 (14 March 2005).

non-compliance procedure elsewhere on the same or a similar matter? In particular, what is the status in the former of legal findings made in the latter?

A quick glance at texts establishing non-compliance procedures confirms that the approach to be taken in this context is very different from that adopted in the context of human rights treaty bodies of a judicial and quasi-judicial nature. According to their own rules on the admissibility of petitions, these bodies are precluded, temporarily or finally, from considering any matter that has been decided by, or is pending before, another international procedure of investigation or settlement.[22] This approach is based on the application of classical concepts such as *lis pendens* and *res iudicata*. None of the compliance procedures concluded so far includes a clause of this kind. Indeed, in the non-compliance procedure under the Aarhus Convention, which shares some similarities with human rights control mechanisms, the inclusion of a similar provision was rejected during negotiations.[23]

This may be explained by the fact that the concepts of *lis pendens* and *res judicata* seem to have a very little role to play, if any, in non-compliance procedures, given their non-judicial character.[24] Needless to say, it is precisely the flexible and result-oriented nature of these procedures that allows compliance bodies, possibly upon the request of the Party concerned, to give a broad relevance to procedures taken

[22] . See, for example, Art. 5.2(a) of the Optional Protocol to the ICCPR and Art. 35.2(b) of the European Convention on Human Rights. It should be noted that consideration of a situation by an environmental non-compliance body may never constitute a bar to the admissibility of individual petitions or communications before human rights treaty bodies under the above-mentioned clauses. The issue could be raised with respect of the non-compliance procedure under the Aarhus Convention, given that it provides for communications from individuals and that, allegedly, in certain specific cases a claim of violation of rights under the Aarhus Convention may be "substantially the same" as a claim under a human rights treaty (for a reflection on the links between the Aarhus Convention and existing rights under human rights instruments, see J. Ebbesson, "The Notion of Public Participation in International Environmental Law", *YB Int'l Envt'l L.*, 8 (1997) 51–97, at 69–75 and P. Quillacq, "Is Legal Symbiosis Possible? The Coming Synergy between the Aarhus Convention and the European Court of Human Rights", in *The Future of Environmental Law: International and European Perspectives*, EUI Working Group On Environmental Law Collected Reports 2004–2005 (2006), 72–76, available at <http://cadmus.iue.it/dspace/bitstream/1814/4083/1/WPLAWNo.20061ELWG.pdf> (visited 2 March 2008). However, the procedure before the Compliance Committee of the Aarhus Convention lacks one of the fundamental characters required from the competing procedures referred to in relevant admissibility clauses before human rights judicial and quasi-judicial bodies. These bodies have elaborated a notion of "equivalence" that presupposes the judicial or quasi-judicial nature of the concurring procedure. A fundamental test to pass for this purpose is that the concurring procedure should be one aimed at redressing individual violations. The Compliance Committee of the Aarhus Convention has underlined that Decision I/7 does not provide for a "redress procedure" in the case of the violation of rights guaranteed by the Convention, in that it does not aim at providing relief to individual victims: see *Report on the Third Meeting*, doc. MP.PP/C.1/2004/2 (2 March 2004), paras. 5 and 17.

[23] In an initial draft it was proposed that "The Committee shall not consider any such communication unless it has ascertained that (a) The same matter is not being examined under another procedure of international investigation or settlement", see *Report of the First Meeting of the Task Force on Compliance Mechanisms*, doc. CEP/WG.5/2000/4 (17 April 2000), Annex VI, para. 7(a).

[24] Indeed, even if those concepts were considered to be applicable, their practical relevance would be quite limited by the fact that the operation of these rules is limited to cases in which the competing procedures have the same parties and the same object, including the identity of the claim and applicable law, see generally Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003).

elsewhere to review compliance with overlapping obligations. Practice in this respect is almost lacking and derives exclusively from cases of non-compliance with the Aarhus Convention.

In the *Bystroe* case the Compliance Committee of the Aarhus Convention was called to rule upon the general issue of lack of public involvement in the process of authorising the construction of the canal. Since the "public concerned" to be consulted under the Aarhus Convention is not limited to a national public, this issue may overlap with the obligation under the Espoo Convention to provide information and participation to the public in affected States[25] that was subject to review by the Implementation Committee of the Espoo Convention. This situation raised no concern in the Compliance Committee of the Aarhus Convention when the latter discussed and decided the case. Quite interestingly, the attitude of the Committee was radically different when, in the very same case, it had to deal with a more specific claim of non-compliance with Article 6.2(e) of the Aarhus Convention, under which national authorities are obliged to inform the public concerned of "[t]he fact that the activity is subject to a […] transboundary environmental impact assessment procedure." In one of the possible readings of this provision[26] its violation was dependent on the actual applicability of the Espoo Convention, e.g., by the existence or likelihood of "significant transboundary harm". This issue was, at the time, pending before an Inquiry Commission that had the power to determine it, although without binding effects.[27] The Aarhus Compliance Committee decided to defer the consideration of this specific issue "in the light of the findings of the inquiry procedure being undertaken under the Espoo Convention."[28] After the Inquiry Commission delivered its report, and significant transboundary harm had been ascertained, the Committee took the very practical view that the issue would be monitored in the framework of the follow-up process on the implementation of the recommendation adopted by the first MOP.[29]

Different elements may have contributed towards the different position taken by the Committee with respect to the two procedures, both of which were initiated after the relevant communication was submitted to the Aarhus Committee. One may attach weight to the nature of the concurring procedure: the one before the Inquiry

[25] On the obligation for Parties to the Espoo Convention to provide information and participation to the public in affected States, see Fasoli, *supra* n. 1, at 132. It is important to stress that the threshold for obligations under the Espoo Convention to be applicable, namely the existence of a significant transboundary harm, is higher than the threshold for the operation of the obligation under the Aarhus Convention which requires the involvement of "the public to be affected or likely to be affected by, or having an interest in, the environmental decision-making" (Art. 2.5).

[26] In fact the Committee raised the issue of whether the obligation was triggered by the mere existence of a legal (international) obligation to carry out a transboundary impact assessment procedure or by the actual conduction of such a procedure, see *Report on the Thirteenth Meeting*, doc. ECE/MP.PP/C.1/2006/6 (16 November 2006), para. 13.

[27] See Art. 3.7 of the Espoo Convention.

[28] See *Finding and Recommendations with Regard to Compliance by Ukraine with the Obligations under the Aarhus Convention in the Case of Bystroe Deep-Water Navigation Canal Construction* (submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine)), adopted 18 February 2005, doc. ECE/MP.PP/C.1/2005/2/Add.3 (14 March 2005), para. 8. See also *Report on the Fifth Meeting*, doc. MP.PP/C.1/2004/6 (26 November 2004), para. 12.

[29] *Report on the Thirteenth Meeting*, doc. ECE/MP.PP/C.1/2006/6 (16 November 2006), paras. 11–14.

Commission is a compulsory dispute settlement procedure, although not legally binding on the parties to the dispute, while the procedure before the Implementation Committee lacks this character. Another element may be that, compared to the Espoo Implementation Committee, the Inquiry Commission was expected to deliver its report in a relatively short time, although in the end it took over two years. Finally, and this seems to be the prevalent rationale, the Committee may have been implicitly guided by a principle of speciality. It considered that its competence to deal with the issue of whether the public – nationally and abroad – had been properly involved was not affected by a pending (but posterior) procedure before the Espoo Implementation Committee. At the same time, as a matter of opportunity, it deferred to the ongoing decision of a competent Inquiry Commission of the Espoo Convention the issue of whether the latter was indeed applicable.

The report prepared by the Espoo Implementation Committee on the *Bystroe* Canal case,[30] after recalling in very general terms that the Aarhus Compliance Committee had found that the Ukrainian regulatory framework for public participation was insufficiently clear,[31] contains findings that are substantially in line with the latter,[32] but it does not emphasise any reliance on them.

In the case concerning the Vlore Industrial Park in Albania, the Compliance Committee of the Aarhus Convention noted that the issues of public participation in certain decision-making processes might also be considered in the course of inspection proceedings carried out by the Panels established by the World Bank and the European Bank for Reconstruction and development. The Committee, recognising "the need to avoid duplication of effort and enhance synergies, (…) agreed to inform these institutions that it was considering a communication on the matter and to inquire about their involvement in the proposed projects and about whether their respective inspection panels were addressing the issue."[33] This position further demonstrates a willingness by the Compliance Committee of the Aarhus Convention to ensure the harmonious development of international law and practice in the field it is concerned with. However, given the fact that the internal review procedures of the two banks were at a very early stage, the Committee completed its decision-making process autonomously, thus showing that the enhancement of synergies must be balanced with other considerations, such as the need not to cause undue delay in the compliance review procedure.

---

[30] *Findings and Recommendations further to a Submission by Romania Regarding Ukraine (EIA/IC/S/1)*, doc. ECE/MP.EIA/2008/6 (27 February 2008).

[31] Ibid., para. 32.

[32] See, in particular, para. 43 ("Ukraine did not follow the requirements of the Convention in relation to assuring the proper involvement of the (…) public in the respective EIA procedures. In particular, Ukraine (…) (f) Did not enter into consultations with Romania concerning the potential transboundary impact and measures to reduce or eliminate such impact, as required under Article 5, and did not take steps to agree with Romania on a time frame for such consultations, as also required under Article 5") and para. 60 ("Ukraine has established a domestic EIA system, but that Ukraine does not comply fully with Article 2, paragraph 2, of the Convention because it does not provide sufficiently clearly in its regulatory framework the information referred to in paragraph 59").

[33] See *Report on the Eleventh Meeting*, doc. ECE/MP.PP/C.1/2006/2 (10 May 2006), para. 17.

On their part, concurring internal procedures of compliance review carried out by the two banks have not yet been completed. In its recourses and arguments, the complainant has heavily relied on the findings of the Aarhus Convention Compliance Committee and it will be interesting to see if and how the final reports of the Inspection Panel of the World Bank and of the compliance review of the IRC will reflect or consider such findings relevant, thus continuing this trend of openness and cross-fertilisation.

From the legal texts it clearly emerges that compliance bodies are not precluded from considering an issue because it is similar to one already considered, or under consideration, by another compliance body. Nor is there a duty to defer to decisions already made by the latter. However, there is a discretionary power to do so and the scarce practice existing is not conclusive as to the willingness and modalities to use these possibilities. The first elements show a positive attitude towards coordination and highlight that compliance bodies can be ready to pay attention to relevant decision previously made by other bodies. As to pending procedures, it seems that discretionary suspension of proceedings to wait for findings by another body may be decided upon on the basis of speciality, that is the peculiar competence recognised to another body to decide upon the matter or a specific aspect of it, rather than priority, which is the traditional criterion of *lis pendens*.

5. The Way Forward

The issue of coordination and cooperation between compliance bodies and procedures is already on the table, but attempts to formalise it have so far failed. Informal ways of exchanging experiences have proved more effective, especially by emphasising the role of Secretariats and by enhancing jurisprudential dialogue between different bodies. However, some lessons have been learned and new ideas may be put forward.

Having excluded from the outset the feasibility and opportunity of creating a universal non-compliance mechanism, one may still wonder whether in certain cases enhanced institutional synergies could be realised. It seems natural for new coordination arrangements to be experimented among non-compliance mechanisms under agreements sharing basic features as to their subject-matter and/or sharing the services of the same organization, such as UNEP or UNECE.[34]

The issue is actually under consideration for the three UNEP conventions on hazardous substances (Basel, Rotterdam PIC and Stockholm POPs Conventions). Through converging decisions of the respective governing bodies an *Ad hoc* Joint Working Group has been established to prepare and send back joint recommendations on enhanced cooperation and coordination among the three conventions.[35] The Draft

[34] See also A. Fodella, "Structural and Institutional Aspects of Non-Compliance Mechanisms", *supra* 355–372, at 371.

[35] See *Decision SC-2/15 on Synergies*, doc. UNEP/POPS/COP.2/30 (15 May 2006) at 54; *Decision RC-3/8 on Cooperation and Coordination between the Rotterdam, Basel and Stockholm Conventions*, doc. UNEP/FAO/RC/COP.3/26 (10 November 2006), at 41 and *Decision VIII/8 on Cooperation and Coordination between the Basel, Rotterdam and Stockholm Conventions*, doc. UNEP/CHW.8/16 (5 January 2007), at 34.

recommendations adopted by the Joint Working Group address also the non-compliance mechanisms in various ways. On the first level, they request the three Secretariats to exchange information on progress made on the operation or establishment of the non-compliance mechanisms under the three conventions. Furthermore, the three COPs are recommended to explore the possibilities for enhancing coordination among the compliance mechanisms, after the processes of their adoption is completed. The Joint Working Group has suggested that this could include convening back-to-back meetings of the three compliance bodies, encouraging the appointment of members to the body or bodies to administer the mechanisms of those who have experience with other compliance mechanisms and even the establishment of a single body to administer the three mechanisms.[36]

The initiative taken in the context of the conventions on hazardous substances is definitely to be welcomed and might provide inspiration for better coordination of existing non-compliance mechanisms, especially those operating under the auspices of the UNECE. However, the proposals made in that context are not to be considered exhaustive. For example, one may imagine that a more institutionalised consultation between compliance bodies could be put in place by building on the model provided by the Inter-Committee Meeting and the Meeting of the Chairpersons of the UN Human Rights Treaty Bodies.

A further suggestion may add a different flavour to the issue. It builds on the existing provision of the non-compliance mechanism of the Protocol on Water and Health, which enables the Committee to "transmit information to the secretariats of other international environmental agreements for consideration in accordance with their applicable procedures on compliance."[37] The idea behind this provision is self-explanatory. However, its effectiveness depends on a number of factors. In particular, the clause seems to be suited for Committees composed of individuals: States representatives may be reluctant to extend the scope of international scrutiny into another State's behaviour. Moreover, the rules of the non-compliance mechanism notified shall allow the Secretariat to trigger the mechanism beyond issues arising out of States reports, or the Committee to act *proprio motu*.

These are only some of the many, and probably better, proposals that may be formulated. However, they well represent a direction that coordination techniques should take: they should aim at creating a culture of cooperation leading the various compliance bodies to regard themselves not as isolated bodies but rather as elements of a global effort to protect the environment for the benefit of present and future generations.

[36] *Draft Recommendations to the Conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions prepared by the Co-chairs of the Ad Hoc Joint Working Group*, doc. UNEP/FAO/CHW/RC/POPS/JWG.3/2 (29 February 2008), paras. 15 and 16.

[37] Protocol on Water and Health NCP, para. 38.