Quasi-judicial bodies

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Abstract

Quasi-judicial bodies have flourished in various areas of international law in the last few decades. These bodies have a mandate to monitor compliance with a body of norms, settle disputes involving those norms, or make factual determinations on the basis of investigations, yet they are not empowered to issue final, binding decisions on questions of international law. This chapter argues that quasi-judicial bodies can be viewed as international lawmakers. They act as procedural rule-makers and are developing a shared collection of principles structuring their procedures. The chapter further suggests that quasi-judicial bodies also act as lawmakers on substantive issues by influencing the interpretation, clarification and refinement of State duties and responsibilities. Quasi-judicial bodies have proved influential in the interpretation of State responsibilities by both national and international courts. Like judicial bodies, they foster compliance with international law and resolve potential conflicts.

Reference

12. Quasi-judicial bodies

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The last few decades have seen a blossoming of quasi-judicial bodies in various areas of international regulation, each with a mandate to monitor compliance with a body of norms, settle disputes regarding those norms, or make determinations on the basis of investigations of one form or another, yet none empowered to make final, binding decisions on questions of international law.1 These bodies not only help to resolve ambiguity and uncertainty of the underlying principles and rules but, perhaps more importantly, are well placed to improve compliance with international commitments.2 Nonetheless, their particular combination of powers seems to leave their practice and decisions in a legal no-man’s land. Even taking for granted that binding interpretation is itself a form of lawmaking, it is not clear that the traditional sources of international law (identified in, for example, the Statute of the International Court of Justice (ICJ)) include the decisions of quasi-judicial bodies,3 even as a ‘subsidiary’ source of international law.4 The obvious question, if their decisions cannot be uncontroversially treated as sources of international law, is how can quasi-judicial bodies be viewed as international lawmakers?

Following a short section that introduces the reader to the diversity of quasi-judicial bodies, this chapter explores a number of possible answers to that question. The first set of answers, explored in Sections 1 and 2, is that quasi-judicial bodies often act as *procedural* rule makers. Often, they are explicitly empowered to make their own rules, but in other cases, an effort to be more effective in keeping stakeholders accountable has pushed them to be innovators of new practices that nonetheless fall within the formal limits of their powers. The push for accountability, however, has also been applied to the work of quasi-judicial bodies themselves. Research has uncovered growing evidence of a trend toward judicialization in quasi-judicial bodies, tracing a

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3 See especially art 38.1 of the Statute of the International Court of Justice (as annexed to the Charter of the United Nations (26 June 1945) 1 UNTS xvi; UKTS 67 (1946), Cmd 7015).

convergence toward a shared collection of principles structuring their procedures. Section 3 provides a brief overview of those trends and then provides examples where quasi-judicial bodies have had an autonomous role in enacting the principles that constitute this trend. In so doing, it suggests that quasi-judicial bodies have acted as lawmakers not only by crafting procedural rules, but by giving more general shape to the principles that constitute the judicialization process or what others have called the rise of global administrative law.

Section 4 widens the picture, touching on the degree to which quasi-judicial bodies also act as substantive rules-makers, by influencing the interpretation, clarification and refinement of State duties and responsibilities. In this context, this section touches on why quasi-judicial bodies have proven influential in the interpretation of State responsibilities by both national and international courts.

The conclusion relates the analysis to legitimacy concerns and broader theoretical questions about the nature of international lawmakering.

1. QUASI-JUDICIAL BODIES: SHARED TASK, DIVERSE PRACTICE

To provide a window on the diversity of ‘quasi-judicial processes’ in the international sphere, the analysis draws on examples from a broad cross-section of regulatory areas. While subsequent sections compare and contrast particular practices to elucidate the role and influence of quasi-judicial bodies more generally, the subsections below are intended to acquaint the reader with the function and structure of these particular bodies.

1.1 The Aarhus Compliance Committee

The Aarhus Compliance Committee is probably the best known of processes providing the public with a chance to participate in international environmental compliance. It was created by a decision of the Meeting of the Parties in accordance with Article 15

5 The process of judicialization of non-compliance bodies established by environmental agreements has been underlined by eg L Boisson de Chazournes and MM Mbengue, ‘A propos du caractère juridictionnel de la procédure de non-respect du Protocole de Kyoto’ in S Maljean-Dubois (ed), Changements climatiques – Les enjeux du contrôle international (La documentation française 2007) 73. Regarding accountability mechanisms established by International Financial Organizations (IFIs), see AN Fourie, The World Bank Inspection Panel and Quasi-Judicial Oversight, in Search of the ‘Judicial Spirit’ in Public International Law, (Eleven 2009), 9.

6 The public also has the right to submit complaints to the Compliance Committee of the Protocol on Water and Health to the Convention on the Protection and Use of the Transboundary Watercourses and International Lakes. Decision on review of compliance, Report of the First Meeting of the Parties of the Protocol on Water and Health to the Convention on the Protection and Use of the Transboundary Watercourses and International Lakes ECE/MP.WH/2/Add.3 EUR/06/S069385/1/Add.3 (2007), para 16.

7 Decision I/7 on Review of Compliance ECE/MP.PP/2/Add.8 (2001).
of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The Committee is tasked with monitoring compliance with the Convention, and specifically with considering claims of non-compliance submitted by members of the public, individual States, Meeting of Parties or referral by the Secretariat. Members of the public are allowed to lodge claims against any State they believe to be in contravention with the norms set out in the Convention. The Committee regularly examines questions of non-compliance by a Party and makes recommendations if and as appropriate, reporting on its work at each ordinary Meeting of the Parties.

1.2 The Economic, Social and Cultural Rights Committee

The Committee on Economic, Social and Cultural Rights (ESCR Committee) is very significant among the quasi-judicial bodies with human rights competence. As part of its task to monitor the implementation of the 1966 Covenant, the ESCR Committee is authorized to make suggestions and recommendations of a general nature on the basis of its consideration of State reports. Since 1989, the Committee has provided Concluding Observations on each report considered, constituting the Committee’s assessment of the State report in question, and summarizing the progress and deficiencies in the implementation of Economic, Social and Cultural rights. Given their formal character and the care with which they are prepared by the Committee, the findings set out in the Concluding Observations are seen as authoritative pronouncements on whether States have or have not complied with the Covenant’s provisions. Given the interpretive dimension implicit to this task, the Concluding Observations are...
understood as a body of jurisprudence that provides insight on the interpretation of the Covenant’s provisions.

Pursuant to a 1987 resolution of the UN Economic and Social Council (ECOSOC)\(^\text{16}\) (subsequently endorsed by the General Assembly\(^\text{17}\)), the Committee is also empowered to adopt General Comments. The 21 General Comments issued since 1989 serve to clarify the content of the norms contained in the Covenant, to aid States in the preparation of their reports regarding the implementation of the rights enshrined therein, and to inform the activities of both State and international actors likely to impact on economic, social and cultural rights.\(^\text{18}\)

### 1.3 The International Financial Organizations’ Investigative Mechanisms

In 1993, the creation of the World Bank Inspection Panel (WBIP) opened a direct channel of communication between project-affected groups and the highest levels of Bank decision-making.\(^\text{19}\) The WBIP has jurisdiction over the operational activities of two key World Bank affiliates.\(^\text{20}\) An additional mechanism, the Office of the Compliance Advisor/Ombudsman (CAO), was created in 1999 to provide oversight to the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA).\(^\text{21}\) Both mechanisms aim to increase accountability for compliance with operational policies within the respective institutions, by providing concerned individuals and communities with a means to seek redress in cases of non-compliance.

Each regional development bank – the African Development Bank (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD) and the Inter-American Development Bank (IDB) – has since developed a similar investigative mechanisms\(^\text{22}\) and those mechanisms have been the subject of

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\(\text{16}\) ECOSOC Res 1987/5 (n 14), para 9.
\(\text{17}\) Indivisibility and interdependence of economic, social, cultural, civil and political rights, UNGA Res A/RES/42/102 (7 Dec 1987), para 5.
\(\text{18}\) According to the Committee on Economic, Social and Cultural Rights (ESCR Committee): ‘Through its general comments, the Committee endeavours to make the experience gained through the examination of States’ reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant’. ECSR Committee (n 15), para 57.
\(\text{19}\) World Bank Inspection Panel, ‘Accountability at the World Bank, The Inspection Panel at 15 Years’ (2009), 5.
\(\text{20}\) Namely, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).
ongoing reforms. Apart from the WBIP, the mechanisms are expected to not only assess policy compliance, but also to exercise a ‘problem-solving’ function, working pro-actively to seek resolution of any disputes with those claiming harms as a result of bank-financed projects.

2. QUASI-JUDICIAL BODIES: LEADING INSTITUTIONAL REFORM?

Over the last few years, quasi-judicial bodies have often been at the forefront of changes to procedural rules that define and in some cases extend the strict boundaries of their own mandate, motivated by a desire to make their process more efficient, clearer for participants, and more effective. Though the contexts driving procedural reform are varied, quasi-judicial bodies have proven to be capable, and even innovative, procedural rule-makers.

Quasi-judicial bodies can often be constrained in the fulfilment of their functions by procedural rules which are unhelpfully vague or superficially narrow in scope. The need to confront real and often unforeseen circumstances has led them to occasionally exercise some creativity in the process. For example, although the WBIP must stay within the bounds of its operating procedures, it has applied a broad and flexible interpretation of those rules, leading to a set of surprising outcomes. In its earliest cases, the WBIP almost exclusively exercised two roles: fact-finding and assessment of compliance with operational policies on the basis of those facts. Despite the fact that Bank never created a ‘problem solving’ mechanism nor empowered the WBIP with a problem-solving mandate, the WBIP has nonetheless been able to exercise some creative procedural ‘problem solving’ to fulfill some of the same functions. This has been illustrated in the Mine Closure and Social Mitigation Project, a request concerning Romanian financing. During its eligibility review, the Panel was informed that the requesters, Bank Management, and project authorities had met and agreed to undertake a series of actions to address the requesters’ concerns related to environmental protection. The requesters asked the Panel to delay making a recommendation for six


24 One important difference between these investigative mechanisms and the two other examples explored in this chapter, is that the ‘applicable law’ of each IFI’s investigative mechanism are located in each institution’s operational policies and procedures. While these instruments primarily serve an internal function, they also provide the framework in which development finance project agreements are negotiated between IFIs and borrowing countries. See L Boisson de Chazournes, ‘Policy Guidance and Compliance: the World Bank Operational Standards’ in D Shelton (ed) (n 2), 281–82.
months, and the Panel recommended that the Board of Directors allow the Panel to delay a decision on initiating an investigation. The Panel subsequently closed the case after receiving a letter from the requesters indicating that the problems had been satisfactorily resolved. As the case illustrates, the Inspection Panel may exercise deference to problem-solving activities, where it seems appropriate to the circumstances, despite the departure this represents from the Panel’s strict procedural rules.

Elements of a problem-solving focus can also be detected in post-process monitoring by the WBIP. The Panel does not have a formal, standing mandate to monitor implementation of Action Plans approved by Bank Management, nor to report on progress in response to the Panel’s investigation. Nonetheless, the fact that other investigative mechanisms do have such authority has obviously provided impetus for a pragmatic extension of Panel responsibilities. For example, the Panel undertook post-decision visits in connection with its involvement in a complaint in the Democratic Republic of Congo (DRC). The requesters in that case had alleged that Bank-funded support for regulatory reform of the logging concession system in the DRC and land-use zoning in the forest areas was made without recognition of the rights of the Pygmy peoples, in violation of Bank policies on indigenous peoples and environmental assessment. After the investigation report, the Panel was able to meet with the requesters representing the Pygmy peoples to review and discuss the Action Plan to assess whether all their concerns had been addressed.

Procedural innovation has also been necessary to address overlaps in the work of multiple quasi-judicial bodies. Many internationally supported development projects receive financing from more than one donor institution. Such an overlap occurred for the proposed hydroelectric plant at Bujagali Falls in Uganda funded by the World Bank and the AfDB. The project gave rise to two separate requests, submitted to the WBIP and the AfDB Independent Review Mechanism (IRM) in 2007. Given the shared issues, the IRM and the Panel signed a memorandum of understanding (MOU) that set out

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26 ibid, para 1.
29 World Bank Inspection Panel, The Inspection Panel at 15 Years (2009), 58.
terms of cooperation on certain aspects of their respective investigations. The MOU was intended to promote efficiency, so that each entity could carry out its own investigation in an effective manner, consistent with the mandate and independence of the other. Although the conclusions of the WBIP and the AfDB panel were independent and based on different applicable policies, the mechanisms collaborated by sharing experts and conducting a joint field mission.

The details of the coordinated approach taken in the Bujagali example offers an important precedent for handling investigative functions when requesters submit complaints to more than one institution. Yet it also provides evidence of the important contribution which can be made to effective, efficient execution of their functions when quasi-judicial bodies are allowed to innovate.

A lack of any clear guidance on procedure can be one catalyst of internal reform for quasi-judicial bodies. They may be forced to choose practices in response to unforeseen circumstances. For example, the ESCR Committee has required that, following consideration of a State’s first report, reports be submitted every five years, unless the Committee decides to shorten the period based on factors such as the quality of the dialogue with the State party. The ESCR Committee has also tried to develop some tools to encourage States to submit their reports; the failure of State parties to comply with their monitoring obligations under the Covenant can have a substantial negative impact on the implementation of economic, social and cultural rights for those who lack official information about their rights provided by the State. One the one hand, the solutions crafted by the Committee could be criticized for their compatibility with an ongoing, large-scale overdue reports problem: in 2012, the Committee had 76 overdue reports, falling among the human rights organs with most overdue reports (the situation of UN treaty bodies range from 29 to 84 overdue reports). Yet such criticisms would miss what is most salient about the Committee’s approach, which is the reality that the Committee came up with a solution despite the relatively limited procedural tools it has at its disposal, and the lack of any explicit mandate to take action in the case of late reports.


33 The Working methods establish three lists of States parties whose reports are overdue: ‘(i) States parties with reports that were due within the past eight years; (ii) States parties with reports that were due from eight to 12 years ago; (iii) States parties with reports that were due more than 12 years ago’. ESCR Committee (n 15), para 41.

3. A CONTRIBUTION TO COMMON PROCEDURAL FAIRNESS PRINCIPLES?

The examples explored above find quasi-judicial bodies developing methods and practices intended to increase the effectiveness of their intrinsic function. Yet procedural changes at the international level have drawn from various sources, in step with the increasing diversity of international law in the last 30 years. In the field of natural resources, for example, understanding international lawmaking requires paying attention not only to principles and rules but techniques and procedures as well. Nonetheless, much of the change seen in quasi-judicial bodies – and even the creation of many of these bodies in the first place – can be ascribed to an overarching trend of judicialization at the international level. Underlying this trend is a commitment to the ‘rule of law’ and, as a corollary, to ensuring due process, implying an increasing emphasis on independence, expertise, publicity of decisions, and public participation in their existing and developing processes.

Under a ‘rule of law’ framework, the effectiveness and legitimacy of any decision-making body depends on the impartiality and competence of its decision-makers. Impartiality requires avoiding conflicts of interest, but it may also require decision-makers who can act free from undue influence, which in a large institutional context

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35 Regarding the elaboration of ‘principles’ and ‘rules’ one arbitral tribunal under the auspices of the Permanent Court of Arbitration put it this way:

There is considerable debate as to what, within the field of environmental law, constitutes ‘rules’ or ‘principles’: what is ‘soft law’, and which environmental treaty law or principles have contributed to the development of customary international law...The emerging principles, whatever their current status, make FNTAReference to conservation, management, notions of prevention and of sustainable development, and protection for future generations. In the arbitration regarding the Iron Rhine (‘IJzeren Rijn’) Railway (Belgium v Netherlands) (2005) 17 RIAA 66, para 58.

36 Techniques and procedures with status and substance in international law include the requirement for environmental impact assessments (EIA), as well as the framework-protocol approach used in the development of international treaty law. Techniques and procedures are often reflected in international standards. The International Court of Justice stressed the importance of the latter saying:

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19 [of the 1977 Treaty], but even prescribed, to the extent that these articles impose a continuing – and thus necessarily evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature.


38 Boisson de Chazournes and Fromageau (n 37), 965.

39 International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA), IBRD Resolution No 93-10 and IDA Resolution No 93-6 ‘The
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may mean separation from day-to-day administration, and security of tenure regardless of the decisions made. The assumptions of impartiality and independence are relatively novel. The employment of competent, impartial decision-makers is only a first step. Keeping international actors ‘accountable’ also means decision-making organs have to be accountable themselves, giving force to the principle of *audi alteram partem*. Perhaps the most basic guarantee flowing from a concern for procedural fairness is a commitment to transparency, with the public availability of decisions as a bare minimum: publishing reports allows external actors to assess the overall functioning of the procedure, while strengthening legal certainty and the predictability of the process. There are sometimes exceptions based on confidentiality concerns, but even these exceptions are narrow. Again, the assumption of publicity is a departure from earlier models. Finally, there is evidence that the increasing impact on individuals and communities by the decisions of international decision-makers has been matched by a concurrent trend giving individuals and communities an increased voice.

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World Bank Inspection Panel’ (22 September 1993), para 6 (members of the World Bank Inspection Panel (WBIP) are explicitly barred from participating in any hearing or investigation where he or she has any history of involvement).

40 See eg ibid, para 5 (Members of the Panel cannot have worked for the Bank in any capacity during the two years prior to their appointment) and para 10 (following the expiry of their term on the Panel, members become ineligible for employment with the Bank Group in any capacity).

41 ibid, para 8 (during their tenure, Panel members may only be removed pursuant to a decision of the Board and only for “cause”).

42 The ESCR Committee is an independent body composed of experts in the field of socio-economic rights but this has not been always the case. Between 1979 and 1985, responsibility for supervising compliance with the Covenant fell to an ECOSOC Working Group composed entirely of government representatives, although eventually governments were expected to appoint experts. The Working Group was widely criticized for its incapacity to independently and effectively assist the Economic and Social Council in monitoring States’ parties compliance. It was only with the 1985 establishment of the ESCR Committee that ECOSOC decided members of the Committee should be experts serving in their personal capacity. P Alston, ‘Out of the Abyss: the Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 333, 340–42.

43 World Bank Inspection Panel, ‘Operating Procedures (1994)’ in ‘Accountability at the World Bank: the Inspection Panel Ten Years On’ (2003), 158, paras 55–56 (at WBIP, Bank is required to inform requester of the results, to relay actions decided by the Board, if any, and to make the Panel Report, Management’s recommendations, and the Board’s final decision all publicly available).

44 Boisson de Chazournes and Fromageau (n 37), 965.


in international decision-making. The Human Rights Committee provides an individual complaint mechanism (at least against countries signatory to the Protocol) and the ESCR Committee has recently been empowered to receive individual complaints as well. At the WBIP (and mechanisms at the regional multilateral development banks (MDBs)), any impacted community (and in some cases even individuals) is empowered to make a complaint against a project they claim will affect them negatively – this scope is in fact the core of their accountability function. Outside the cases studied here, there continues to be great controversy about what role affected parties can play.

In part, these changes have come about as a result of the same external pressures that helped create such bodies in the first place. Yet here again, quasi-judicial bodies have authored rules aimed at procedural fairness; the larger context suggests that, in authoring these rules, quasi-judicial bodies also contribute to the elucidation and elaboration of what is required by the principles constituting this judicialization trend. This role of quasi-judicial bodies in recrafting their procedures raises interesting theoretical issues. If specific rule changes flow out of demands for transparency, accountability, and participation, the harder question is what rules are required by those higher-order principles. In cases where the rules are set by a governing body of member States, the question is less relevant. Where quasi-judicial bodies exercise autonomy in setting procedural rules, however, they can also in some sense be understood as contributing to the elaboration of a set of international principles regarding what is required by ‘procedural fairness.’

The issue is far from speculative and the Aarhus Convention provides a particularly interesting case. Its very existence is tied to belief that access to justice requires both public access to relevant information, and on channels for public participation in decision-making. The Compliance Committee’s capacity to set its own rules therefore provides a potential window on what rules of procedural fairness at the international level may require. Many aspects of the Committee’s processes go beyond what is allowed elsewhere. A commitment to independence from the political interests of individual States is reflected even more strongly than in other settings, with Committee members who include not only candidates nominated by States, but also those nominated by non-governmental organizations (NGOs). Communications are discussed formally with the public, following a procedure which provides an opportunity for observers to comment before decisions are made. A strikingly broad set of rights has been assigned to individual complainants: a member of the public which makes a

47 Boisson de Chazournes and Fromageau (n 37), 965.
50 On the combination of internal and external forces that gave birth to the WBIP, see IFI Shihata, The World Bank Inspection Panel: in Practice (2nd edn, OUP 2000), 65.
51 Decision I/7, Review of Compliance, adopted at the First Meeting of the Parties (2002) ECE/MP.PP/2/Add.8, para 4.
communication to the Committee has the right to participate in any meeting in which the matter is discussed and the Committee may also consider submitting a request that the Secretariat provide financial assistance to individual communicants from the Convention’s trust fund.

The Aarhus Committee is not alone in making these contributions, however. The principle of participation is reflected in the right of NGOs to make contributions not only to the Aarhus Committee, but also to the ESCR Committee. The ESCR Committee has accepted written and oral submissions from NGOs since 1987 and, in 1993, established a formal procedure for NGO participation. Under that procedure, the Committee precedes its ‘pre-sessional working group’, which aims to identify questions that will constitute the principal focus of the dialogue with reporting States representatives, with an invitation to NGOs to submit relevant and appropriate documentation to inform the working group’s conclusions. The Committee furthermore blocks off part of each of its sessions to receive oral information provided by NGOs. The Committee has also asked the Secretariat to place certain types of information provided by NGOs into the files of the countries submitting reports. Thus, through the submission of relevant documentation, NGOs assist in monitoring the implementation of Covenant rights by States parties. Above and beyond these contributions, members of the Committee have also consulted with NGOs in the preparation of General Comments.

Beyond the question of standing in the ongoing elaboration of a commitment to public participation, the Democratic Republic of Congo case at the WBIP points to additional questions, about the types of contribution that affected communities should be allowed to make to the work of quasi-judicial bodies.

53 Decision I/7, Review of Compliance, (n 7), para 32.
55 Beyond having a right to submit communications, NGOs actively contribute to the Aarhus Committee’s efforts to collect information. The Committee’s sessions are open to the public and the Committee is empowered to invite NGO representatives to raise compliance issues, and to allot time explicitly to discussing non-compliance issues with them – even where they are not directly raised in a communication. See eg United Nations Economic Commission for Europe, ‘Guidance document on the Aarhus Convention Compliance Mechanism’ (December 2010) available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf>, 28-29. NGO participation at the ESCR Committee is discussed below.
56 Lyon (n 32).
57 ESCR Committee (n 15), para 57.
59 In this regard it said that: ‘Non-governmental organizations in consultative status with the Council may submit to the Committee written statements that might contribute to full and universal recognition and realization of the rights contained in the Covenant’. ESCR Committee, ibid, para 1.
60 See n 29.
61 At the IFI investigative mechanisms, affected parties not only have an active, ongoing role in ensuring that Bank policies and procedures are respected, but may also be consulted in the development and design of post-finding actions. See eg the return visits in connection with
4. QUASI-JUDICIAL BODIES AND THE DEVELOPMENT OF SUBSTANTIVE INTERNATIONAL LAW

Beyond their active contribution to the elaboration of procedural rules and principles, the direct impact quasi-judicial bodies have had on international organizations and States should be no surprise: increasing ‘compliance’ with substantive rules is after all the underlying reason for the creation of such bodies. Consider the Wilmar case brought before the CAO. Between 2003 and 2008, IFC undertook four investments in the oil palm business of Wilmar Group, a large agribusiness company. In 2007 and 2008, the CAO received two complaints from community groups, as well as local and international NGOs, raising concerns about adverse environmental and social impacts of Wilmar’s operations. The 2008 CAO Appraisal Report found problems with the Wilmar loans, but also found a problem with the implementation of IFC standards in certain supply chains.62 The strength of the CAO’s combined roles led to substantial changes in the IFC’s internal processes and its approach at the sector level. Indeed, as a result of the CAO audit, the President of the World Bank decided to suspend further financing to the oil palm sector until the IFC implemented a revised strategy, a decision subsequently extended to the entire World Bank group.63

Successful feedback from investigations conducted by quasi-judicial bodies can feed directly and indirectly into changing practice, but in making their decisions based on a body of norms, that role also often means defining or elaborating substantive rules of international law. This dimension is complicated, however, in a way it is not for judicial organs; part of what defines these bodies as quasi-judicial is that they lack a formal capacity to make binding, final determinations on questions of international law. On the other hand, beyond formal, binding adjudication, the application, interpretation and clarifications of norms of international law is not limited to judicial bodies and interpretations from international quasi-judicial bodies may be particularly influential given their specialized function and expert composition, and even more so where a quasi-judicial body is seen as the ‘custodian’ of a particular treaty or set of rules. The examples below even suggest that their interpretive and procedural work may extend beyond their metier.


62 CAO Appraisal for Audit (2008), C-I-R6-Y08-F096, paras 16–18. The Director of the agribusiness department at IFC noted:

CAO's audit findings are helping inform a number of internal process adjustments at IFC, including how we categorize projects with single commodity traders and how we address supply chain risks. The audit has also served as a catalyst for a stakeholder informed palm oil strategy which we believe will materially enhance our contribution to building a sustainable oil palm sector.


63 ibid.
4.1 Quasi-judicial Bodies as Caretakers of their Applicable Norms

The influence and authority of legal interpretations are bolstered when they are subject to refinement, criticism, debate and, in some cases, amendment. Reliance on a body of case law allows quasi-judicial bodies to do just that.

Consider the Aarhus Compliance Committee. Although its role is formally only ‘consultative’, it has used its consideration of individual complaints to develop a body of case law regarding the interpretation of the Aarhus Convention’s provisions. It applies provisions of the Convention in the same way in similar situations. Thus in an Armenian case regarding the issuance of a mining license, the Compliance Committee interpreted the aspects of Article 6 on the duty to provide early public notice in the EIA procedure by referring to its earlier decisions in cases concerning Lithuania and France. The Committee considered that: ‘The requirement to provide reasonable time frames implies that the public should have sufficient time to get acquainted with the documentation and to submit comments, taking into account, inter alia, the nature, complexity and size of the proposed activity.’ Yet the Committee also added complexity and colour to its existing jurisprudence, holding that ‘a time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project’.

Another question came up in a case concerning Ukraine and its Bystro Canal Project in the Danube delta, concerning which members of the public must be notified during an EIA, and what must be done to take public comments into account. The Compliance Committee concluded that the scale and impact of the project required nation-wide media attention and notification of organizations likely to be interested.

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65 Articles 6.2 and 6.3 of the Aarhus Convention provide that:

The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner. […]

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

66 In this regard, the Committee notes that ‘one week to examine the EIA documentation relating to a mining project (first hearing) is not an early notice in the meaning of article 6, paragraph 2, because it does not allow enough time to the public concerned to get acquainted with voluminous documentation of technical nature and participate in an effective manner’. Findings and recommendations with regard to communication ACCC/C/2009/43 concerning compliance by Armenia [2010] (n 64), para 67.

67 ibid, para 73.

68 Aarhus Compliance Committee, Findings and recommendations with regard to compliance by Ukraine with the obligations under the Aarhus Convention in the case of Bystre deep-water navigation canal construction (submission ACCC/S/2004/01 by Romania and
Since 2013, like the Aarhus Compliance Committee and its closer relative, the UN Human Rights Committee, the ESCR Committee is developing a body of case law through the adjudication of individual complaints. Moreover, the Committee has articulated clarifications of international legal norms, particularly through the adoption of General Comments. The authority of these instruments is bolstered by many factors: the Committee has been given a mandate which requires it to provide States with an interpretation of the norms of the International Covenant on Economic, Social and Cultural Rights (ESCR Covenant); they are authored by an independent body of experts; they can only be adopted by consensus of the entire Committee; and they are released only after consultation with other UN bodies, civil society and individuals experts aimed at creating a result supported among a broad collection of stakeholders.

In practice, the interpretations of the ESCR Covenant made through General Comments have achieved a significant degree of acceptance. Their content is rarely questioned by States parties. The interpretation of the norms in the ESCR Covenant via General Comments could be compared to the practice by which international tribunals provide advisory opinions. Like advisory opinions, General Comments not only inform State assessments of their own compliance with the ESCR Covenant, but also provide individuals with a foundation for their own arguments on human rights questions before national and international courts.

The practice of the UN human rights treaty bodies have provided courts with a legal foundation for the application and interpretation of these rights. For example, the International Court of Justice found evidence on the extra-territorial application of the International Covenant on Civil and Political Rights in the case law of the Human


\[\text{ESCR Committee (n 15), paras 55 and 57. See P Alston, ‘The Historical Origins of ‘General Comments’ in Human Rights Law’ in L Boisson de Chazournes and V Gowlland-Debass (eds), \textit{The International Legal System in Quest of Equity and Universality. Liber Amicorum George Abi-Saab} (Brill 2001) 764.}\]

\[\text{T Winkler, \textit{The Human Right to Water: Significance, Legal Status and Implications for Water Allocation} (Hart 2012), 41.}\]

\[\text{I Winkler, \textit{The Human Right to Water: Significance, Legal Status and Implications for Water Allocation} (Hart 2012), 41.}\]

\[\text{M Sepulveda, \textit{The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights} (Intersentia 2003), 42.}\]


Rights Committee. The Court likewise found evidence of the applicability of the ESCR Covenant in foreign territories in the concluding observations of the ESCR Committee.

The influence and authority of General Comments is illustrated by the impact of the General Comment No 15 on the Right to Water. An example is the *Matsipane Moselthanyane & Gakenyatsiwe Matsipane v The Attorney General* case brought before the Court of Appeal of Botswana in 2011. The Court found that the government’s deprivation of water to the Bushmen people living in the Central Kgalagadi Game Reserve constituted degrading treatment in violation of the Constitution of Botswana – relying on this point directly on General Comment 15. In *City of Johannesburg v L Mazibuko*, as well, the High Court of South Africa pointed out that the ‘effect’ of concepts such as ‘availability’ and ‘accessibility’ in terms of the General Comment, ‘is that the right to water must be accessible equally to the rich as well as to the poor and to the most vulnerable members of the population. It is in this context, that the State in under an obligation to provide the poor with the necessary water and water facilities on a non-discriminatory basis’.

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75 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, paras 109–111. In the advisory opinion, the Court states (para.109):

> [W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguayan cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *Lopez Burgos v Uruguay*: case No. 56/79, *Lilian Celiberti de Casariego v Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*).

76 ibid, para 112.

77 ESCR Committee, ‘General Comment No 15, The right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2002) UN Doc E/C.12/2002/11. Although there is no explicit recognition of a right to water in the 1966 International Covenant, the Committee considers this right to be inextricably related to the rights to an adequate standard of living and to the highest attainable standard of health, respectively recognized in arts 11 and 12 of the Covenant (para 3).


General Comment No 15 has also influenced the interpretation of that right by international tribunals. The Inter-American Court of Human Rights has found that sufficient and safe water are indispensable to the guarantee of a decent life in three of its cases. The Court relied on General Comment 15 to highlight the special vulnerabilities of indigenous peoples when facing restrictions on access to ancestral lands, and the impact this may have on access to clean water. In line with the General Comment, the Court found that limitations on the access to water affects the right of the members of a community to a decent life and the right to life because they are deprived of the possibility of accessing their means of subsistence which are necessary to their survival. This case illustrates that the practice of quasi-judicial bodies can nourish the jurisprudence of judicial bodies on socio-economic rights.

4.2 Quasi-judicial Bodies as Substantive International Lawmakers: How Much Influence?

The influence of General Comment No 15 on the adjudication of human rights responsibilities by national and international courts provides a window on the tension inherent in asking a body to review compliance without giving it a mandate to provide binding interpretations. Even without a formal interpretation power, it is easy to understand how independent, consensus-based, consultative opinions by experts on a body of norms would be influential in subsequent applications of those norms. This influence also depends, however, on the perceived uniformity and coherence of the human rights norms in question. The question then arises how influential the work of quasi-judicial bodies remain outside the strict interpretation of the body of norms for which they are responsible.

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80 Case of the Yaxye Axa Indigenous Community v Paraguay (n 74), para 167; Case of the Sawhoyamaxa Indigenous Community v Paraguay (n 73), para 164; Case of Xákmok Kásek indigenous Community v Paraguay (Merits, Reparations and Costs Judgement) Inter-American Court of Human Rights Series C No 214 (24 August 2010), paras 194–196. See generally D Shelton, ‘Water Rights of Indigenous Communities and Local Communities’ in L Boisson de Chazournes ao (eds), International Law and Freshwater: the Multiple Challenges (Edward Elgar 2013) 69–94.

81 Case of the Yaxye Axa Indigenous Community v Paraguay (n 74), paras 167–168. Case of the Sawhoyamaxa Indigenous Community v Paraguay (n 74), para 164. It is interesting to note that in order to ensure a decent life, in both the Yakye Axa (para 205) and Sawhoyamaxa (para 224) cases, the Court ordered the State of Paraguay to establish a community development fund to be used to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of these indigenous communities. Moreover, in Xákmok Kásek ibid, paras 195–196, the Court emphasized that access to and quality of water are part of the right to a decent existence. In this case, the Court observed that since 2003 the members of the Community have not had water distribution services. Moreover, water supplied by the State from May to August 2009 amounted to no more than 2.17 litres per person per day. Under these circumstances, the measures taken by the State have not been sufficient to provide the members of the Community with water in sufficient quantity as required by human rights requirements and this has exposed them to risks and disease.
An example will help clarify this issue. The Aarhus Compliance Committee has explicitly situated its decisions within a framework of international law beyond the strict text of its operative treaty. In part, this simply means that the Committee considers its assessment of compliance with the Aarhus Convention to also be governed by general international law, such as the norms contained in the 1969 Vienna Convention on the Law of Treaties. More specifically, however, the Committee has opened the door to the assessment of Aarhus Convention provisions in light of the rules and principles contained in treaties of environmental and human rights law sharing common objectives and aims with the Aarhus Convention. From a lawmaking perspective, the question is how often the reverse might occur, whether international law will or should draw on the meaning that the Compliance Committee would give to human rights and environmental norms outside the scope of the Aarhus Convention.

For the Aarhus Compliance Committee, the evidence pulls both ways. The Committee has much to say about the duty to carry out an EIA, and the correlated obligation to conduct ‘public consultations’ with local populations. These norms are embodied in other legal frameworks at the regional level, and have been explicitly enshrined in universal consensus documents like the Rio Declaration on the Environment and Development as well as the 2010 United Nations Environment Programme (UNEP) Guidelines for the Development of National Legislation on Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines). Of course, as a regional body, the Committee has no explicit power to determine the content of these norms and it could be argued that a duty to conduct an EIA and public consultations depends on the context in which those rules are articulated, interpreted and applied.

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82 Report of the Twelfth Meeting of the Aarhus Compliance Committee, ‘Findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))’ (2006) ECE/MP.PP/C.1/2006/4/Add.2, para 41. In a similar vein, the WTO Panel concluded ‘the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO’. Korea – Measures Affecting Government Procurement (2000) WTO Doc. WT/DS163/R, para 7.96.


The practice of the Aarhus Compliance Committee has nonetheless been taken into account in the interpretation of environmental consultation rights by the WBIP. The Vlora case turned in part on clarifying what was required by the ‘meaningful public consultations’ demanded by operational policies on public consultation and disclosure. The Panel found that public consultations had to take place in parallel with preparations for the EIA; since no consultations were held until after the government had approved the setting of the project, public meetings convened by the government were therefore held to be ‘pro-forma’ and not a genuine consultation. What was noteworthy about the case for our purposes is that the Panel considered Albania’s lack of compliance with the Aarhus Convention requirements as additional evidence of non-compliance with internal policies. After having recalled some of the conclusions of the Aarhus Committee, the Panel concluded, ‘that Management did not ensure that the Project preparation activities complied with the consultation and public participation requirements of the Aarhus Convention. This does not comply with OP 4.01’.

It is true that the ICJ has still proved reticent to strongly endorse the authority of the reasoning and rulings provided in the decisions of quasi-judicial bodies. In the case on the Pulp Mills on the Uruguay River between Argentina and Uruguay, the ICJ did refer to the duty to carry out an EIA as a practice ‘which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law’. Yet the Court did not specify the content of an EIA, instead leaving each State the discretion ‘to determine in its domestic legislation or in the authorization process for the project, the specific content of the EIA required in each case’. At the same time, the ICJ did indirectly consider some elements characterizing an EIA process and recognize that both Uruguay and IFC had undertaken consultations with affected populations in carrying out an EIA.

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87 The Operational Policy 4.01 on Environmental Assessment specifically requires that ‘[f]or meaningful consultations between the borrower and project-affected groups and local NGOs on all Category A and B projects proposed for IBRD or IDA financing, the borrower provides relevant material in a timely manner prior to consultation and in a form and language that are understandable and accessible to the groups being consulted.’ OP 4.01 is explicit that the borrower must consult affected groups and local NGOs ‘as early as possible’ and ‘at least twice.’ OP. 4.01, Environmental Assessment (January 1999) available at <http://go.worldbank.org/K7F3DCUDDO>, paras 14–15.


90 ibid, paras 327–28.

91 ibid, para 332.


93 ibid, para 205.

94 ibid, paras 217–19.
5. FINAL REMARKS

The international system is now home to a broad constellation of quasi-judicial bodies. In the best cases these bodies, created by treaty regimes or States parties, help keep parties accountable for the norms they have committed to by drawing attention to shortcomings, resolving ambiguity and uncertainty and thereby encouraging compliance.

Increasingly, however, the demand for accountability pulls in multiple directions: it covers not only the relationships between international organizations (or treaty-based organs) and their member States (or State parties) but also the relationships among States, international organizations, quasi-judicial bodies themselves and a range of other actors that might be thought of as stakeholders, from NGOs to private individuals. Quasi-judicial bodies rarely possess formal enforcement powers, but must instead rely on community pressure to exert direct influence, so their relationship with NGOs and private parties has therefore emerged as fundamental to their success. On the other hand, the processes provided by quasi-judicial bodies are supposed to aid the individuals adversely affected by non-compliance with international norms.

In this context, the increasing influence of quasi-judicial decision-making on international law may raise legitimacy concerns. In some cases, their ‘application’ of international rules provides the principal vehicle by which the underlying norms are developed and specified. These interpretations lack the pedigree and specification that are the traditional benchmark of formal sources of international law. Indeed, not only do they clearly influence international norms, but also they express the calls for accountability by third parties – private individuals, local communities, and NGOs – that gain a voice, albeit indirect, in the lawmaking process.

There is a need to include various actors with different statuses in the formulation of norms and rules which have common objectives and interests. The production of international norms now includes informal procedures involving non-State actors excluded from the classical ideal of international lawmaking. This trend is not limited to the quasi-judicial bodies. Non-state actors can bring complaints against a State or participate through the submission of amicus curiae briefs in international judicial proceedings.

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99 At some inter-state dispute settlement mechanisms such as the ICI, non-State actors still have limited participation rights, and often none at all. Regional human rights courts on the other hand represent a countervailing trend for the inclusion of individuals and communities in
Overall, international norm making has undergone a process of pluralization, understood as a diversification of the modes or practice by which norms are made or refined at the international level. In an age of ‘pluralized normativity’ it seems more fruitful to pursue a theory of sources which grounds the identification of international norms in the analysis of their techniques of production, impact or influence in the international legal order. Nothing in these developments seems to challenge the reality that States remain the final lawmaking authority, capable of amending treaties, producing official interpretations, and demanding authoritative resolution of disputes where it is called for. In the meantime, quasi-judicial bodies perform various important functions in the administration of international law, including the elaboration, interpretation and application of its norms. Like the rulings of international judicial bodies, doing so may not only foster compliance with international law, and resolve potential conflict, but also promote international justice.

decision-making that effects. Although amicus curiae had long been ignored in international proceedings, limiting participation in the procedure to the parties involved in litigation, in order to increase participation and transparency, there are emerging new practices in this regard. For example, investment arbitration tribunals, established under the International Centre for Settlement of Investment Disputes (ICSID), have accepted amici briefs from third parties. See Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Argentine Republic (Aguas Argentinas) (Order in response to a petition for participation as amicus curiae) [2005] ICSID Case ARB/03/19, paras 6–7. Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v Argentine Republic (Aguas provinciales de Santa Fe) (Order in response to a petition for participation as amicus curiae) [2006] ICSID Case ARB/03/17, paras 7–8. See B Stern, ‘Civil Society’s Voice in the Settlement of International Economic Disputes’ (2007) 22 ICSID Review Foreign Investment Law Review 280.