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Austria

Aarhus Convention Secretariat
c/o Fiona Marshall
Palais des Nations
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Vienna, 19.01.2017

Re: Comments to Austria's third progress report on the implementation of Decision V/9b of the Meeting of the Parties to the Aarhus Convention

Dear Ms. Marshall,

We are very grateful for this opportunity to provide comments on Austria's third progress report regarding the implementation of Decision V/9b of the Meeting of the Parties to the Aarhus Convention (MOP) in our capacity as the communicant in ACCC/C/2010/48.

Paragraph 3(a)(i) and (ii) of Decision V/9b (Access to Information)

We can confirm that Austria has taken meaningful steps to implement the Convention and paragraph 3(a)(i) and (ii) regarding access to information specifically. The amendments of the environmental information acts at the federal level and in seven of the nine provinces transpose the Convention in a manner that is, in our view, fully compliant.

However, we note that two major provinces (Lower Austria and Styria) have yet to change their laws to come into compliance. It is vital that all of the provinces fully implement the Convention. As explained in our oral statement at the Compliance Committee's fifty-second

meeting, significant areas of environmental law – such as nature protection, hunting and fishing laws – fall within the competence of the provinces. Lacking adequate transposition regarding access to information in these two provinces can accordingly have serious consequences indeed. This is demonstrated by a recent case in Lower Austria in which the NGO WWF Austria was denied access to information regarding requests about the culling and possible relocation of Eurasian otters and the numbers of otters reported to the European Union according to Directive 92/43/EEC (Habitats Directive). WWF requested information about the otters on July 27th 2016 and was given some, but not all, answers on September 5th 2016. On October 18th, WWF asked for answers to the still open questions and clarified the open points. The Lower Austrian authorities confirmed receipt of the mail and promised an answer by November 13th 2016, but have to date failed to respond. After WWF filed a complaint of omission, since the answer was not given within several months, the Lower Austrian authority referred to their unchanged environmental information law (Niederösterreichisches Auskunftsgesetz), which first requires a formal request for a legal notice of non-compliance with the request, which then the authority has six months to produce. WWF presented this request on January 12th 2017. If the Lower Austrian law on environmental information had been altered to track the Federal Environmental Information Act, the case could already be before the Administrative Court.

Paragraph 3 (a)(iii) and Paragraph 6 of Decision V/9b (Access to Justice)

As we have indicated on multiple occasions previously, access to justice is the most critical problem in Austria. While the problems with regard to access to information discussed above entailed correcting an existing system, the transposition of the third pillar was and remains simply nonexistent to a huge extent.

We would like to first point out that Austria seems, in fact, to have nothing new to add to what was already contained in its second progress report, despite its professed intention to table access to justice issues for 2016. Concretely, this means that not a single act of legislation since the ACCC adopted its Findings in ACCC/C/2010/48 in December of 2011 has been seriously pursued, let alone enacted, to implement Article 9, para. 3. This despite the passage of over five years. While in 2014, the Minister for the Environment did express his intention for the implementation of access to justice for the public in the environmental committee of the parliament (PK-Nr. 627), concrete actions are still missing.

No Court Action towards the Implementation of Access to Justice

Recently, the Constitutional Court denied legal standing to environmental NGOs in two different cases (VfGH V 87/2014-11 and V 134/2015-7) to challenge regulations which they argued contradict national environmental law. The Court went on to say that Article 9, para. 3 of the Aarhus Convention is not applicable and that standing for NGOs would require a change to Article 139 of the Austrian Constitution.

No Legal Measures Taken to Implement Access to Justice

Only the proposed amendment of the nature, park, hunting and fishing laws of the province of Vienna showed some initiative and even here, such progress was marked by serious

shortcomings. Among other deficits, this draft excluded acts and omissions, providing only for some access to justice with regards to decisions in permitting procedures. This limitation is quite significant – not only does it fall quite short of fulfilling scope of the Convention – on the ground it poses a serious problem for the effective enforcement of environmental law in Austria, where commonly the major problem lies in the inaction of administrative agencies. What is worse, even such limited steps appear to be on ice. According to our information, Vienna will not proceed further with its legislative process due to the deadlock in other regions and on the federal level. We would also note here that a recent draft amendment of the Carinthian law on nature protection contained absolutely no access to justice rights and thus represents yet another missed opportunity.

On the federal level we must add that the proposed draft amendment to the Austrian law on waste (AWG) from July 2015, which is yet to be adopted, contained nothing to address the utter lack of access to justice in this area. Nor did the recent draft amendment to the Austrian Trade Act (GewO) from November 2016 contain such a proposal. Not even the Environmental Ministry's huge new proposed administrative law reform package from October of 2016 contained proposals for the creation of access to justice rights. It is truly difficult to emphasize the importance of this omission enough. This reform involved, namely, the review (and concomitant proposed amendment) of most of Austria's environmental laws.

If anything we find the Environmental Ministry's administrative law reform package is a serious attempt to weaken the role civil society can play in environmental matters. Specifically, the package proposes among other things, changes to Austria's EIA law (UVP-G) which would considerably increase costs and other burdens on the limited resources of NGOs. For example, the proposed changes included the requirement for NGOs to publish all received donations online (which would violate the fundamental constitutional right to data protection of both donors and NGOs) and to have a review of all NGO criteria at least every five years (at the moment this can already be done at any time at the will of the Ministry). The plans also required that challenges to EIA decisions prove why arguments were not raised in the EIA itself, at the risk of being dismissed, and for the public concerned to be burdened with all expenses arising from additional expert opinions due to new information, regardless of any fault of the public concerned. If the court would see the need for new expert opinions due to arguments from NGOs or citizens/citizens' initiatives, for example, the NGOs or citizens/citizens initiatives would be responsible for all associated costs, which could be up to several thousand to tens-of-thousands of Euros. Such unforeseen costs strike us as prohibitive within the meaning of Article 9, para. 4.

We find these proposed measures threaten to roll-back one of the few areas in which the public can exert any meaningful influence. We furthermore fail to understand why such an attack is even perceived as desirable or warranted, given that there are only approximately two EIA complaint procedures per year, and there has only been one single IPCC complaint procedure in the past ten years. These statistics should, in our view, allay any concerns about the implementation of Article 9, para. 3 in Austria as well.

Unfortunately, such steps which move Austria in exactly the wrong direction seem to be increasingly taken. In the province of Upper Austria, for example, the legal standing and

focus of the Environmental Ombudsman in environmental matters has recently been undercut. Although – as this Committee has already found – the Environmental Ombudsman cannot alone adequately represent the interests of the public (concerned) in environmental matters, we nonetheless acknowledge the hugely important role this office can play, and see its continued function, along with adequate access to justice rights for the public, as crucial to ensuring proper implementation of the Convention in Austria. The aforementioned planned changes to the EIA act also included the stripping of procedural rights of the Environmental Ombudsman. This was justified by claiming that the public's rights are being broadened due to the Convention, a claim which is of course wholly unsupported by the true status of the non-implementation of Article 9, para. 3 in Austria.

Finally, we would like to point out that there is simply no discussion in Austria regarding access to justice with respect to its criminal or animal protection laws, despite its obligations stemming from this Committee's Findings in ACCC/C/2011/63.

Overarching Comments on the State of Implementation

We would like to add that we find that there is a strong trend to undertake efforts to implement access to justice in Austria only in response to pressure exerted at the European level, i.e., to infringement procedures and CJEU decisions. For example, any and all legislative efforts to bring Austria into compliance with the Convention on access to justice were suspended pending the ECJ's ruling in the preliminary reference procedure related to the hydropower plant at Tumpen-Habichen. We find this reflects a truly regrettable lack of comprehension regarding Austria's commitments under international law generally, as well as a lack of respect for this Committee, and the MOP's Decision V/9b, specifically.

To illustrate this point, we note Austria failed to even provide a concrete timetable for the implementation of paragraph 3(a)(iii) and paragraph 6 of Decision V/9b, as this Committee has repeatedly requested.

In conclusion: We cannot possibly share the optimism regarding future steps to implement Article 9, para. 3 suggested in Austria's third progress report. There was hope in 2014 when the Minister of Environment admitted in a parliament hearing on Aarhus that he will take legislative steps soon, but after an engaged administrative start, nothing came even into the legislative process. In our view, the coming year appears quite bleak indeed, particularly given the upcoming elections and overall political climate in Austria. At best we can hope for a continuation of the status quo which, as demonstrated above, falls clearly short of meeting the requirements of Decision V/9b.

Paragraph 3 (b) of Decision V/9b (Capacity Building)

In contrast to the above very serious failures to implement the Convention, we find the prominence Aarhus matters have enjoyed in academic discussions and at the administrative level mentioned in third progress report (in particular the annex thereto) to be very positive, as are the capacity building measures Austria has undertaken.

Requested Measures

In light of the above failures in the implementation of Decision V/9b, in particular with regards to access to justice, we respectfully request that the MOP issue Austria a caution. To permit Austria to continue to disregard this Committee's Findings and Recommendations (endorsed by Decision V/9b) over the course of more than five years would seriously jeopardize the effectiveness of the compliance mechanism – it would suggest that the Convention is not to be taken seriously, and that the Parties to the Convention can simply disregard their obligations with impunity.

We would further respectfully request that the Compliance Committee and/or the UN-ECE send a letter to the offices of the Austrian Chancellor and Vice-Chancellor. As suggested in our oral statement during the fifty-second meeting of this Committee, we believe such an intervention could be helpful.

We very much hope that these remarks can aid the Committee in its review process. At any event, we appreciate the Committee's consideration enormously.

Thomas Alge,
Director, ÖKOBURO



OEKOBUERO is the alliance of the Austrian Environmental Movement. It is comprised of 16 Austrian organizations engaged in environmental, nature and animal protection like, GLOBAL 2000 (Friends of the Earth Austria), FOUR PAWS, Greenpeace and WWF). OEKOBUERO works on the political and legal level for the interests of the environmental movement.