

Jerzy Jendrośka, Ph.D

Compliance mechanism under MEAs: experience
with different approaches under UNECE

EU BBNJ workshop on EIA/SEA in areas beyond
national jurisdiction,
28-29 January 2020, Brussels

Jerzy Jendrośka Ph.D

- Managing Partner at Jendroska Jerzmański Bar and Partners. Environmental Lawyers
- Professor (Adjunct) and Director, Postgraduate European Environmental Law Studies, Opole University
- Former Secretary of the UNECE Aarhus Convention
- Member of the Permanent Court of Arbitrage in the Hague (2001-2016)
- Member of the Implementation Committee of the Espoo Convention (2004-2017)
- Member of the Compliance Committee of the Aarhus Convention (since 2005)
- Member of the State Environmental Council in Poland (since 2014)
- Member of National EIA/SEA Commission in Poland (1992-2006)
- Drafter of EIA/SEA/Aarhus legislation in Poland
- Legal consultant for drafting EIA/SEA/Aarhus legislation in Balkan, Eastern Europe, Caucasus and Central Asia countries

LEGAL BACKGROUND

- Vienna Law of the Treaties
 - Art.26 -Pacta sunt servanda
 - Art.60.2 –"sanctions"
- Guidelines on Compliance
 - UNEP 2002
 - UNECE 2003
- Each MEA – directly or indirectly

DEFINITION

- Art.9a UNEP and art.4a UNECE Guidelines
- Compliance – fulfilment by the contracting Parties of their obligations under an MEA and any amendments to it

COMPLIANCE MECHANISMS IN UNECE

- Compliance mechanisms vs dispute settlements
- Special Compliance Bodies
 - Permanent
 - Ad-hoc
- Compliance mechanisms
 - Reporting
 - Compliance procedure

Functions

- Monitoring implementation and/or adjudicating on compliance
 - permanent body (Compliance/Implementation Committee or WG on Implementation)
 - independent from other Treaty bodies
 - various relationship to Parties depending on composition
 - opinions/findings require endorsement by MOP
- Fact finding (scientific opinion on technical issues)
 - ad-hoc body (Inquiry Commissions under Espoo and TEIA)
 - established upon request of Parties concerned
 - fully independent
 - opinion is final and not appealable

Composition of permanent bodies

- Representatives of Parties (Espoo, TEIA)
 - no requirements as to qualifications
 - lack of personal stability
 - often reflect interests of individual Parties
 - strong link with other Treaty bodies
- Members in individual capacity (Aarhus, PRTR Protocol, Water and Health Protocol)
 - requirements as to qualifications
 - personal stability
 - independence
 - no link with other Treaty bodies

Aarhus and Espoo compliance procedures - triggers

- Submission by Party about another Party
 - in Aarhus (2 hitherto)
 - In Espoo (7 hitherto)
- Espoo
 - Committee Initiative – 6 hitherto (including 3 resulting from „any other source”)
- Aarhus
 - Submission by Party about itself (none)
 - Referrals by secretariat (none)
 - Communications by the public (about 170 in 2003- 2019)

Aarhus Compliance procedure

- Template for complaint
- Criteria for admissibility
- Exhaustion of domestic remedies
- Procedure
 - Hearing (possibility to be represented)
 - Draft findings available for comments
 - All documents publicly available
- Possibility for revision the findings after comments
- Follow-up

Aarhus - types of non-compliance

- **General failure** by a Party to take the necessary legislative, regulatory and other measures to implement the Convention
- **Failure of legislation**, regulations, other measures or jurisprudence to meet specific Convention requirements
- **Specific events, acts, omissions or situations** demonstrating a failure by public authorities or courts to comply with (or enforce)the Convention

Aarhus - legal effect

- Findings and recommendations of ACCC
 - Findings
 - compliance or non-compliance
 - Recommendations
 - steps to be taken Party concerned
 - steps to be taken by MOP
- Adoption by MOP
- Measures (sanctions)
 - Declaration of non-compliance
 - Caution
 - Suspension of rights

Aarhus – implications of ACCC findings

- In relation to particular case
 - no retro-active effect
 - strategy to rectify situation to be adopted, submitted to ACCC, and implemented
- As a reference point for
 - implementing the Convention in legislation
 - interpreting the Convention in particular cases

Key issues to decide

- Function:
 - Advisory or decision-making
 - Monitoring/ adjuducating compliance or fact-finding
- Composition:
 - representing Parties or in individual capacity
- Triggers
- Legal effect
- Sanctions