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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

Forty-third meeting
Geneva, 17–20 December 2013
Item 7 (a) of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2011/62 concerning compliance by Armenia*

Adopted by the Compliance Committee on 28 June 2013

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* The present document was submitted late owing to the Committee's need for more time to finalize the agenda for its forty-third meeting.

I. Introduction

1. On 6 September 2011, the non-governmental organization (NGO) Ecoera (the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Armenia had failed to comply with its obligations under article 9, paragraphs 2, 3 and 4, of the Convention.

2. The communication concerns compliance by the Party concerned related to subsequent developments on matters addressed by the Committee in its findings on communication ACCC/C/2009/43 (ECE/MP.PP/2011/11/Add.1), endorsed by the Meeting of the Parties to the Convention at its fourth session (Chisinau, 29 June–1 July 2011) through decision IV/9a, (see ECE/MP.PP/2011/2/Add.1). The communication alleges that, following the facts described in that communication, the Party concerned now failed to comply with article 9, paragraphs 2, 3 and 4, of the Convention, because recent jurisprudence of the Cassation Court has reversed its earlier jurisprudence with respect to the standing of NGOs in environmental matters.

3. At its thirty-fourth meeting (Geneva, 20–23 September 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 20 October 2011. On the same date, a letter was sent to the communicant. Both parties were invited to answer questions concerning the communication.

5. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee agreed to discuss the content of the communication at its thirty-eighth meeting (Geneva, 25–28 September 2012).

6. On 30 March 2012, the communicant replied to the Committee's questions. On 4 April 2012, the Party concerned sent its response to the communication.

7. On 25 June 2012, the communicant sent additional comments to the Committee. On 20 July 2012, the Party concerned responded to those comments.

8. The Committee discussed the communication at its thirty-eight meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to both the communicant and the Party concerned and invited them to respond in writing after the meeting.

9. The Party concerned and the communicant submitted their response on 26 and 29 October 2012, respectively.

10. The Committee prepared draft findings at its fortieth meeting (Geneva, 25–28 March 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 2 May 2013. Both were invited to provide comments by 30 May 2013.

11. The communicant and the Party concerned provided comments on 30 May and 31 May 2013, respectively.

12. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal

pre-session document to its forty-third meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[1]

A. Legal framework

13. The Constitution of Armenia (art. 6) provides that international treaties have direct application in the Party concerned, with the exception of those treaty provisions which require further regulatory action at the domestic level to be implemented.

14. The Administrative Procedure Code (art. 3, para. 1) provides that natural and legal persons have the right to bring a case to the administrative court, if they consider that their rights and freedoms, as defined in the Constitution, the international treaties, laws and other acts, have been or may be directly violated by acts or omissions of local authorities or their officials.

15. The Law on NGOs (art. 15, para. 1) provides that an organization has the right, among others, to represent and defend its rights and legal interests and those of its members, before other organizations, the courts, the state and local authorities.

16. The Civil Code (art. 52) provides that a legal person may have civil rights corresponding to the purposes of its activity, as defined in its founding document, and bear the duties related to this activity. It also provides that the rights of a legal person may be limited only in cases and according to the procedure provided by law; and that the legal person has the right to challenge such a decision limiting its rights.

17. Further to amendments to the Constitution in 2005 and to the Judicial Code in 2007, the Court of Cassation has the mandate, as the highest instance in the judicial system of the Party concerned, to ensure the uniform application of the laws in the country.

B. Facts

18. The communication relates to the issuance to and renewal of licences for a developer for the exploitation of copper and molybdenum deposits in the Lori region of Armenia (see also findings on communication ACCC/C/2009/43).

19. The communicant, together with Transparency International Anti-corruption Center and the Helsinki Citizens' Assembly Vanadzor Office, challenged the legality of several administrative acts relating to that project in the administrative court. The applicants alleged that those acts were issued in contravention of several provisions of Armenian legislation relating to the environmental impact assessment (EIA) procedure, land, water, mineral resources, concessions, flora and fauna. In their application, the communicant referred also to non-compliance with the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and the Aarhus Convention (in particular, article 6, paragraphs 2, 4, 8, 9 and 10).

20. On 9 July 2009, the administrative court rejected the application as inadmissible on the grounds that "[a] person cannot apply to the court with any or an abstract demand, but may make a claim only if he/she is a person concerned, i.e., if the administrative body has

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

violated his/her public subjective rights."[2] On 28 July 2009, the applicants appealed against this decision, but the appeal court confirmed the first instance decision.

21. On 7 August 2009, the communicant and Transparency International submitted a joint complaint with the Court of Cassation. On 9 September 2009, the Court of Cassation determined the complaint admissible and, on 30 October 2009, the Court decided to refer the case back to the administrative court to consider the merits of the case only with regard to one of the applicants, Ecoera (the present communicant).

22. Specifically, the Court of Cassation noted that:

> the public environmental organization Ecoera, a properly registered non-governmental organization established under the Law … on Public Organizations, meets the criteria laid down by national legislation and engages in issues relating to environmental protection on the basis of the aims and objectives enshrined in its Articles of Association. On the basis of the above, the Court of Cassation finds that in this case, as a public environmental organization, Ecoera falls within the definition of the "public concerned" under the Aarhus Convention and consequently, in connection with its statutory aims, enjoys the right to legal remedy in matters relating to environmental protection.[3]

23. On 24 March 2010, the administrative court again rejected Ecoera's application on the grounds that Ecoera could not question environmental decisions issued by institutions. Specifically, the Court, referring to the Administrative Procedure Code (art. 3, para. 1), stated that:

> administrative justice is specific, i.e. a person may not seek court protection with any or abstract demands, but rather, may apply to court only when it is an interested party, i.e. a party the public subjective rights of which have been violated by an administrative body. ... Persons may not seek court review of any administration, which is not related directly to them, simply on the ground that they have a general interest in the legitimate conduct of administrative bodies.[4]

24. On 26 April 2010, the communicant challenged this decision before the Court of Cassation. On 1 April 2011, the Court of Cassation dismissed the communicant's application and this time it upheld the ruling of the Administrative Court of 24 March 2010. It thus issued a reverse decision to the one of 30 October 2009: it rejected the complaint and held that only entities the rights of which have been directly violated by an act, action or inaction, may challenge that act, action or inaction. The Court of Cassation in its analysis referred to the ruling of the Constitutional Court of 7 September 2010. The Constitutional Court, on the occasion of a different case, had examined the allegation that article 3 of the Administrative Procedure Code was unconstitutional, because article 19 of the Constitution

[2] See communication (6 September 2011), p. 3. The communication and other documentation submitted by the communicant and the Party concerned are available on a dedicated web page of the Committee's website (http://www.unece.org/env/pp/compliance/compliancecommittee/62tablearm.html).

[3] Translation provided by the communicant, see response from the communicant (20 March 2012), attachment (b) Decision of the Court of Cassation of 30 October 2009..

[4] Translation provided by the communicant, see response from the communicant (20 March 2012), attachment (c) Decision of the Administrative Court of 24 March 2010. The Party concerned explains that "any or abstract" means that an organization may not bring an abstract case to the court and may access the courts as a concerned party. The communicant understands that "any or abstract" means that "the Administrative Court interpreted the law in a manner that does not provide any access to justice public organizations, even when their statutory goals include the protection of the environment".

envisaged a wider scope of persons that might have standing to apply to the court and that standing should not be limited only to persons whose rights had been directly violated. The Constitutional Court found that the law was in conformity with the Constitution.

C. Substantive issues

Access to justice — article 9

25. The communicant alleges that, by the determination of the supreme courts of the Party concerned (Court of Cassation and Constitutional Court) that public associations do not have standing to bring cases before the courts in matters concerning activities within the scope of article 6, the Party concerned fails to comply with article 9, paragraph 2, of the Convention. The communicant also alleges that, by the failure of the courts of the Party concerned to grant standing to public associations in matters that in general relate to environmental protection, the Party concerned fails to comply with article 9, paragraph 3, of the Convention. The communicant stresses that the Court of Cassation by its decision of 1 April 2011 effectively reversed its ruling of 30 October 2009. The communicant alleges that the legal framework of the Party concerned is not clear, because the Administrative Procedure Code, the Law on NGOs and other laws do not clearly define the status of the "public concerned". The communicant finally alleges that by taking up to one year for the Court of Cassation to deliver its decision, the Party concerned fails to provide for timely procedures and fails to comply with article 9, paragraph 4, of the Convention.

26. The Party concerned contends that the law and jurisprudence lead to the conclusion that access to justice was granted to the communicant and the fact that the communicant is not satisfied with the Court's consideration is not relevant. The Party concerned points in particular to the decision of the Court of Cassation of 30 October 2009, which determined that the communicant was a "concerned" organization in the meaning of the Convention.

27. During the discussion of the communication with the Committee at its thirty-eighth meeting, the Party concerned submitted that, as the Court of Cassation decision of 30 October 2009 and the Constitutional Court decision of 7 September 2010 showcase, the legislation allows for a broad interpretation of the issue of "legal interest" to allow for NGO standing in accordance with the Convention. The Party concerned also noted that it could not explain the inconsistent interpretation by the supreme courts of the country. Therefore, in its view, there may be a need for some changes in the legislation to ensure proper implementation of the Convention provisions.

28. In addition, during the discussion of the communication at the Committee's thirty-eighth meeting, both the Party concerned and the communicant agreed that as the decision of the Constitutional Court and the first decision of the Court of Cassation demonstrate, current legislation can be applied in a way that the standards of the Convention are fully met; however, in order to avoid situations where a Court applies the law in a different way (as did, for example, the Court of Cassation in its second decision), they agreed that it would be useful to introduce legislative changes that do not leave room for a different interpretation.

D. Domestic remedies

29. The communicant has exhausted all domestic remedies.

III. Consideration and evaluation by the Committee

30. Armenia ratified the Convention on 1 August 2001. The Convention entered into force for Armenia on 30 October 2001.

31. The central issue of the communication is legal standing for NGOs in environmental matters. In its original communication, the communicant did not make a clear distinction in what constituted alleged non-compliance with article 9, paragraphs 2 and 3, of the Convention. More information was submitted to the Committee during the discussion on 25 September 2012 and subsequently by letter of the communicant dated 29 October 2012. In effect, the communicant also alleges non-compliance with article 9, paragraph 2, for acts it challenged, which did not relate to public participation procedures.

NGO standing to challenge decisions subject to article 6 — article 9, para. 2

32. The communicant alleges non-compliance with article 9, paragraph 2, of the Convention with respect to three decisions: (a) the EIA affirmative conclusion (BP-31) approved by the Ministry of Nature Protection on 3 April 2006; (b) the EIA affirmative conclusion (BP-135) approved by the Ministry on 7 November 2006; and (c) the licence agreement number 316 between the Armenia Copper Programme and the Republic of Armenia Ministry of Trade and Economic Development and Ministry of Nature Protection on Subsoil Use for Mining Purposes of 9 October 2007.

33. The Committee has already reviewed the applicability of article 6 in the decisions challenged by the communicant before the courts of the Party concerned on the occasion of its findings on communication ACCC/C/2009/43 (see ECE/MP.PP/2011/11/Add.1, paras. 57–62). It then considered that the three decisions mentioned above are decisions within the scope of article 6 of the Convention.[5] The Committee, thus, notes that article 9, paragraph 2, of the Convention applies.

34. The Committee notes that the communicant is an NGO under article 2, paragraph 5, of the Convention and as such it should be granted access to review procedures under article 9, paragraph 2. Hence, the interpretation of the law of the Party concerned by the Court of Cassation in its decision of 30 October 2009 was in accordance with the Convention.

35. It is not clear to the Committee why, after the Court of Cassation issued its decision on admissibility on 30 October 2009 and referred the case back to the administrative court, the administrative court decided again on the admissibility and did not examine the merits.

36. In its decision of 1 April 2011, the Court of Cassation issued a reverse decision to the one of 30 October 2009 and decided that the communicant, an environmental NGO, did not have standing to pursue the review of decisions that fall within article 6. The Committee finds that while the wording of the national legislation does not run counter to article 9, paragraph 2, the decision of the Court of Cassation of 1 April 2011, by declaring that the environmental NGO did not have standing, failed to meet the standards set by the Convention. Thus the Party concerned failed to comply with article 9, paragraph 2, of the Convention.

[5] The Committee's findings on ACCC/C/2009/43 refer to the License Agreement number 316 as dated 8 October 2007. The Committee understands that the agreement is the same and that there might have been an error in the correct date (8 or 9 October 2007) provided by the parties in their submissions.

NGO standing to challenge acts and omissions contravening national law relating to the environment — article 9, para. 3

37. Unlike article 9, paragraph 2, article 9, paragraph 3, of the Convention applies to a broader range of acts and omissions. Namely, this paragraph provides for the possibility of members of the public to review acts and omissions which allegedly contravene provisions of national law relating to the environment, and not only public participation provisions. In implementing paragraph 3, Parties are granted more flexibility in defining which environmental organizations have access to justice. The Committee has already considered implementation of article 9, paragraph 3, of the Convention (cf. findings on communications ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2); ACCC/C/2006/18 (Denmark) ECE/MP.PP/2008/5/Add.4; and ACCC/C/2010/48 (Austria) ECE/MP.PP/C.1/2012/4) and has in general determined that, while Parties are not obliged to establish a system of popular action in their national laws, Parties may not take the clause "where they meet the criteria, if any, laid down in its national law", as an excuse for maintaining or introducing criteria that effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment. However, in the present case, the allegations of the communicant with respect to article 9, paragraph 3, of the Convention, were not substantiated.

Timely procedures — article 9, para. 4

38. As regards the allegations of non-compliance with article 9, paragraph 4, of the Convention, on the grounds that procedures are not timely, the Committee considers that one year is not a particularly long time for a supreme court to deliver a decision in this case, and that the allegations were not sufficiently substantiated. Hence, the Committee does not find the Party concerned to be in non-compliance with article 9, paragraph 4, of the Convention, in this respect.

IV. Conclusions and recommendations

39. 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

40. The Committee finds that while the wording of the legislation of the Party concerned does not run counter to article 9, paragraph 2, of the Convention, the decision of the Court of Cassation of 1 April 2011, by declaring that the environmental NGO did not have standing, failed to meet the standards set by the Convention. Thus the Party concerned failed to comply with article 9, paragraph 2, of the Convention (see para. 36).

B. Recommendations

41. Pursuant to paragraph 35 of the annex to decision I/7, the Committee recommends the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, to recommend to the Party concerned that it:

(a) Review and clarify its legislation, including the law on NGOs and administrative procedures, so as to ensure compliance with article 9, paragraph 2, of the Convention with regard to standing;

(b) Take the measures necessary to raise awareness among the judiciary to promote implementation of domestic legislation in accordance with the Convention.

42. The Committee notes that the non-compliance of the Party concerned in this particular case is not due to a systemic error, but also that recent court practice raises concerns that could lead to misinterpretation.