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Brölmann, C.

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**FINAL REPORT ON
THE AARHUS CONVENTION COMPLIANCE COMMITTEE**

29 November – 13 December 2020, Kyoto

*Catherine Brölmann (University of Amsterdam)**

A. Introduction

Of the many multilateral environmental agreements (MEAs) many have established “compliance committees.” Such Committees can be said to fit the scope of study of this project, in that they are treaty bodies. Also, their work fits the account of ‘dispute settlement’ in the broad sense (Article 33 UN Charter). However, set in the landscape of dispute settlement through (semi-)judicial procedures and complaint mechanisms, compliance committees are different, for their (in the wording of Article 15 of the Aarhus Convention) “non-confrontational, non-judicial and consultative” approach. This said, it is instructive to examine, next to the courts and tribunals and the human rights complaints mechanisms, the Aarhus Convention mechanism, that is at the outer end of the ‘judicial’ spectrum,¹ but which does involve contestation and decision through application -and therefore interpretation- of a legal text.

Pursuant to Art. 15, the Parties to the 1998 *Aarhus Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters* were required to set up arrangements “to review compliance with the Convention”.² At its first session in Lucca, Italy in October 2002, the Meeting of Parties (MOP) adopted Decision I/7 on the review of compliance, establishing *inter alia* the Aarhus Convention Compliance Committee (ACCC) as the main body to

* This Preliminary Report is in large part based on a research report prepared by Jamie Vatcher, LL.M., for whose excellent work many thanks are due.

¹ See for example E Fasoli, A McGlone, ‘The Non-Compliance Mechanism Under the Aarhus Convention as ‘Soft’ Enforcement of International Environmental Law: Not So Soft After All!’. *Neth Int Law Rev* 65, 27–53 (2018). <https://doi.org/10.1007/s40802-018-0102-0>

² Article 15 Aarhus Convention (Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, *done at Aarhus, Denmark, on 25 June 1998, entered into force 30 October 2001*), stable URL <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

address issues of alleged non-compliance with the Convention.³ The ACCC consists of nine independent experts who serve in their personal capacity and who have recognized expertise in the field.⁴

The ACCC is mandated to perform three tasks: a) consider submissions by parties, referrals by the secretariat, and communications from the public;⁵ b) report on compliance with or implementation of the convention for the MOP; and c) monitor, assess and facilitate implementation of and compliance with each party's obligation to regularly report on their implementation of the convention.⁶ When the Committee makes a provisional Finding that the Party concerned is not in compliance, it will refer its conclusions to the MOP accompanied by feasible measures and recommendations.⁷ As the ACCC's powers are recommendatory conform to Art. 15, the MOP is the final arbiter and not obliged to adopt the Committee's recommendations.⁸ However, to date, all Findings of non-compliance by the ACCC have been endorsed by the Meeting of the Parties.⁹

Some observations on the method used in this report are in order. The body of material that was considered, consists of a little over forty *Findings* of the Aarhus Committee, since its creation in 2004, the last one at the time of writing being the Finding in a case against the Netherlands (Borsele) (ACCC/C/2014/104) of 4 October 2018.¹⁰

Given the comparatively small number of cases, the analysis is qualitative rather than quantitative in nature. Also, because of the relatively brief time span, the diachronic aspect of this interpretation project is not very prominent. As the material covers only up to fifteen years, it is not easy convincingly to trace an "evolution of rules".

The report concretely refers to eighteen Findings – these have been chosen as the most prominent examples of the interpretative phenomena on which the questionnaire is focused.

³ Guide to the Aarhus Compliance Committee, § 2 (https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf)

⁴ Annex to Decision 1/7 (UN Doc ECE/MP.PP/2/Add.8), §§ 1 and 2.

⁵ The first compliance mechanism under an MEA permitting submissions from the public against States parties.

⁶ Annex to Decision 1/7 (UN Doc ECE/MP.PP/2/Add.8), § 13.

⁷ Ibid.

⁸ *The Aarhus Convention: An Implementation Guide* (second edition), p. 133. (https://www.unece.org/env/pp/implementation_guide.html)

⁹ Sixth session of MOP in Budva 2017, § 48.

¹⁰ See <https://www.unece.org/env/pp/cc/com.html> (all Communications); see also the compilation of Findings prepared by the UN (http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_23.04.2019.pdf); see also A Andrusyevych, S Kern (eds), *Case Law of the Aarhus Convention Compliance Committee (2004-2014)*, 3rd Edition (RACSE, Lviv 2016 - <https://www.rac.org.ua/uploads/content/244/files/caselaw2016final.pdf>).

When it comes to identifying relevant instances of interpretation for the purpose of this project, the report has taken additional guidance from signs of ‘self-awareness’ on the part of the Committee. Therefore, apart from explicit mentions by the Committee of VCLT provisions, or of classic law of treaties notions, account has been taken of deliberations and reasonings which suggest that the Committee is consciously engaging in an interpretative exercise. This distinguishes the interpretation that is subject of the present report, from the unconscious interpretation that is inherent in *implementation*, and that is subject of the Committee’s guidance work for the states parties of the Aarhus Convention.

This report is guided by the queries in the questionnaire and is structured accordingly.

B. Questionnaire

I Content-related issues/questions

1. Do the courts and tribunals refer to the VCLT rules of interpretation? Do they discuss the content of these rules?

Direct references to the VCLT rules of interpretation in the Findings of the ACCC are sparse, with merely four explicit citations of the corresponding VCLT articles in three separate cases.¹¹ In these

¹¹ § 35 1ACCC/A/2014/1 (Belarus): “Regarding the Party’s second question, the Committee notes that the term “basic runway length” is not defined in the Aarhus Convention. **However, in accordance with article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.** To this end, the Committee also recommends to the Party concerned that, while in accordance with annex 14 to the Chicago Convention, taxiways are not included in basic runway length, the ordinary meaning of the term “basic runway length” in paragraph 8 (a) of annex I to the Convention be understood to include accelerating and braking zones” (emphasis added); § 40 ACCC/A/2014/1 (Belarus): “Having considered the secretariat’s draft response, and after taking into account the comments by the Party concerned above, the **Committee considers that further clarification of the term “residues” is required to address the question of the Party concerned. In accordance with article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.** The Committee considers that the ordinary meaning of residues is “a small amount of something that remains after the main part has gone or been taken or used”. Regarding the question by the Party concerned of 23 March 2017, the Committee considers that, in the context of article 6, paragraph 6 (a), residues may include, but are by no means limited to, raw materials not having been used in the production process; secondary raw materials generated in the production process; and, in some cases, unsold end products. In this regard, the Committee emphasizes that “residues” are not limited to substances or objects that have economic value. The Committee also points out that the estimate of the expected residues of the proposed activity should be made on a case-by-case basis, taking into account the nature of the specific

four instances the ACCC, moreover limits itself to a mere statement of the provision, without providing substantive insights into the interpretative process. There are, however, indications that the ACCC has integrated the rules and methods of interpretation into its reasonings, as may be gleaned from the references to elements of the provisions of Articles 31 - 33 VCLT, such as “object and purpose”, “ordinary meaning”, or similar terms.¹² It seems that the ACCC in particular refers to the rules of Article 31(1) (general rule) and Article 31(3)(b) (subsequent practice) and (c) (systemic interpretation) VCLT, albeit without citation of the provisions.

2. Preference/Prevalence of a particular approach to interpretation over others (textual, contextual, teleological, intentions of the parties, historical). Has the approach changed over time?

While there are limited express references to the rules of interpretation in the VCLT, it is possible to identify some trends in the interpretative practice of the Committee. The ACCC appears to give a prominent role to the teleological approach (here taken as synonymous with the interpretation based on ‘object and purpose’), combined with a focus on the ‘effective’ application of the provisions of the Convention, and inclined to a contextual, case-by-case assessment by the Committee. In its considerations and evaluations, the ACCC frequently refers to the object and purpose of the Aarhus

activity proposed and the environment in which it will be undertaken. **In the light of the foregoing, the Committee considers that the ordinary meaning of residues as stated above fits with the context of article 6, paragraph 6 (a), and with the object and purpose of the Convention.** The Committee accordingly recommends to the Party concerned that, for the purpose of article 6, paragraph 6 (a), of the Convention, “expected residues” is understood to be that which is expected to be left behind as a result of the proposed activity being undertaken” (emphasis added); § 69 ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom) “As a preliminary matter, **the Committee stresses that the terms used in the Convention, as an international agreement, must be interpreted in the context of international law and the Convention itself, in the light of its object and purpose.*** (art. 31(1) VCLT in footnote) To this end, what constitutes “national law relating to the environment” **must be interpreted in accordance with the object and purpose of the Convention** (emphasis added); § 67 ACCC/C/2014/102 (Belarus) **The terms “penalized”, “persecuted” and “harassed” are not defined in the Convention, and they are to be understood according to their ordinary meaning in their context and in the light of the Convention’s object and purpose.*** (art. 31(1) VCLT in footnote) According to the ordinary meaning of the terms: “to penalize” means to impose a restriction or penalty on, to put at a disadvantage; “to harass” means to trouble or vex by repeated attacks; and “to persecute” means to seek out and subject (a person, group, organization, etc.) to hostility or ill-treatment, on grounds of political belief, religious faith, race, etc.; to oppress, to torment. As stated in the Aarhus Convention Implementation Guide, article 3, paragraph 8, “is a broadly worded provision which aims to prevent retribution of any kind.” (emphasis added).

¹² § 70 ACCC/C/2005/13 (Hungary).

Convention as a whole, as reflected in the preamble, namely “that effective judicial mechanisms should be accessible to the public, including organization, so that its legitimate interests are protected and the law is enforced”.¹³ Additionally, the ACCC has on numerous occasions referred to the objective of the Convention as it is set out in Articles 1, 3 and 9 of the Aarhus Convention by way of a shorthand: “giving the public wide access to justice”.¹⁴

It appears that the Committee primarily refers to the object and purpose of the Convention as the starting point for its reasoning in cases concerning the discretion of State Parties in the implementation of the Convention provisions into its national law. Thus, the ACCC has found, on several occasions, that

*“since the application of this requirement by the Party concerned does not seem to contravene the objective of giving the public concerned wide access to justice, the Party concerned does not fail to comply with Article 9(2) of the Convention in this respect”.*¹⁵

Which may be complemented by a statement along the lines of

¹³ Convention, preambular para. 18; § 34 (Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006 “To the extent that a town planning permit should not be considered a permit for a specific activity as provided for in article 6 of the Convention, the decision is still an act by a public authority. As such it may contravene provisions of national law relating to the environment. Thus, Belgium is obliged to ensure that in these cases members of the public have access to administrative or judicial procedures to challenge the acts concerned, as set out in article 9, paragraph 3. This provision is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. When assessing the Belgian criteria for access to justice for environmental organizations in the light of article 9, paragraph 3, **the provision should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.”** (emphasis added); § 52 Bulgaria ACCC/C/2011/58; ECE/MP.PP/C.1/2013/4, 11 January 2013 When evaluating the compliance of the Party concerned with article 9 of the Convention in each of these areas, the Committee pays attention to the general picture on access to justice, in the light of the purpose also reflected in the preamble of the Convention, that **“effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced”** (Convention, preambular para. 18; cf. also Findings on communication ACCC/C/2006/18 concerning Denmark (ECE/MP.PP/2008/5/Add.4), § 30). Therefore, in assessing whether the Convention’s requirement for effective access to justice is met by the Party concerned, the Committee looks at the legal framework in general and the different possibilities for access to justice, available to members of the public, including organizations, in different stages of the decision-making (“tiered” decision-making).” (emphasis added).

¹⁴ § 36 Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005: “The communication also includes the allegation as to non-compliance with article 1. The Committee notes that a non-compliance with the operative provisions of the Convention is not in conformity with the objective of the Convention as defined in article 1.”

¹⁵ § 73 (Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8).

“(…) Parties, thus, retain some discretion in defining the scope of the public entitled to standing in these cases: but the Convention further sets the limitation that this determination must be consistent with the objective of giving the public concerned wide access to justice within the scope of the Convention (see ECE/MP.PP/C.1/2006/4/Add.2, para. 33). This means that the parties in exercising their discretion may not interpret these criteria in a way that significantly narrows down standing and runs counter to its general obligations under Arts. 1, 3 and 9 of the Convention.”

This seems indicative of a trend which is for the Committee to leave a significant margin of appreciation to States parties as long as this does not contravene the object and purpose of the Convention.¹⁶

Otherwise there is evidence of contextual interpretation, in the sense of Article 31(2) VCLT, when the ACCC makes a connection between a provision in the Aarhus Convention with other provisions in the Convention, the preamble, its annex. An interpretative exercise on the basis of the context provided for elsewhere in the Convention and the Committee’s previous Findings, can be found for example in ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom). In this case it was submitted that the Aarhus Convention does not define the term “national law relating to the environment” as used in Art. 9(3). The Committee held:

*“Art. 2(3), does, however, contain a definition of “environmental information”. This definition is broad and includes, inter alia, “factors such as noise”, “conditions of human life”, and “built structures”. As the Committee pointed out in its findings on communication ACCC/C/2011/63 (Austria), this also implies a broad understanding of the term “environment” in Art. 9(3)”.*¹⁷

This is an indicator of contextual interpretation in the spirit of Article 31(2) VCLT, referring both to the Committee’s previous Findings and other parts of the text of the Convention.

This said, the ACCC may also place its reasoning in a yet broader setting (that is no longer designated as ‘context’ in the VCLT), by adopting the systemic interpretation approach, as set out in Article 31(3)(c) VCLT, and refer to other rules of international law, including international environmental and human rights law.¹⁸

¹⁶ § 61 ACCC/C/2010/48 (Austria).

¹⁷ § 70 ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom).

¹⁸ § 18 ACCC/C/2004/04 (Hungary): “The Committee does not exclude the possibility when determining issues of noncompliance to take into consideration general rules and principles of international law, including international environmental and human rights law, which might be relevant in context of interpretation and application of the Convention. However, there is an existing provision in the Convention, demonstrating that negotiating parties considered the issue of the relationship between the existing rights and the rights provided by the Convention itself (art. 3, para. 6) but that they did not wish to completely exclude a possibility of reducing

Finally, the Committee also uses textual interpretative methods, with countless references to terms such as “the wording”, “the express terms of”, albeit often with an added teleological and/or contextual dimension. An example of multiple interpretative methods (without express citation of corresponding VCLT provisions) is found in Finding ACCC/A/2014/1 (Belarus).¹⁹

3. When has the case-law of an international court and tribunal indicated a clear shift in the content of a rule of interpretation? How was this established?

No clear shift in the Findings of the ACCC can be discerned, which is perhaps not surprising. The Compliance Committee was established in 2002 by Decision I/7 adopted at the first Meeting of Parties, and became operational with regard to communications in 2003, and fully operational (ACCC recommendations were endorsed at the second Meeting of Parties) in 2004 – so the Aarhus Compliance Committee is relatively young.²⁰ The comparatively short time span of the totality of Findings makes it more difficult to discern clear trends and undertake solid diachronic analysis.

One (very) tentative observation is that there could be signs in the body of Findings of a trend towards systemic interpretation. This would be supported by logical development. The naturally growing body of MOP decisions attaches considerable importance to “synergies between the Convention and other relevant multilateral environmental agreements and organizations.”²¹ It would make sense that also the Findings of the ACCC -which do refer to decisions of the MOP (*infra* para 4)- would increasingly comprise suggestions of a systemic interpretation approach along the lines of Article 31(3)(c) VCLT (see Belarus case *supra*).²²

existing rights as long as they did not fall below the level granted by the Convention. However, the wording of article 3, paragraph 6, especially taken together with article 1 and article 3, paragraph 5, also indicates that **such reduction was not generally perceived to be in line with the objective of the Convention.**” (emphasis added).

¹⁹ §45 ACCC/A/2014/1 (Belarus): “According to **the wording of Art. 6(7)** of the Convention, and subject to the requirements of national law, it may not be necessary to hold a public hearing in every decision-making procedure within the scope of Art. 6. The Committee, however recommends to the Party concerned that its public authorities select the appropriate tools and techniques that will ensure, bearing in mind **the nature of the proposed activity**, and the public concerned can participate effectively, including a public hearing where one would be appropriate to achieve this end. In accordance with Art. 6(8) of the Convention, authorities must in all cases ensure that due account can be taken of the outcome of the public participation.” (emphasis added).

²⁰ *Supra* para 3

²¹ Cf. Report of the sixth session of the Meeting of the Parties (UN Doc ECE/MP.PP/2017/2), p 18.

²² *Supra* note 19 and accompanying text.

4. When, how and what maxims/canon of interpretation (not explicitly referred to in the VCLT) have been used in international case-law? What is their status?

The ACCC does not make explicit mention of any of the classic maxims of interpretation. There is no mention, nor an argumentative trace, of principles such as *lex posterior* or *lex specialis*. However, the Committee clearly relies on the canon of international legal rules for interpretation in its reasoning. Most notably, the Committee puts considerable emphasis on ensuring that the interpretation of the Convention results in the *effective* implementation of its provisions, generally inspired by the object and purpose of the Convention as a whole. The principle of effectiveness, or *effet utile*,²³ is evidenced by a prominent presence of the term “effective” not only in multiple locations in the text of the Convention itself,²⁴ but also in (nearly all) analyses by the Committee, where it is often accompanied by a reference to the object and purpose of the Convention.

An example evidencing reliance on the principle of *effet utile*, illustrating also the intricate connection between interpretation and implementation - is found in submission ACCC/C/2004/05 (Turkmenistan):

*“With regard to Art. 17(3), the Committee observes that the Convention does not exclude the possibility for Parties to regulate and monitor to a certain degree activities of non-governmental organizations within their jurisdiction, and that there is no requirement in it to either regulate or deregulate activities of non-registered organizations. Thus the matter is within the sovereign powers of each Party. However, any such regulation should be done in a way that does not frustrate the objective of the Convention or conflict with its provisions. Having regard to the arguments set out in §16 above, [see footnote] it should not prevent members of the public from **more effectively exercising their rights** under the Convention by forming or participating in NGOs”.*²⁵

²³ M Herdegen, Interpretation in international law (2008), para 4, *Max Planck Encyclopedia of Public International Law*, OUP (<https://opil.oup.com/home/MPIL>).

²⁴ Preambular paragraph 18; art. 3(9) Convention; art. 5(2) Convention; art. 6(2); art. 6(3); art. 6(4); art. 8; art. 9(4); art. 9(5).

²⁵ § 20 ACCC/C/2004/05 (Turkmenistan); for purposes of understanding the context of argumentation §16 Ibid.: “As described in paragraph 11 (a) above, the Act in its article 5 largely limits membership in Turkmen public associations to citizens of Turkmenistan. Non-governmental organisations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention

Additionally, the Committee noted that

*“there is certainly (...) a freedom for the public authorities to choose which enforcement measures are most appropriate as long as they **achieve effective results** required by law (...) The Committee notes, however, that actions with regard to the facility undertaken by the authorities in the course of the past seven years (e.g. imposing fines) consistently failed to ensure effective results, as demonstrated by the information presented in paragraphs 4(e), 10, and 16”.*²⁶

Finally, as an indication of the frequent usage of *effet utile*, it is worth recalling a statement of the Committee:

*“Belgium is obliged to ensure that in these cases members of the public have access to administrative or judicial procedures to challenge the acts concerned, as set out in Art. 9(3). This provision is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and **made effective**.”*²⁷

While the Aarhus Convention mechanism and the regular human rights treaty mechanisms bear a resemblance for the role they accord to the effectiveness principle,²⁸ the ACCC Findings give little evidence of the ‘living instrument’ doctrine, in the sense of a dynamic-interpretative approach that goes beyond ‘object and purpose’ to take into account societal changes (“changing present-day conditions”) as a factor in interpretation. One passage that arguably carries signs of such an approach, in combination with the ‘object and purpose approach’, is found in ACCC/C/2010/45 and ACCC/C/2011/60 (United Kingdom):

“given the growing significance of the cooperative endeavours between public and private actors for the preparations of local investment plans, and in view of the object and

than individual members of the public. Furthermore, certain rights accorded to the ‘public concerned’ (e.g. under art. 6, paras. 2, 5 and 6, and art. 9, para. 2) are guaranteed to a greater extent with respect to registered environmental NGOs than they are for individual members of the public, who might have to demonstrate that, for example, their material interests are directly affected in order to be recognized as the ‘public concerned’ Thus the exclusion of foreign citizens and persons without citizenship from the possibility to found and participate in an NGO might constitute a disadvantageous discrimination against them. The Committee is, therefore, of the opinion that article 5 of the Act is not in compliance with article 3, paragraph 9, of the Convention.”

²⁶ § 30(c) ACCC/C/2004/06 (Kazakhstan).

²⁷ § 34 ACCC/C/2005/11 (Belgium).

²⁸ See M Herdegen, Interpretation in international law (2008), para 5, *Max Planck Encyclopedia of Public International Law*, OUP (<https://opil.ouplaw.com/home/MPIL>).

*purpose of the Convention, the Committee considers that participation of the public in the preparation of the local investment plans and related procedures is highly appropriate.*²⁹

Self-referentiality

Otherwise, the Committee uses a self-referential approach as a tool for interpretation. It is a complex form of self-referentiality, as the Committee not only frequently refers to its own Findings, but also to the Implementation Guide, to reports of the Meetings of the Parties, and to sources developed under the auspices of the Aarhus Convention, such as the Maastricht Recommendations.³⁰ Interestingly, the Implementation Guide, created primarily to offer guidance to State Parties concerning the *implementation* of the Convention, has served the ACCC on multiple occasions in the interpretation of the Convention.³¹ For instance in ACCC/A/2014/1 (Belarus), when the meaning of the term “manifestly unreasonable” was disputed, the ACCC referred to the Implementation Guide stating:

“Although the Convention does not give direct guidance on how to define “manifestly unreasonable”, it is clear [from the Implementation Guide] that it must be more than just the volume and complexity of the information requested. Under Art. 4(2), the volume and complexity of the information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request “manifestly unreasonable” as envisioned in Art. 4(3)(b).”³²

This said, the Committee in reference to the authoritative status of the Implementation Guide, has also cautioned that “while a tool to assist Parties in their implementation of the Convention, does not constitute an authoritative text for the Committee to follow in its deliberations.”³³

In another case, which included a dispute concerning the term “environmental laws” in ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), “the Committee found that “the text

²⁹ § 82 ACCC/C/2010/45 and ACCC/C/2011/60; ECE/MP.PP/C.1/2013/12, 23 October 2013 (United Kingdom).

³⁰ Cf. § 5 Belarus *supra* note 19.

³¹ From the foreword of the Implementation Guide by the then UN Secretary-General Ban Ki-Moon: “[...] The second edition of the Guide builds on the considerable experience amassed during the Convention’s implementation. It provides practical examples and offers valuable insights from the findings of the Aarhus Convention Compliance Committee, a unique body inspired by human rights treaty mechanisms.” (p. 3 *Implementation Guide* (*supra* note 8))

³² § 26 Belarus *supra* note 19; *Implementation Guide* (*supra* note 8), p. 84.

³³ § 53 ACCC/C/2010/48 (Austria).

of the Convention does not refer to ‘environmental laws’, but to ‘laws relating to the environment.’”
The Committee went on to state that by consequence

“Art. 9(3) is not limited to ‘environmental laws’ e.g. laws that explicitly include the term ‘environment’ in their title or provisions. The Aarhus Convention Implementation Guide states that the “the provisions on access to justice essentially apply to all matters of environmental law” and that “national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment.”[Implementation Guide p. 187 footnoted] The Committee finds that a broad interpretation of the term “national law relating to the environment” should likewise be applied when considering whether Art. 9(3) of the Convention applies to private nuisance proceedings.”³⁴

In addition, there are instances where the ACCC confirms its interpretation by way of a reference to statements of the Meeting of the Parties.³⁵ It seems the ACCC notably uses references to its own jurisprudence and to reports of the Meeting of Parties to confirm the outcome of its interpretative exercise. It is uncertain whether this type of self-referentiality, where the ‘self’ consists partly of the earlier Findings of the Committee, and partly of other explanatory and definitional sources within the Aarhus regime, fits the VCLT framework. But if in terms of legal *instrumentarium* it had to be brought under the VCLT, it would have to be categorised as “subsequent practice” (Article 31(3)(b)).³⁶

³⁴ § 71 United Kingdom ACCC/C/2010/45 and ACCC/C/2011/60; ECE/MP.PP/C.1/2013/12, 23 October 2013.

³⁵ § 36 ACCC/C/2005/11 (Belgium); Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. One way for the Parties to avoid a popular action (“*actio popularis*”) in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public. **This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice.”**

³⁶ As has been proposed with regard to COP decisions in the ILC *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* of 2018 (UN DOC A/73/10, para. 51), Conclusion 11 - Decisions adopted within the framework of a Conference of States Parties.

5. How do courts and tribunals define key concepts in the interpretative process (e.g. ordinary meaning, context, object and purpose [multiplicity, selection between a variety of objects and purposes] supplementary means etc.?)

The Committee does not reflect on the key concepts in its interpretative endeavours. If and when the Committee expressly referred to the relevant concepts in the VCLT (see *supra* para.1), it did not go further than a citation of the pertinent provision. The only exception -albeit that the ACCC does not give any conceptual reflections- is the key notion of object & purpose. The Aarhus Convention, as may be gleaned from its full name, is concerned with access to information; public participation in decision-making; and access to justice in environmental matters. As mentioned (see *supra* para.2) the ACCC tends to focus on the latter for the object and purpose of the Convention, which it declaredly derives from the Preamble, or from Articles 1, 3 and 9.

6. Is there a difference between the interpretative approach to treaties and that to unilateral acts of States/and or acts of international organizations?

It seems the ACCC has not had to deal with unilateral statements as formal sources of state obligation, so this question is not applicable.

7. How do courts and tribunals respond to multiple authentic and conflicting texts of a treaty (or any other instrument)? How has Art. 33 VCLT been employed in practice? Does the procedure followed by courts and tribunals differ from that of Art. 33?

The authentic texts of the Aarhus Convention are in English, French and Russian.³⁷ So far only one instance has been found in which the ACCC was confronted with a “possible risk of confusion,” resulting from the use of ““необоснованной” in the Russian text of the Convention.” The Committee proceeded, stating that it understood

“that the words “manifestly unreasonable” can be expressed in Russian in several ways. The Committee recommends to the Secretariat that it consult the United Nations Translation Service to seek its view on the

³⁷ <https://www.unece.org/env/pp/treatytext.html>.

most appropriate translation of “manifestly unreasonable” in the context of Art. 4 of the Convention (for example, “нецелесообразной”, “явно нерациональной” or “бессмысленной”) and to explore with the United Nations Treaty Office the possibility of undertaking a correction procedure to correct the word “необоснованной” in article 4, paragraph 3 (b), of the Russian text of the Convention accordingly.”³⁸

The Secretariat, then, in its “draft response to the Statement by Belarus at the fifth session of the Convention’s Meeting of Parties agenda: 7(a) Implementation of the work programme for 2012-2014” referred to guidance in the Implementation Guide.³⁹ Additionally, the Secretariat stated that “to date, no Findings of the Compliance Committee directly addressed what would constitute a “manifestly unreasonable” request within the meaning of Art. 4(3)(b).⁴⁰

It is not entirely clear whether the aforementioned case is a matter of ‘conflicting texts of a treaty’. Therefore it is uncertain how the ACCC would respond to such a conflict, and whether this would conform to the rule in Art. 33(4) VCLT, which requires that “when a comparison of the authentic texts discloses a difference of meaning (...) the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”⁴¹

II. Process-related issues/questions

1. Variety of materials used during the interpretative process and their probative values (e.g. dictionaries, commentaries, statements, etc.)

By virtue of Decision I/7, the ACCC has “almost unlimited power to gather information and to consider information submitted to the Compliance Committee.”⁴² Paragraph 25 of the Annex to Decision I/7 provides that in order to assist the performance of its function, assessing (non)-compliance under the Convention, the Committee may:

³⁸ § 29 ACCC/A/2014/1 (Belarus) (*supra* note 19).

³⁹ P. 3 https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests_for_Advice/ACCC-A-2014-1_Belarus/Draft_response_by_Aarhus_secretariat_17.11.2015.pdf.

⁴⁰ *Ibid.*

⁴¹ Art. 33(4) VCLT.

⁴² Veit Koester, ‘The Compliance Committee of the Aarhus Convention’, 37 *Envtl. Pol’y & Law* (2007), p. 5.

“a) request further information on matters under its consideration; b) undertake, with the consent of any Party concerned, information gathering in the territory of that Party; c) consider any relevant information submitted to it and d) seek the services of experts and advisers as appropriate”.⁴³

In gathering information, the possible sources

“may vary and may include: a) requests to the Government of the Party concerned; b) requests to NGOs and scientific communities and academia; c) literature and other research and analytical material; d) the public and e) the Secretariat.”⁴⁴

Unique to the Compliance Mechanism under the Aarhus Convention within the international environmental law framework is the significant role of NGOs in the context of the Aarhus Convention.

The ACCC may take account of “existing sources of interpretation developed under the auspices of the Convention, and, in particular, the Implementation Guide, the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters* (Maastricht Recommendations) and relevant Findings adopted by the Aarhus Convention Compliance Committee”.⁴⁵ As stated under question I. 4, the ACCC has developed a method of self-referentiality when it comes to guidance of the interpretative process, and uses this frequently to reconfirm its interpretation of the Convention. This is focused on the institutionalised connection with decisions of the Meeting of the Parties. About the Implementation Guide, on the other hand, the Committee has cautioned that it “does not constitute an authoritative text for the Committee to follow in its deliberations.” (see *supra* para 4). However, with such frequent recourse to the Implementation Guide in the evaluation and recommendations of the ACCC, the Guide does appear to have some form of probative value to the interpretative process of the Committee.

Further, the ACCC has referred to the Oxford Dictionary (online version) in order to determine the ordinary meaning of the term “residues”, and the terms “penalized”, “persecuted”, and “harassed” in ACCC/A/2014/1 (Belarus),⁴⁶ and to the Black’s Law Dictionary, 10th edition, in

⁴³ § 25 of Annex to Decision I/7, taken from the Guide of the Compliance Committee (*supra* note 3), p. 40 § 164.

⁴⁴ Guide to the Compliance Committee (*supra* note 3), p. 40 §.166.

⁴⁵ § 5 (Belarus), *supra* note 19.

⁴⁶ § 40 and § 67 1 (Belarus), *supra* note 19.

ACCC/C/2014/104 (Netherlands) to clarify the meaning of “mutatis mutandis”.⁴⁷ The ACCC has also referred to Internet World Stats and the CIA World Factbook in ACCC/C/2009/44 (Belarus) for purposes of statistical data gathering.⁴⁸

2. Do international courts and tribunals have a tendency to explain the process and stages of their interpretative reasoning? If yes, what is the form this usually takes?

The Aarhus Convention Compliance Committee does not seem inclined to explain the processes and stages of their interpretative reasoning. In fact, the introduction to the analytical summary of the “Case Law of the Aarhus Convention Compliance Committee (2004-2014)”, created under the auspices of the Aarhus Convention itself, states: “when developing this publication, it was decided not to provide any substantive comments on the interpretations made by the Committee except for a few explanatory notes providing brief context to some of the statements by the Committee”.⁴⁹

3. What internal or external factors (e.g. contract incompleteness, statute of the court, the background of the judges, the subject area, political constellations or situations, concerns about the court’s legitimacy, or about implementation of the judgment) affect the interpretative choices of international courts and tribunals, or changes in such choices, and in what manner?

⁴⁷ § 70 ACCC/C/2014/104 (Netherlands).

⁴⁸ Cf. § 73 ACCC/C/2009/44 (Belarus): “The Committee notes that the public notice was published on the Internet and also in the national (Respublika and Sovietskaya Belorussia) and local printed media (Ostrovetskaya Pravda and Grodnenskaya Pravda). As for the use of Internet, according to statistic data, as of June 2010 there was a 46.2 per cent Internet penetration in the country, considered to be the highest level of penetration in the Commonwealth of Independent States, after the Russian Federation. In addition, Internet access is widespread in the urban areas, where 75 per cent (2010) of the total population is concentrated. The fact that public notice was published in the local press and the project-related documentation could be accessed in Ostrovets compensates for the fact that Internet access is not widespread in rural areas. For these reasons, the Committee is not convinced that the Party concerned failed to comply with article 6, paragraph 2.”

⁴⁹ A Andrusyevych, S Kern (eds), Case Law of the Aarhus Convention Compliance Committee (2004-2014), 3rd Edition (RACSE, Lviv 2016 - <https://www.rac.org.ua/uploads/content/244/files/caselaw2016final.pdf>), Introduction, § 2.

This involves mere speculation. The ACCC consists of nine independent experts who serve in their personal capacity.⁵⁰ The fact that the composition of the Compliance Committee rotates every three years, and individual members may stay on a maximum of six years might lead to fluctuations in the interpretative practice.⁵¹

III. Systemic Issues/Questions

1. What are the defining characteristics that differentiate interpretation from gap-filling and normative conflict? How do courts and tribunals address these processes?

This is difficult to answer, as the ACCC is not inclined to reflect on its own interpretation processes. Cases in which normative conflict was at issue, have not come to our attention. On the other hand, given the inclination of the Committee to teleological interpretation, there is at least in theory room for some gap-filling in concrete cases. But no evident cases have come to our attention.

A final distinction, relevant in the case of the Aarhus mechanism, is the difference between interpretation and implementation. As mentioned in the Introduction, this report has taken into account, apart from explicit VCLT references or classic law of treaties notions, deliberations and reasonings in which the Committee seemed consciously to engage in an interpretative exercise.

2. When have international courts and tribunals interpreted (not identified) the rules of interpretation? How do they distinguish between interpretation and identification?

There are no examples in the Findings of such meta-analysis.

⁵⁰ Paras 1 and 2 annex to decision 1/7 (UN Doc ECE/MP.PP/2/Add.8).

⁵¹ § 18 Guide to the Aarhus Compliance Committee § 2 https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf.