Report of the Compliance Committee on its twelfth meeting

Contents

I. Organizational matters ................................................................. 2
II. Adoption of the agenda ............................................................... 2
III. Consideration of submissions, referrals and communications ......................... 2
IV. Relevant developments since the eleventh meeting of the Compliance Committee .......... 3
V. Implementation of and compliance with the reporting requirements ................... 3
VI. Compliance with the obligation to set targets and target dates............................ 4
VII. Report of the Committee to the Meeting of the Parties at its fourth session .......... 4
VIII. Consultation with Parties to facilitate implementation of the Protocol ................... 5
IX. Calendar of future meetings .......................................................... 5
X. Financial situation ......................................................................... 5
XI. Adoption of the report .................................................................. 5

Annex

Findings and recommendations with regard to case ECE/MP.WH/CC/CI/1 initiated by the Committee concerning compliance by Portugal ................................................................. 6
I. Organizational matters

1. The twelfth meeting of the Compliance Committee under the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) was held on 19 and 20 October 2015 in Geneva, Switzerland. The following members of the Committee attended: Mr. Pierre Chantrel; Ms. Ilona Drulyte; Ms. Diana Iskrev-Aldigo; Mr. Veit Koester (Chair); Mr. Oddvar Georg Lindholm; Mr. Vadim Ni; Mr. Ilya Trombitsky; and Mr. Serhiy Vykhryst. The consultations with Parties on 20 October were attended by representatives of Albania, Azerbaijan and Bosnia and Herzegovina, the latter as an observer. Romania and the Association of World Citizens attended the meeting as observers. The meeting was serviced by the United Nations Economic Commission for Europe (ECE) secretariat.

II. Adoption of the agenda

2. The Compliance Committee adopted its agenda as set out in document ECE/MP.WH.C.1/2015/3–EUDCE/1408105/1.10/2015/CC2/03.¹

III. Consideration of submissions, referrals and communications

3. On 24 November 2014, the secretariat had received a communication (ECE/MP.WH/CC/COM/1) from the non-governmental organization Earthjustice addressed to the Compliance Committee, alleging that Portugal was not in compliance with its obligations under articles 6 and 7 of the Protocol.² The communication had been received too late to be considered at the Committee’s tenth meeting (Geneva, 25 November 2014), at which the Committee had begun consideration of the question of Portugal’s compliance with its reporting obligation, in accordance with article 7 of the Protocol (see ECE/MP.WH.C.1/2014/2–EUDCE/1408105/1.10/2014/CC/06, paras. 6 and 17–21; see also paras. 12–14 below).

4. In an e-mail exchange prior to its eleventh meeting (Geneva, 24–25 March 2015), the Committee had determined on a preliminary basis that the communication was admissible. Pursuant to paragraph 20 of the Compliance Procedure set out in decision I/2 (ECE/MP.WH/2/Add.3–EUR/06/5069385/1/Add.3, annex), the communication had been forwarded to the Party concerned on 17 February 2015 with a deadline of 17 July 2015 for the Party to submit any written explanations or statements clarifying the matter referred to in the communication and describing any response that might have been made in the meantime. As of 19 October 2015, the Party had not submitted any explanations or statements.

5. At its eleventh meeting, the Committee had noted that the legal issue in the case it had initiated concerning possible non-compliance by Portugal with its reporting obligations was the same as that raised in communication ECE/MP.WH/CC/COM/1. At that same meeting, it had also prepared draft findings with regard to the case it had initiated (see

---

¹ Information and documentation on this meeting, including a list of participants, is available on a dedicated web page of the Committee’s website (http://www.unece.org/env/water/12th_compliance_committee_2015.html#/).

² Information on this communication, including relevant documentation, is available from http://www.unece.org/environmental/protocol-on-water-and-health/cc/communications/ecempwhccom1.html.
paras. 9–11 below). As the Committee considered that the allegations of the communication would be addressed within the case it had initiated, it agreed to close its consideration of the communication.

IV. Relevant developments since the eleventh meeting of the Compliance Committee

6. The secretariat informed the Committee about the outcomes of the eighth meeting of the Task Force on Target Setting and Reporting (Geneva, 2 July 2015). The Task Force had considered that the experience and knowledge gathered in different countries from applying the Guidelines on the Setting of Targets, Evaluation of Progress and Reporting should be made available to all Parties to the Protocol and other States considering accession in the form of a collection of good practices and lessons learned. The draft version of the document would be discussed at the workshop on collecting good practices on target setting and reporting (Geneva, 29 February–1 March 2016), and subsequently finalized for consideration at the ninth meeting of the Working Group on Water and Health (Geneva, 29–30 June 2016). It was expected that a finalized draft would be submitted to the Meeting of the Parties to the Protocol for adoption at its fourth session (Bern, 14–16 November 2016). The Committee expressed its readiness to be involved in the exercise at its different stages.

7. The Chair reported on the outcomes of the third meeting of the informal network of the chairs of compliance and implementation bodies under the ECE multilateral environmental agreements (Geneva, 29 June 2015), focusing on the discussion regarding the transboundary aspects of the agreements. The Committee considered that analysing the transboundary dimension of the Protocol was particularly important for facilitating the accession of a number of countries in the Caucasus and Central Asia. It agreed that its legal experts would analyse the relevant provisions of the Protocol and present the outcomes at the next Committee meeting. Based on that analysis, the Committee would prepare an informal note on the transboundary dimension of the Protocol. The possibility of sharing such an informal note with the Implementation Committee of the Water Convention at a later stage was also discussed.

V. Implementation of and compliance with the reporting requirements

8. At its tenth meeting, the Committee had discussed different possibilities to address the failure of some Parties to comply with their reporting requirements under the Protocol. It had concluded that, based on paragraph 11 (c) read in conjunction with paragraph 12 of the Compliance Procedure, it had the competence to not only examine general issues of compliance but also to take appropriate action in case of possible non-compliance by a specific Party with its obligation to report (see ECE/MP.WH/C.1/2014/2–EUDCE/1408105/1.10/2014/CC/06, paras. 17–20).

9. Accordingly, the Committee had decided to initiate a case (ECE/MP.WH/CC/CI/1)\(^4\) regarding possible non-compliance by Portugal with its obligation to report under article 7, as that Party had failed to submit its summary report within the second reporting exercise — the only Party that had failed to do so (ibid., para. 21; see also sect. III above).

10. At its eleventh meeting, the Compliance Committee had prepared draft findings with regard to the case. In accordance with paragraph 32 of the annex to decision I/2, the draft findings were then forwarded for comments to the Party on 20 April 2015, with the invitation to provide comments by 15 May 2015. No comments had been received by the deadline.

11. The Committee proceeded to finalize its findings on 8 June 2015, with all Committee members giving their agreement by e-mail by 15 July 2015. The Committee confirmed the adoption of the findings and agreed that they would be annexed to the report of the present meeting.

12. The Committee also discussed an informal note prepared by a Committee member on the interpretation of legal obligations under articles 6 and 7 of the Protocol regarding, inter alia, the scope of reporting and the possibility for the Committee to address the failure of Parties to comply with the reporting requirements under the Protocol. The secretariat was entrusted with reviewing the note and submitting it to the twelfth meeting of the Committee as a background note for the preparation of a draft decision on general legal obligations.

VI. Compliance with the obligation to set targets and target dates

13. The Committee agreed that a decision on general issues of compliance would be prepared for the Meeting of the Parties at its fourth session. Issues to be particularly addressed included compliance by Parties to the Protocol that were members of the European Union, the timeline for submitting summary reports and the modalities for the communication of targets set under the Protocol to the joint secretariat.

VII. Report of the Committee to the Meeting of the Parties at its fourth session

14. The Committee agreed on the distribution of tasks for the preparation of its report to the Meeting of the Parties to the Protocol at its fourth session, and outlined a preliminary table of contents for the report. The Committee also agreed on the timeline and the modalities for the preparatory work. The deadline for Committee members to submit individual inputs for the report to the secretariat was 15 May 2016. In that regard, the secretariat was requested to forward the incoming national summary reports to the Committee members as soon as possible. The Committee decided that it would not consider any national summary reports submitted later than 1 May 2016. The preliminary outcomes of the analysis of the report would be presented at the ninth meeting of the Working Group on Water and Health.

VIII. Consultation with Parties to facilitate implementation of the Protocol

15. In accordance with its decision at its tenth meeting, the Committee had invited Albania, Azerbaijan and Croatia to engage in a Consultation Process. Taking into account the request for assistance submitted to the secretariat by Bosnia and Herzegovina, that country had been invited to join the Process as an observer.

16. Albania and Azerbaijan had accepted the invitation to engage in the Consultation Process and Bosnia and Herzegovina had agreed to participate as an observer. No response had been received from Croatia.

17. The Committee made its internal arrangements on 19 October and consultations with Parties took place on 20 October. Consultations were carried out as an open process, with country presentations, follow-up questions and discussion by the Committee. The advice provided by the Committee on a provisional basis at the end of the consultations to each of the two Parties and to the observer was positively received. The Committee requested the secretariat to finalize the advice, to send it to the countries in a letter on behalf of the Committee and to subsequently make the advice publicly available.

IX. Calendar of future meetings

18. The Committee agreed to hold its thirteenth meeting in Geneva on 27 and 28 June 2016, with the understanding that the meeting might be reduced to one day depending on the expected workload.

X. Financial situation

19. The secretariat informed the Committee that there were no funds available to support the Committee’s activities and asked for suggestions on possible sources of financing. A Committee member suggested further exploring possibilities with Norway for financing the Committee’s activities.

XI. Adoption of the report

20. The Committee adopted its report by electronic means after the meeting.
Annex

Findings and recommendations with regard to case ECE/MP.WH/CC/CI/1 initiated by the Committee concerning compliance by Portugal

Adopted by the Compliance Committee on 15 July 2015

I. Introduction

1. At its tenth meeting (Geneva, 25 November 2014), the Compliance Committee under the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes agreed that, based on paragraph 11 (c) read in conjunction with paragraph 12 of the Compliance Procedure set out in the annex to decision I/2 of the Meeting of the Parties to the Protocol (ECE/MP.WH/2/Add.3–EUR/06/5069385/1/Add.3), the Committee had the competence not only to examine general issues of compliance, but also to take appropriate action in case of possible non-compliance by a specific Party with the obligation to report under the Protocol.

2. Accordingly, the Committee decided to initiate a case regarding possible non-compliance by Portugal with its obligation to report under article 7 of the Protocol.

3. The Committee prepared draft findings at its eleventh meeting (Geneva, 24–25 March 2015). In accordance with paragraph 32 of the annex to decision I/2, the draft findings were then forwarded for comments to the Party concerned on 20 April 2015. The Party was invited to provide comments by 15 May 2015.

4. The Party concerned did not provide any comments by the deadline.

5. The Committee proceeded to finalize its findings on 8 June 2015, with all Committee members giving their agreement by e-mail by 15 July 2015. The Committee adopted its findings and agreed that they should be annexed to the report of its twelfth meeting (Geneva, 19–20 October 2015). It requested the secretariat to send the findings to the Party concerned.

6. In addition, on 24 November 2014, the secretariat had received communication ECE/MP.WH/CC/COM/1 from the non-governmental organization Earthjustice addressed to the Committee, alleging that the Party concerned was not in compliance with its obligations under articles 6 and 7 of the Protocol, thereby undermining the capacity of the Party concerned, as well as opportunities for the public and the international community to contribute to achieving the substantive goals of the Party concerned to improve water management, protect water ecosystems and control water-related disease.

7. Specifically, the communicant alleged that the Party concerned failed to comply with articles 6 and 7 of the Protocol by not submitting its summary report within the second reporting exercise under the Protocol.

8. By means of e-mail consultations prior to its eleventh meeting, the Committee determined on a preliminary basis that the communication was admissible.

9. Pursuant to paragraphs 20 and 21 of the annex to decision I/2, the communication was forwarded to the Party concerned on 17 February 2015 and given a deadline of 17 July
2015 to submit any written explanations or statements clarifying the matter referred to in
the communication and describing any response that it may have made in the meantime.

II. Summary of facts, evidence and issues

A. Facts

10. The Meeting of the Parties to the Protocol on Water and Health, at its second session
(Bucharest, 23–25 November 2010), having considered the outcomes of the first reporting
exercise, adopted the guidelines and template for summary reports in accordance with
article 7 of the Protocol (ECE/MP.WH/2010/L.5–EUDHP/1003944/4.2/1/7) and
recognized the strategic importance of the summary reports for assessing progress in the
implementation of the Protocol. The Meeting of the Parties requested Parties to the Protocol
and other States to follow the guidelines and template in the following reporting cycle for
the third session of the Meeting of the Parties. The deadline for submission of summary
reports was 210 days prior to the following session of the Meeting of the Parties, i.e. 29
April 2013.

11. At the fifth meeting of the Working Group on Water and Health (Geneva,
11–12 October 2012), the secretariat informed the delegates of the timeline for the second
reporting exercise.

12. Subsequently, a letter from the secretariat inviting Parties to submit their summary
reports of the data collected and evaluated and indicating the deadline for submission was
sent on 13 December 2012.

13. At its sixth meeting (Geneva, 3–4 July 2013), the Working Group invited Parties
that had not yet submitted their summary reports to do so as soon as possible.

14. In its report to the third session of the Meeting of the Parties (Oslo,
25–27 November 2013), the Compliance Committee noted that the concerned Party, among
a number of other Parties, had failed to report in the second reporting exercise. Based on
the recommendation of the Committee, the Meeting of the Parties adopted decision III/1 on
general issues of compliance, in which it requested those Parties that had failed to submit
their national implementation reports to submit their reports to the secretariat by
28 February 2014, inter alia, for forwarding to the Committee.

15. On 20 May 2014, a letter from the secretariat was addressed to the official focal
point of the Party concerned inviting the country to submit its national report by 20 August
2014 or to furnish necessary information about the matter to the secretariat.

16. Taking into account the holiday season, an e-mail was sent by the secretariat to the
focal point of the Party concerned on 18 July 2014 extending the deadline until
15 September 2014.

17. A reminder e-mail was sent by the secretariat on 5 August 2014. A response by the
Party concerned on 17 September 2014 indicated that, due to a high workload, the Party
would not be able to submit its summary report within the second reporting exercise.

---

a This section summarizes only the main facts, evidence and issues considered to be relevant to the
question of compliance, as considered by the Committee.

b See ECE/MP.WH/4–EUDHP/1003944/4.2/1/06, para. 52 (a) and (b).


18. At the time of drafting these findings and recommendations, the Party concerned had still not submitted its summary report to the secretariat.

B. Substantive issues

19. Further to the Committee’s determination at its tenth meeting that it had the competence to take appropriate action in case of possible non-compliance by a specific Party with its reporting obligations (see para. 1 above), the Committee decided to initiate a case regarding possible non-compliance by Portugal with its obligation to report under the Protocol.

20. In order to define a procedure for the Committee to address the failure of Parties to report, the Committee decided to apply, mutatis mutandis, the relevant rules of the Compliance Procedure, specifically the deadline for a reply of three months indicated in paragraph 14 and the principles set out in paragraphs 20–22 and 30–32, taking into account that any procedure should be governed by the spirit of the compliance mechanism under the Protocol.

21. The Committee asked the secretariat to proceed in accordance with its decision, informing the Party that the Committee expected to deliberate the case and proceed with drafting findings, measures and recommendations, as appropriate, at its eleventh meeting.

22. The letter from the secretariat to the focal point of the Party concerned was sent on 19 December 2014, inviting the Party to submit any reply, written explanations or statements clarifying the matter, as well as supporting information, to the secretariat within three months. No reply was received within the specified deadline.

23. In the light of the above considerations, the substantive issue the Committee had to consider was whether the failure of the Party to submit its summary report within the second reporting exercise constituted non-compliance with article 7, paragraph 5, of the Protocol.

24. At its eleventh meeting, the Committee noted that the legal issue to be considered by the Committee was the same issue raised in communication ECE/MP.WH/CC/COM/1. Since the deadline for the Party concerned to respond to the communication had not yet passed, the Committee limited its considerations to the present case.

III. Consideration and evaluation by the Committee


26. Article 7, paragraph 5, of the Protocol requires that “each Party shall provide to the secretariat …, for circulation to the other Parties, a summary report of the data collected and evaluated and the assessment of the progress achieved. Such reports shall be in accordance with guidelines established by the Meeting of the Parties”. The Committee considers that the Protocol establishes a clear obligation to achieve a result which is the obligation of Parties to submit their summary reports to the secretariat. The Committee observes that, although it is not its task to evaluate provisions of the Protocol, reporting is a key instrument for assessing the implementation of the Protocol by Parties themselves and by the Meeting of the Parties.

27. At its second session, the Meeting of the Parties adopted the guidelines and template for summary reports in accordance with article 7 of the Protocol (ECE/MP.WH/2010/L.5–EUDHP/1003944/4.2/1/7), and requested Parties to the Protocol and other States to follow
the guidelines and template in the following reporting cycle for the third session of the Meeting of the Parties. The guidelines “require” Parties to submit the summary reports 210 days prior to the following session of the Meeting of the Parties, i.e., in the case of the second reporting exercise, by 29 April 2013.

28. In the view of the Committee, it is obvious that the clear legal obligation of article 7, paragraph 5, of the Protocol to submit summary reports cannot become operational without supplementary decisions by the Meeting of the Parties, as it does not contain any provisions on the submission deadline. Hence, such decisions are presupposed following also from the principle of effectiveness in treaty interpretation.

29. Although the guidelines referred to in paragraph 27 are generally speaking formulated in a non-obligatory language, the particular provision relating to the submission deadline contains a requirement. Since that requirement does not entail any additional substantive obligations of the Parties, but may be considered as a procedural decision having been made only to operationalize a clear legal obligation reflected in a provision of the Protocol, the Committee considers that the decision is legally binding upon the Parties.

30. The above considerations of the Committee are confirmed by the decisions of the Meeting of the Parties at its second and third sessions, recognizing that failure to submit summary reports or to submit reports within the specified deadlines constitutes non-compliance with the article 7 of the Protocol, since those decisions may be considered as agreement by Parties to interpret the relevant provision of the Protocol in that manner. The Committee refers in that respect to the article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties which establishes that when interpreting a treaty “[t]here shall be taken into account, together with the context[…] any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” The Committee considers that the above mentioned decisions of the Meeting of the Parties may be considered to constitute an agreement of the Parties to interpret the provisions of the Protocol.

31. In the opinion of the Committee there was a clear legal obligation for Parties to submit summary reports and to do so within the deadline established by the Meeting of the Parties.

IV. Conclusions and recommendations

32. 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

33. The Committee finds the Party concerned has failed to comply with article 7, paragraph 5, of the Protocol since it has not submitted its summary report within the second reporting exercise.

B. Recommendations

34. The Committee, pursuant to paragraph 34 (d) of the annex to decision I/2 of the Meeting of the Parties, issues a caution to the Party concerned.

35. The caution includes a warning to the effect that the Committee recommends to the Meeting of the Parties to issue a declaration of non-compliance pursuant to paragraph
35 (d) of the annex to decision I/2 if the Party concerned has not submitted its summary
report within the second reporting exercise prior to the fourth session of the Meeting of the
Parties to the Protocol (Bern, 14–16 November 2016).