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Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

Geneva, 29–31 March 2006

REPORT ON THE ELEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Armenia with its obligations under the Aarhus Convention in relation to the development of the Dalma Orchards area
(Communication ACCC/C/2004/08 by the Center for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Center and the Armenian Botanical Society (Armenia))

Adopted by the Aarhus Convention's Compliance Committee on 31 March 2006

INTRODUCTION

1. On 20 September 2004, three Armenian non-governmental organizations (NGOs), the Center for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Center and the Armenian Botanical Society, submitted a

communication to the Committee alleging non-compliance by Armenia with its obligations under article 4, paragraphs 1 and 2; article 6, paragraphs 1–5 and 7–9; article 7; article 8; and article 9, paragraph 2, of the Aarhus Convention.

2. The communication concerns access to information and public participation in the decision-making on modification of land use designation and zoning as well as on the leasing of certain plots in an agricultural area of Dalma Orchards. The communicants claim that their right to information, guaranteed under article 4, paragraphs 1 and 2, of the Convention, was violated by the public authorities' failure to respond to information requests and to provide adequate and complete information. The communicants also claim that, in adopting the relevant decrees, the Government failed to notify the public about the decision-making process; to ensure public participation in it, including by taking account of the public comments; and to publish the adopted decisions. They allege that these omissions constituted failure to comply with multiple provisions of articles 6 and 7 of the Convention. They also allege that adoption of government decrees without a public participation procedure contravenes article 8 of the Convention. They further claim that a failure to address the administrative appeals challenging the relevant decisions and a failure to provide for an appropriate judiciary appeal procedure constitute non-compliance with article 9, paragraph 2, of the Convention. The communication is available in full at <http://www.unece.org/env/pp/pubcom.htm>.

3. The communication was forwarded to the Party concerned on 22 October 2004 after a preliminary determination of its admissibility.

4. A response was received from the Party concerned on 2 April 2005 indicating that, in accordance with Armenian legislation, government decrees can be challenged only in the Constitutional court. The Party maintained that the other matters addressed in the communication did not fall under the Convention. In its comments on the draft findings and recommendations, the Party provided further information with regard to legislative developments and practical measures underway in Armenia. In particular, it noted proposed changes to the Constitution which will provide members of the public with standing in the Constitutional Court¹, as well as the draft law on Administration, which aims to make decisions such as those described in paragraph 10 below subject to review by the administrative courts. It also mentioned publication of a guide to the implementation of the Convention and a training event for legal professionals organized in 2005.

5. The Committee at its fourth meeting (MP.PP/C.1/2004/6, para. 26) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the arguments put forward by the Party concerned in its response and having further consulted with both parties at its eighth meeting, the Committee hereby confirms the admissibility of the communication, deeming the points raised by the Party concerned to be of substance rather than related to admissibility.

6. The Committee discussed the communication at its eighth meeting (22–24 May 2005), with the participation of representatives of both the Party concerned and the communicants, both of whom provided additional information.

¹ Following the adoption of these recommendations, the Committee became aware that these changes to the Constitution of Armenia had been made (see: <http://www.president.am/library/eng/?task=41&id=1>).

7. In accordance with paragraph 34 and with reference to paragraph 36 (b) of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicants on 18 October 2005. Both were invited to provide comments, if any, by 17 November 2005. Comments were received from the communicants on 16 November 2005. At the request of the Party concerned, the Committee extended the commenting deadline to accommodate a wider consultation process on the findings and recommendations in the country. The Party concerned provided its comments on 2 February 2006. The Committee, having reviewed the comments, took them into account in finalizing its findings and recommendations by amending the draft where the comments, in its opinion, necessitated changes in the presentation of the facts or the Committee's consideration, evaluation or conclusions.

I. SUMMARY OF FACTS²

8. Dalma Orchards is an agricultural area of historical, cultural and environmental value in the south-western part of the Armenian capital, Yerevan. In 1989, the area was included in the Plan for Preservation and Use of Historical and Cultural Monuments. The Plan was approved in 1991 by the Mayor of Yerevan. However, in 2000, this decision was annulled for all sites of historical or cultural value in the city, and no new list has been developed.

9. In December 2003, the district administration rejected a request submitted by the then-lessees of Dalma Orchards for extension of their leases. The rejection letter indicated that the Yerevan municipality already had in place an area development plan. The municipality confirmed the existence of the area development plan at a meeting organized by NGOs. It clarified that the plan had been adopted by the Government of Armenia and was not subject to change.

10. An inquiry into the matter by a group of NGOs identified five decrees with regard to the area in question adopted by the Government of Armenia in the period between March 2003 and March 2004:

- (a) Decree 1941-A of 27 March 2003 "On Modifying the Boundaries and Designated Use of the Conservable Land in the Dalma Orchards of Yerevan", ratified by the President of the Republic of Armenia on 29 March 2004;
- (b) Decree 503-A of 27 March 2003 "On Providing Lease over Land Plots to the 'Renko Armestate' Limited Liability Company and the 'Frank Muller' Closed Joint-Stock Company without Tender", ratified by the President of the Republic of Armenia on 15 May 2003;
- (c) Decree 745-A of 25 June 2003 "On Modifying the Designated Use of Land and Providing Lease over a Land Plot to Tavros Galshoyan and Syranuysh Galshoyan without Tender", ratified by the President of the Republic of Armenia on 25 June 2003;
- (d) Decree 1281-A of 11 September 2003 "On Modifying the Designated Use of Land and Providing a Land Plot to the 'Armenian Airways' Closed Joint-Stock Company", ratified by the President on 23 October 2003; and

² This chapter includes only the main facts considered relevant to the question of compliance, as presented to and considered by the Committee.

- (e) Decree 397-A of 31 March 2004 “On Zoning of Areas and Modifying the Designated Use of Land”, ratified by the President on 6 April 2004.

Another decree with regard to the land use on the territory was adopted on 21 October 2004 without prior notice or public consultation.

11. The decrees were adopted as stand-alone acts. No public participation was provided for in the course of the decision-making process. Consequently, any comments provided by the public were provided following the formal adoption of the decrees and were not taken into account. Moreover, stand-alone acts, in accordance with Armenian legislation, are not subject to publication. At the Committee’s eighth meeting, the representatives of Armenia confirmed that regulation of the matters in question through stand-alone decrees was not legally required. The communicants maintain that, in accordance with article 7 of the Armenian Land Code, changes of land use designation should be dealt with through normative regulation of general applicability rather than stand-alone acts applying to a defined piece or pieces of land.

12. The types of activity for which the land was designated (e.g. construction of houses, buildings or complexes, other planned activities exceeding the threshold value of 1,000 square metres, and forest restoration) should be subject to an environmental impact assessment (EIA) procedure in accordance with the Armenian Law on Environmental Impact Assessment. This procedure, in turn, requires public participation. It is not clear from the facts presented to the Committee whether a further (article 6-type) permitting process must be undergone, with public participation, before any specific activity can proceed.

13. Several requests for information were sent to various public authorities by the communicants, including:

- (a) a letter of 19 March 2004 to the Chairperson of the State Real Estate Cadastre Committee requesting information about the boundaries of Dalma Orchards, the category of land to which Dalma Orchards belonged, the administrative area the land was in, whether there were leases issued for the land on this territory (and, if so, their boundaries) and what plans and programmes had been developed for the area;
- (b) a letter of 31 May 2004 to the Mayor of Yerevan requesting information about decisions on the allocation of 533 hectares of land in Dalma Orchards, the duration of leases and proposed activities, whether and in what way the public had been informed of the proposed modifications of the land-use, and whether any public comments had been received; and
- (c) a letter of 3 August 2004 to the Mayor of Yerevan requesting access to documents that had served as a basis for the adoption of the government decrees referred to in paragraph 10 above and maps annexed to the decrees, and requesting information as to the location of land plots allocated by the decrees for particular activities.

Some of the requests, such as those mentioned in subparagraphs (a) and (c) above, were not answered at all, while others, such as the letter referred to in subparagraph (b), were answered only partially.

14. On 9 August 2004, the communicants filed a lawsuit with the first-instance district court of Yerevan appealing the five government decrees on grounds of violations of the Aarhus

Convention, the Armenian Law on Environmental Impact Assessment, the Law on Urban Development and the Land Code. They petitioned for a writ to declare the government decree null and void. The lawsuit was determined inadmissible for lack of jurisdiction. In particular, the court specified that the conformity of the government decrees with the Constitution of Armenia could be established only by the Constitutional Court of Armenia. The determination was left standing by the appellate instance.

15. According to Armenian legislation, only three institutions may make appeals to the Constitutional Court: the National Assembly, the Government and the President. The communicants point out that they approached these three institutions prior to or at the time of filing a lawsuit. In their responses to a request from one of the communicants, the Head of the Standing Committee of the National Assembly (letter of 15 June 2004) and the Head of the Department of Expertise of the Ministry of Justice (letter of 12 September 2004) recommended that the communicants appeal the decrees in the court of first instance.

II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

16. Armenia deposited its instrument of ratification of the Convention on 1 August 2001. The Convention entered into force for Armenia on 30 October 2001.

17. The Convention, as an international treaty ratified by Armenia, has direct applicability in the Armenian legal system. All the provisions of the Convention are directly applicable, including by the courts.

18. The communicants are NGOs that fall under the definition of “the public” as set out in article 2, paragraph 4, of the Convention. The Committee considers that all the communicants, being registered NGOs and having expressed an interest in the decision-making process, fall within the definition of “the public concerned” as set out in article 2, paragraph 5.

19. The agencies referred to in the communication with regard to provision of information and public participation in the decision-making process fall under the definition of “public authority” in article 2, paragraph 2 (a), of the Convention.

20. The issuing of government decrees on land use and planning constitutes “measures” within the meaning of article 2, paragraph 3 (b), of the Convention. In the Committee’s opinion, the information referred to in paragraph 13 above clearly falls under the definition of “environmental information” under article 2, paragraph 3.

21. It is therefore the opinion of the Committee that, as public authorities within the meaning of article 2, paragraph 2 (a), the State Real Estate Cadastre Committee and the Office of the Mayor of Yerevan were under an obligation to provide the environmental information requested by the communicants pursuant to article 4, paragraph 1, and that their failure to do so or to respond within the time limits indicated in the article was not in conformity with provisions of article 4, paragraphs 1 and 2.

22. The Committee notes that the communicants do not appear to have used domestic appeal procedures to challenge the failure of the public authorities to provide information, and have not provided any information to the Committee as to why they did not do so. They do not cite article 9, paragraph 1, among the articles that they claim have been breached.

23. The government decrees referred to in the communication, in particular decrees 503-A, 745-A (paras. 2 and 3) and 1281-A (para. 2), deal with the designation of land for a particular type of commercial activity. Typically, this would be considered as a type of decision falling within the scope of article 7 of the Convention. However, some of the decrees specify not only the general type of activity (e.g. manufacturing, agriculture) that may be carried out in the designated areas but also the specific activity (e.g. watch-making factory, construction of a diplomatic complex) and even the names of the companies or enterprises that would undertake these activities. These elements are more characteristic of a type of decision falling within the scope of article 6 of the Convention. The implications with respect to articles 7 and 6 are considered in turn in paragraphs 24–27 and 28–33 respectively.

24. Decree 1941-A, provisions of paragraph 1 of decree 745-A and paragraph 1 of decree 1281-A, and decree 397-A, in the Committee's opinion, relate to land-use planning. The first three change the designation of land use in the existing zoning plan, while the fourth adopts the territorial zoning plan of the area and modifies the designated use of lands.

25. In the Committee's view, such plans fall under article 7 of the Convention and are subject to the public participation requirements contained therein, including, *inter alia*, the application of the provisions in paragraphs 3, 4 and 8 of article 6. The Committee therefore finds that the failure to ensure public participation in the preparation of plans such as those referred to in paragraph 21 above constitutes non-compliance with article 7 of the Convention.

26. It is noteworthy that the failure to provide for public participation in this case appears to also contravene Armenian national legislation. The Armenian Law on Environmental Impact Assessment (article 15, paragraphs 3 and 4) requires that, *inter alia*, socio-economic, urban construction, industrial and environmental protection plans, programmes, complex designs and master plans be subject to public hearings and be communicated to the public at least 30 days in advance of the hearing. The law also requires that public opinion be taken into consideration.

27. In the Committee's opinion, the difficulties related to compliance with articles 4 and 7 of the Convention lie not in the lack of a regulatory framework but rather in deficiencies in implementation and enforcement.

28. The extent to which the provisions of article 6 apply in this case depends *inter alia* on the extent to which the decrees (or some of them) can be considered "decisions on specific activities", that is, decisions that effectively pave the way for specific activities to take place. While the decrees are not typical of article 6-type decisions on the permitting of specific activities, some elements of them are (as is mentioned in paragraphs 12 and 23 above) more specific than a typical decision on land use designation would normally be. The Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions. Notwithstanding that, the fact that some of the decrees award leases to individual named enterprises to undertake quite specific activities leads the Committee to believe that,

in addition to containing article 7-type decisions, some of the decrees do contain decisions on specific activities.

29. Another question that arises is whether a further, more detailed permitting process, with public participation, is envisaged for the various specific activities. The information available to the Committee on this point is somewhat ambiguous. The communicants maintain that Armenian legislation requires that an EIA be carried out, with public participation, for such activities (see para. 10). If this takes place, it would certainly help to mitigate the lack of public participation in the formulation of the decrees. However, even if public participation is included at that stage, the scope of the decision on which the public would be consulted would be more limited than should be the case for article 6-type decisions, in the sense that some options (such as the option of not building any watch factory at a particular location) would no longer be open for discussion (cf. article 6, para. 4).

30. If no further permitting process is envisaged, then the question of compliance with article 6 arises more starkly. On the basis of the information available to it, the Committee is not able to identify whether any of the activities concerned fall under the categories listed in paragraphs 1–19 of Annex I to the Convention. It does, however, note that the fact that under the Armenian legislation these activities are subject to an environmental assessment procedure, including public participation, as described in paragraph 12 above, brings them within the scope of paragraph 20 of Annex I of the Convention. Furthermore, the fact that an EIA procedure is foreseen for such acts points to the Armenian legislator's recognition of their potential environmental impact. Thus, the decisions referred to in paragraph 24 above could be seen as subject to article 6, paragraph 1(b) of the Convention.

31. The Party concerned pointed out at the Committee's eighth meeting that, even though the decrees in question had not been published, they could be now accessed through an electronic database. However, in the Committee's view, such an approach does not satisfy the requirement of article 6, paragraph 9, of the Convention to promptly inform the public of the decision.

32. The representatives of Armenia presented no evidence to the Committee that the decision-making on the proposed activities was still at a stage where all options remained open. The Committee therefore concludes that the decision-making with regard to specific activities was not done in accordance with the requirements of article 6, paragraph 1 (b), and, in conjunction with it, article 6, paragraphs 2–9 of the Convention.

33. The Committee also wishes to point out that, on the basis of the information available to it, detailed regulation appears to be lacking where public participation in decision-making on specific activities is concerned. While the Law on Environmental Impact Assessment itself provides some of the details, the elaboration of a more specific procedure in secondary legislation or in the form of guidelines might be advisable.

34. The communicants allege that failure to ensure public participation in the development and adoption of the government decrees referred to in paragraph 10 above constitutes non-compliance with article 8 of the Convention. In the Committee's understanding, however, the decrees in question do not fall under generally applicable legally binding rules. Rather, they

seem to constitute a form of adopting decisions on plans for designation of land (article 7) and to some extent a form of decisions mandating specific activities (article 6).

35. With regard to access to justice, the communicants claim that they were denied access to a review procedure to challenge the substantive and procedural legality of the government decrees which, they argue, should be guaranteed under article 9, paragraph 2, of the Convention. The relevance of article 9, paragraph 2, would depend on the extent to which article 6 is applicable, and, as was stated above (paras. 28–32), the Committee considers that, while the decrees primarily concern article 7 decision-making, some of their elements fall within the scope of article 6, and that therefore provisions of article 9, paragraph 2, apply.

36. The communicants also point out that they were denied access to review procedures to challenge the land designation aspect of the decrees. In this respect the Committee notes that the subject matter of the decrees is regulated in detail by both Armenian environmental laws (such as the Law on Environmental Impact Assessment) and laws regulating urban planning. Moreover, these laws require that the public be consulted in the process of such decision-making. It is therefore the Committee's opinion that the communicants, in accordance with article 9, paragraph 3, should have had access to a review procedure to challenge the decisions, which deal with such subject matter and which they believed to contradict their national law relating to the environment.

37. The lawsuit challenging the legality of the decrees and petitioning for a writ to declare them null and void was dismissed by the district court for lack of jurisdiction. The decision of the court points out that the Civil Procedure Code prevents courts from declaring null and void for any reason decisions whose constitutionality is subject to review by the Constitutional court. It further notes that the Constitution of Armenia provides for a review of the constitutionality of government decisions by the Constitutional Court only. However, as the communicants point out, only three institutions have standing in the Constitutional Court (see para. 15 above). Two of these represent the executive that issues government decrees, and the third constitutes a large proportion of the national legislative body. In the Committee's opinion, such an approach does not ensure that members of the public have access to review procedures.

38. However, in the Committee's opinion, the problem is not so much with the issue of jurisdiction or standing. Rather, it is connected to the fact that planning decisions whose subject matter is regulated by environmental legislation, and decisions on specific activities which, in accordance with the Convention, should be subject to an administrative or judicial review, were taken through a procedure that provides no possibility for the public to participate and no remedies. The Committee acknowledges that national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to regulate matters subject to articles 6 and 7 of the Convention exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of the

Convention. In this case, the Committee has not been made aware of any compelling reason justifying the choice of this form of decision-making.

39. The Committee finds this approach to be out of compliance with the obligations to ensure that members of the public concerned have access to a review procedure and to provide adequate and effective remedies in accordance with article 9, paragraphs 2–4, of the Convention. At the same time, the Committee notes the information provided to it by the Party concerned with regard to proposed legislative changes described in paragraph 4 above. In the Committee's opinion, such changes will, if implemented, bring the situation into compliance with article 9 of the Convention.

III. CONCLUSIONS

40. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

41. The Committee finds that by failing to ensure that bodies performing public functions implement the provisions of article 4, paragraphs 1 and 2, of the Convention, Armenia was not in compliance with that article.

42. The Committee also finds that by failing to ensure effective public participation in decision-making on specific activities, the Government of Armenia did not comply fully with article 6, paragraph 1 (a); with annex I, paragraph 20, of the Convention; or, in connection with this, with article 6, paragraphs 2–5 and 7–9. It considers that the extent of non-compliance would be somewhat mitigated if public participation were to be provided for in further permitting processes for the specific activities in question, but it notes that the requirement under article 6, paragraph 4, to ensure that early public participation is provided for when all options are open would still have been breached. In this regard, the Committee notes, however, the information provided to it by the Government of Armenia regarding the new draft law on Environmental Impact Assessment and understands that the drafters of the new law will take this opportunity to ensure its approximation with the requirements of the Convention.

43. The Committee also finds that by failing to provide for public participation in decision-making processes for the designation of land use, the Government of Armenia was not in compliance with article 7 of the Convention.

44. The Committee further finds that by failing to ensure that members of the public concerned had access to a review procedure and to provide adequate and effective remedies, the Government of Armenia was not in compliance with article 9, paragraphs 2–4, of the Convention.

B. Recommendations

45. Noting that the Party concerned has agreed that the Committee take the measure referred to in paragraph 37 (b) of the annex to decision I/7, the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, recommends that Armenia:

- (a) undertake practical and legislative measures to overcome the existing problems with access to environmental information, including, where appropriate, statistical monitoring of processing information requests;
- (b) ensure practical application of public participation procedures at all levels of decision-making in accordance with article 7 of the Convention and relevant domestic legislation;
- (c) develop detailed procedures for public participation in decision-making on activities referred to in article 6, paragraph 1, of the Convention, *inter alia* by incorporating them into the new Law on Environmental Impact Assessment, and to ensure their practical application, including by providing training to officials of all the relevant public authorities at various levels of administration;
- (d) ensure that appropriate forms of decisions are used in decision-making on matters subject to articles 6 and 7, so as to ensure that the public can effectively exercise their rights under the Convention;
- (e) undertake appropriate practical measures to ensure effective access to justice, including the availability of adequate and effective remedies to challenge the legality of decisions on matters regulated by articles 6 and 7 of the Convention;
- (f) take the consideration and evaluation of the Committee into account in the ongoing revision of legislation referred to in paragraphs 4, 39 and 42 above as well as in further consideration of the specific matter raised by the communicants; and
- (g) take the findings and conclusions of the Committee into account in further consideration of the specific matter raised by the communicants.

46. The Committee invites the Party concerned to provide information to the Committee, no less than six months before the third meeting of the Parties, on the measures taken and the results achieved in implementation of the above recommendations.

47. The Committee requests the secretariat, and invites relevant international and regional organizations and financial institutions, to provide advice and assistance to Armenia as necessary in the implementation of the measures referred to in paragraph 45.

48. The Committee resolves to review the matter no later than three months before the third meeting of the Parties and to decide what recommendations, if any, to make to the Meeting of the Parties, taking into account all relevant information received in the meantime.