

Task Force on Access to Justice

Ninth meeting

Geneva, 14–15 June 2016

Items 2 (a) of the provisional agenda

Update on legislative, policy and case-law developments

RECENT FINDINGS OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE OF A SYSTEMIC NATURE CONCERNING ACCESS TO JUSTICE

Background paper¹

Prepared by the secretariat

This background paper was prepared on the basis of recent relevant findings and reports of the Aarhus Convention Compliance Committee² (hereinafter – the Committee). It outlines systemic issues with regard to access to justice relevant to the agenda of the ninth meeting of the Task Force on Access to Justice under the Aarhus Convention.

Delegates are invited to consult this document in order to gain an overview of the challenges encountered by the Parties in the implementation of the Aarhus Convention and to discuss further needs to be addressed under auspices of the Task Force on Access to Justice.

¹ The document was not formally edited.

² Available from <http://www.unece.org/env/pp/cc.html>

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I. GENERAL COMPLIANCE ISSUES RELATED TO ACCESS TO JUSTICE CONSIDERED BY THE MEETING OF THE PARTIES TO THE CONVENTION AT ITS FIFTH SESSION³

Label under national law not decisive with respect to access to justice

88. In the same vein as set out in the Committee's report to the fourth session, when examining access to justice with respect to different types of acts (for example, strategic environmental assessment statements, spatial plans or construction and exploitation permits), whether a decision should be challengeable under article 9 is determined by the legal functions and effects of that decision, not by its label under national law (ACCC/C/2011/58).

Access to justice regarding tiered decision-making

89. If activities listed in annex I to the Convention are permitted by a number of tiered decisions, it may not be necessary to allow members of the public concerned to challenge each such decision separately in an independent court procedure. Accordingly, if one or more of the decisions have a preliminary character and are in some way integrated into a subsequent decision, a Party may remain in compliance with article 9, paragraph 2, of the Convention if the previous decision is subject to judicial review upon appeal of the final decision. Nevertheless, the system of judicial review as a whole must comply with the requirements of article 9, paragraph 4, of the Convention also with respect to each of the tiered decisions (ACCC/C/2011/58).

Access to justice regarding EIA screening decisions or other determinations under article 6, paragraph 1 (b)

90. Article 9, paragraph 2, of the Convention requires Parties to provide the public with access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of article 6. This necessarily also includes decisions and determinations subject to article 6, paragraph 1 (b). The Committee has found that the outcome of an EIA screening decision is a determination under article 6, paragraph 1 (b). These determinations are thus subject to the requirements of article 9, paragraph 2, of the Convention and members of the public concerned should have access to a review procedure under article 9, paragraph 2, to challenge the legality of the outcome of the EIA screening process (ACCC/C/2010/45 and ACCC/C/2011/60, ACCC/C/2010/50).

Standing under article 9, paragraph 2

91. While Parties retain some discretion in defining the scope of the public entitled to standing, this determination must be consistent "with the objective of giving the public concerned wide access to justice within the scope of the Convention". Hence, in exercising their discretion, Parties

³ The session took place in Maastricht, the Netherlands on 30 June and 1 July 2014. See document ECE/MP.PP/2014/9 available from http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_II_documents/ECE_MP.PP_2014_9_ENG.pdf

may not interpret these criteria in a way that significantly narrows standing and runs counter to their general obligations under articles 1, 3 and 9 of the Convention (ACCC/C/2010/50, recalling its findings on ACCC/C/2005/11⁴).

92. In defining standing under article 9, paragraph 2, the Convention provides guidance to the Parties on how to interpret the “sufficient interest” of NGOs. Hence, the interest of NGOs meeting the requirements of article 2, paragraph 5, of the Convention should be deemed sufficient and should be deemed to have rights capable of being impaired. Moreover, the rights of such NGOs under article 9, paragraph 2, of the Convention are not limited to the EIA procedure only, but apply to all stages of the decision-making to permit an activity subject to article 6. A requirement that an NGO must have exercised its right to participate during the EIA procedure or other procedures prior to the decision/authorization in order to have standing to access review procedures regarding the final decisions permitting proposed activities, such as building permits, fails to comply with article 9, paragraph 2, of the Convention (ACCC/C/2010/50).

93. The Committee has noted that if the courts systematically interpret the relevant legislation in such a way that the “rights” that have been “created, nullified or infringed” by the administrative procedure refer only to property rights and do not include any other possible rights or interests of the public relating to the environment (including those of tenants), this may hinder wide access to justice and run counter to the objectives of article 9, paragraph 2, of the Convention (ACCC/C/2010/50).

Standing under article 9, paragraph 3

94. Article 9, paragraph 3, applies to a broad range of acts or omissions, while at the same time it allows more flexibility — as compared to article 9, paragraphs 1 and 2 — to the Parties in implementing it. The Convention allows Parties to set criteria for standing and access to environmental enforcement proceedings, but any such criteria should be consistent with the objectives of the Convention to ensure wide access to justice.

95. The Committee has considered the criteria for standing under article 9, paragraph 3, in a number of cases in this inter-sessional period (ACCC/C/2008/31, ACCC/C/2008/32 (Part I), ACCC/C/2010/48, ACCC/C/2010/50, ACCC/C/2011/58, ACCC/C/2011/63). In many of those findings, it recalled its earlier finding in communication ACCC/C/2005/11 where it had noted that:

The Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act [sic] or omissions that contravene national law relating to the environment.

Accordingly the phrase ‘the criteria, if any, laid down in national law’ indicates a self-restraint on the Parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception.⁵

96. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e., the extent to which national law effectively blocks access to justice for members of the public in general, including environmental NGOs, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation article 9, paragraph 3, should be read in

⁴ ECE/MP.PP/C.1/2006/4/Add.2

⁵ Ibid., paras. 35 and 36.

conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (ACCC/C/2010/48).

97. In one case, the Committee considered the situation of a standing requirement which requires the person seeking standing to be “directly and individually concerned”, where to be “individually concerned” is interpreted to require that the legal situation of that person is affected because of a factual situation that differentiates him or her from all other persons. Under this requirement, persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation, which means that in effect no member of the public would ever be able to challenge a decision or a regulation relating to environment or health issues. The Committee held that it was clear that such an interpretation was too strict to meet the criteria of article 9, paragraph 3, of the Convention (ACCC/C/2008/32 (Part I)).

II. FINDINGS OF A SYSTEMIC NATURE ADOPTED BY THE COMPLIANCE COMMITTEE SINCE THE FIFTH SESSION OF THE MEETING OF THE PARTIES TO THE CONVENTION⁶

Communication / Issue	Consideration and evaluation by the Committee	Findings of the Committee
<p>ACCC/C/2012/69 (Document ECE/MP.PP/C.1/2015/3)</p> <p><i>Timeliness of court procedures for access to information and effective remedies</i></p>	<p>Article 9, paragraph 1, of the Convention requires Parties to ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused in part or in full, inadequately answered, etc., has access to a review procedure before a court of law or another independent and impartial body established by law. Article 9, paragraph 4, requires that the procedures referred to in article 9, paragraphs 1, 2 and 3, be, inter alia, timely.</p> <p>(See para. 84 of document ECE/MP.PP/C.1/2016/3)</p> <p>In the view of the Committee, the jurisprudence of the European Court of Human Rights deals with cases of greater variety than access to environmental information cases. For that reason the Committee does not find the European Court of Human Rights jurisprudence to be directly applicable when considering allegations under article 9, paragraph 4, in relation to article 9, paragraph 1, of the Convention. However, some of the criteria used by the European Court of Human Rights, such as the complexity of the factual or legal issues raised by the case or the issue at stake for the applicant, are relevant here also. In the light of the first of these criteria, the Committee considers that an access to environmental information case would generally be</p>	<p>The Committee finds that the Party concerned has failed to ensure that the review procedures for information requests referred to in article 9, paragraph 1, are timely and provide an effective remedy, as required by article 9, paragraph 4.</p> <p>(See para. 92 (d) of document ECE/MP.PP/C.1/2016/3)</p>

⁶ All findings on individual communications are available from <http://www.unece.org/env/pp/cc/com.html>

Communication / Issue	Consideration and evaluation by the Committee	Findings of the Committee
	<p>neither factually nor legally complex. The Committee notes that the National Agency for Mineral Resources did not lodge a defence to the first instance court proceedings regarding access to mining-related information — i.e., the factual and legal complexity of the case apparently did not motivate the defendant to make a submission before the court. As for the second criterion, in both of the communicants' court proceedings subject to the present communication the requested information could have helped the applicants to more effectively participate in the repeat procedure for EIA of the Rosia Montana mining project. Therefore, the issues at stake required timely final decisions.</p> <p>... The Committee notes that in at least one instance the information requested was relevant to an ongoing environmental decision-making procedure subject to the Convention. Since the court procedure did not provide access to the requested information within a time frame that would enable that information to be used in the ongoing environmental decision-making procedure, the Committee finds that the court procedure for access to the requested information was neither timely nor provided an effective remedy as required under article 9, paragraph 4, of the Convention.</p> <p><i>(See paras. 87-88 of document ECE/MP.PP/C.1/2016/3)</i></p> <p>Thus, in the light of the duration of the communicants' eight cited court procedures concerning access to environmental information, and bearing in mind that the Party concerned did not provide any examples of access to environmental information court procedures that were completed in a considerably shorter time, the Committee finds that the Party concerned has failed to ensure that the review procedures for information requests referred to in article 9, paragraph 1, are timely and provide an effective remedy, as required by article 9, paragraph 4, of the Convention.</p> <p><i>(See para. 90 of document ECE/MP.PP/C.1/2016/3)</i></p>	

Communication / Issue	Consideration and evaluation by the Committee	Findings of the Committee
<p>ACCC/C/2012/76 (Document ECE/MP.PP/C.1/2016/3)</p> <p><i>Adequate and effective remedies to prevent environmental damage that could be caused by an activity having been subject to environmental impact assessment (EIA)/strategic environmental assessment (SEA)</i></p>	<p>The Committee confirms that, as submitted by the communicant, the requirement in article 9, paragraph 4, of the Convention that injunctive relief and other remedies be “effective” includes, inter alia, an implicit requirement that those remedies should prevent irreversible damage to the environment.</p> <p>In this respect, it is important to note that the Party concerned is bound to guarantee access to justice in accordance with the objective set out in article 1 of the Convention, that is, in order to contribute to the right of every person to live in an environment adequate to his or her health and well-being...</p> <p>Given that the EIA/SEA decision is itself challenged in the main proceeding, this will require that the reviewing body, when considering the appeal against an order for preliminary enforcement, undertakes its own assessment as to whether there is any risk of damage to the environment should the activity proceed while the challenge to the EIA/SEA decision is still pending. This assessment must be carried out on the basis of all the facts and arguments before it, and taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm. (See paras.69-72 of document ECE/MP.PP/C.1/2015/3)</p> <p>... the above facts reveal the existence of a certain trend, condoned by the Party concerned: when considering an appeal of an order for preliminary enforcement of a challenged EIA/SEA decision, instead of reviewing the extent to which the criteria in article 60, paragraph 1, of the Administrative Procedure Code are met in the light of the proportionality principle (APC, art. 6) and the requirement to assess all the facts and arguments significant for the case (APC, art. 7), the courts rely heavily on the conclusions contained in the EIA/SEA decision, despite the fact that the legality of that decision is being challenged in the main proceeding. The Committee considers that the courts’ approach is not in accordance with the requirement in article 9, paragraph 4, of the Convention to provide adequate and effective remedies.</p>	<p>The Committee finds that, with respect to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, a practice in which the courts rely on the conclusions of the contested EIA/SEA decision rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.</p> <p>(See para. 82 of document ECE/MP.PP/C.1/2016/3)</p>

Communication / Issue	Consideration and evaluation by the Committee	Findings of the Committee
	<p>... the Committee finds that a practice in which the review bodies rely on the conclusions of the contested EIA/SEA decision, rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.</p> <p><i>(See paras.76-77 of document ECE/MP.PP/C.1/2015/3)</i></p>	
<p>ACCC/C/2012/77 <i>(Document ECE/MP.PP/C.1/2015/3)</i></p> <p><i>Costs and prohibitively expensive procedure</i></p>	<p>In determining whether the cost of judicial proceedings is prohibitively expensive the costs borne by the party concerned as a whole must be assessed. Moreover, such an assessment should involve both objective and subjective elements. In addition, the Committee has previously noted with respect to costs that “fairness” in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.</p> <p><i>(See para.72 of document ECE/MP.PP/C.1/2015/3)</i></p> <p>The Committee takes this opportunity to point out that the Party concerned, being a Party to the Convention, is bound by the Convention under international law and that the nature of its national legal system or lack of incorporation of the Convention in national law are not arguments that it can successfully avail itself of as justification for improper implementation of the Convention.</p> <p><i>(See para.79 of document ECE/MP.PP/C.1/2015/3)</i></p>	<p>The Committee finds the Party concerned has failed to comply with article 9, paragraph 4, of the Convention since the cost order awarded against the communicant in this case made the procedure prohibitively expensive.</p> <p><i>(See para. 81 of Document ECE/MP.PP/C.1/2015/3)</i></p>