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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

Twenty-third meeting

Geneva, 31 March–3 April 2009

Report of the Compliance Committee on its Twenty-third meeting

Addendum

**Findings with regard to communication ACCC/C/2007/21 concerning
compliance by the European Community**

Adopted by the Compliance Committee on 3 April 2009

Summary

These findings were prepared by the Compliance Committee in accordance with its mandate set out in paragraphs 13, 14 and 35 of the annex to decision I/7 of the Meeting of the Parties. They concern communication ACCC/C/2007/21 submitted by the Albanian non-governmental organization Civic Alliance for the Protection of the Bay of Vlora regarding compliance by the European Community with its obligations under the Convention in relation to the actions of the European Investment Bank with respect to access to information and public participation in the decision-making on the financing and construction of a thermal power plant in Vlora (Albania).

I. Background

1. On 14 August 2007, the Albanian non-governmental organization (NGO) Civic Alliance for the Protection of the Bay of Vlora (Albania) submitted a communication to the Committee alleging a failure by the European Community to comply with its obligations under article 6 of the Convention.
2. The communication alleged that the European Community, through the European Investment Bank (EIB), was not in compliance with the Convention's article 6 by virtue of its decision to finance the construction of a thermo-power plant (TPP) in Vlora, Albania, without ensuring proper public participation in the process. The communicant claimed that the project had not been carried out in accordance with the public participation requirements of the national legislation or those of the Convention, to which both the European Community and Albania were Parties.
3. The communication is related to communication ACCC/C/2005/12, submitted earlier by the same communicant and alleging non-compliance by Albania with the Convention, *inter alia*, in relation to decision-making with respect to the TPP in Vlora considered by the Committee in the period 2005–2007 (ECE/MP.PP/C.1/2007/4/Add.1).
4. Noting that at the time of its submission the communication did not contain any supporting documentation, the Committee requested additional information and clarification from the communicant regarding the alleged violations of the Convention in a letter dated 1 October 2007. In response to this letter, the communicant submitted a memorandum specifying that in its opinion the European Community had not been in compliance with article 4, paragraph 1, article 5, paragraph 3, and article 6 of the Convention.
5. At its eighteenth meeting (28–30 November 2007), the Committee determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned.
6. Notification of the communication was forwarded to the Party concerned on 19 December 2007 along with a number of questions put forward by the Committee. The Committee inquired, in particular, whether information the communicant had requested from EIB was considered by the Party concerned to be environmental information and whether the consent of a borrower would be needed to release information related to loan agreements. The Committee also inquired about any available review procedures for denials of information requests. The communication itself was forwarded on 14 January 2008.
7. Also on 19 December 2007, the secretariat forwarded to the communicant a number of questions posed by the Committee, *inter alia* with regard to more detailed information on the information request and to the timing of the events and decisions referred to in the communication.
8. The Party concerned requested an extension for its response by e-mail on 20 May 2008. It responded on 5 August 2008, stating that it would contend that the Community was not to be considered as having acted in breach of the Convention. The communicant replied in a letter dated 20 August 2008.
9. The Committee discussed the communication at its twenty-first meeting (17–19 September 2008). The meeting was attended by representatives of both the Party concerned and the communicant, who answered questions, clarified issues and presented information.

10. Having reviewed the arguments put forward by the Party concerned in its response and further discussed the issue with both parties, at the same meeting the Committee confirmed the admissibility of the communication, deeming the points raised by the Party to be of substance rather than related to admissibility.

11. The Committee deliberated on the communication at its twenty-second meeting and completed its preparation of draft findings through its electronic decision-making procedure in January 2009.

12. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded for comment to the Party concerned and to the communicant on 22 January 2009. Both were invited to provide any comments by 19 March 2009.

13. The Party concerned and the communicant provided comments on 18 February 2009 and 1 March 2009, respectively.

14. At its twenty-third meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received, including additional comments provided in writing by the communicant on the final day of the meeting. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues¹

15. The communication concerns the co-financing of the Vlora TPP project by EIB. The project is co-financed by the World Bank and the European Bank for Reconstruction and Development (EBRD). Both the World Bank and EBRD had also received complaints concerning the decision-making process leading to the loans by these institutions for the project. Independent review procedures have been or are being undertaken by the relevant bodies established by the World Bank and EBRD to examine whether they acted in conformity, inter alia, with their respective environmental policies and procedures. The Independent Recourse Mechanism established by EBRD published its “compliance review report relating to the Vlora Thermal Power Generation Project” on 17 April 2008. The compliance review expert came to the conclusion that “the aforesaid failure of the Bank to ensure full compliance with its obligations under Section II, paragraph 11, and Section III, paragraph 26, of the EBRD Environment Policy constitutes a material violation of the Environmental Policy warranting remedial changes to the Bank’s practices and procedures so as to avoid a recurrence of such or similar violations in the future but not one warranting any remedial changes in the scope or implementation of the Project”. The World Bank Inspection Panel recommended an investigation of the matters raised in a complaint submitted on behalf of the Civic Alliance for the Protection of the Bay of Vlora², but that investigation is understood to be ongoing at the time of finalizing these findings.

16. The communicant alleged that EIB had violated articles 4, 5 and 6 of the Convention. In its communication, the communicant argued that EIB should have applied the Convention “at an early stage, when all options were open”, and not have relied upon the efforts of other international financial institutions, the fact of its being a co-lender for

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.

² World Bank Inspection Panel Report and Recommendation, “Albania: Power Sector Generation and Restructuring Project” (Report No. 40213-AL, IDA Credit No. 3872-ALB, dated 2 July 2007).

this particular project notwithstanding. It also argued that EIB did not conduct any public participation effort under article 6 of the Convention after 7 February 2005.

17. The communicant argued that whereas the World Bank and EBRD had taken measures to ensure that Albania complied with its obligations under international law, in particular the Convention, and its national law, EIB did not undertake an independent environmental impact assessment (EIA) procedure.

18. Furthermore, the communicant argued that “in two occasions, ‘any party’, or individuals acting in connection or on behalf of the Civic Alliance have requested environmental information to EIB”. In the first request on 5 April 2006, it requested “(i) the disclosure of the ‘Loan Agreement’ between EIB and Albania of 29 September 2004; (ii) the disclosure of EIB’s Environmental Impact Assessment; and (iii) whether or not EIB conducted its own inquiry on ‘potential historical/archaeological value of the [Vlora TPP] site’”.³ The second request, made on 9 September 2007, was for a copy of the Framework Agreement between EIB and Albania of 5 February 1998.

19. Neither request as initially submitted mentioned the Convention or stated that environmental information was sought. They were formulated in a broad manner.

20. In regard to the first request, EIB replied to the second and third questions contained in the request but declined to provide a copy of the terms of the Loan Agreement, citing grounds of confidentiality, although the Albanian translation of the agreement was in the public domain.

21. As regards the second request, EIB replied on 8 October 2007 stating that the document in question was already in the public domain and indicating where it could be obtained. The same day, the requester responded to the message of EIB, pointing out that only the decision concerning the approval of the Framework Agreement was in the public domain, not the Framework Agreement itself, and citing the obligations of EIB under the Convention. EIB responded on 8 November 2007, acknowledging that, contrary to its earlier advice, the Framework Agreement was not in the public domain. EIB indicated its readiness to disclose the content of the Agreement provided that it received the authorization to do so from the Albanian authorities, which it undertook to seek. EIB provided the Framework Agreement on 15 January 2008, after having received the corresponding authorization from the Albanian authorities.

22. A further request was made by the communicant to EIB – following the reply of EIB on 15 January 2008 – for disclosure of the English texts of the Framework Agreement of 1998, the finance contract between EIB and the State-owned Albanian Electrical Energy Corporation (Korporata Elektroenergjeteke Shqiptare, or KESH) on the TPP and the Albanian guarantee agreement of 6 December 2004, as well as for copies of the EIB Statute in force in 1998 and 2004. EIB provided the requested information on 17 March 2008 on the basis of the fact that they were already in the public domain. The annexes of the Finance Contract, which had not been in the public domain, were disclosed on 10 June 2008 following the authorization of the Albanian authorities.

23. The communicant complained on 18 May 2007 to the European Ombudsman against EIB concerning the decision to finance the construction of the TPP Vlora and the Loan Guarantee Agreement of 2004. It stated that the project violated the relevant legislation and policies of both EIB and the European Union (EU). In the reply – dated 19 June 2007 – the Ombudsman stated that he had “no power to deal with [the complaint] as such” because the communicant did not meet either of the two requirements as regards the

³ A copy of this request was provided by the communicant as annex I of the communication.

sources from which the Ombudsman can receive complaints in accordance with the Treaty establishing the European Community – it was not an EU citizen or a natural or legal person residing or having a registered office in a Member State of the EU. The Ombudsman also stated that “there are not sufficient grounds to consider opening an own-initiative inquiry into the subject matter of [the complaint] since [the communicant has] not provided any supporting documentation”.⁴ This reply was sent to the address and the e-mail address supplied by the communicant, but was not received. It was sent again on 23 September 2008 after the Ombudsman learned that it had not been received by the communicant.

24. The Committee had already considered the TPP project under ACCC/C/2005/12. In that communication, it had been alleged that Albania was not in compliance with its obligations under the Convention. Specifically, as concerned the proposed TPP, the Committee found that Albania had failed to comply with the requirements for public participation in the decision-making process.

III. Consideration and evaluation by the Committee

25. The European Community deposited its instrument of approval on 17 February 2005. The Convention entered into force for the European Community on 18 May 2005. It should be noted that Albania deposited its instrument of ratification of the Convention on 27 June 2001 and the Convention entered into force for Albania on 25 September 2005.

26. It has not been disputed during the deliberations before the Committee that the provisions of the Convention are applicable to EIB. This is affirmed by the relevant legal provisions of the European Community.

27. With regard to the issues raised in the communication, the Committee has identified the following main issues as needing to be considered: (a) whether actions of EIB concerning the request for the disclosure of information were in compliance with article 4 of the Convention; and (b) whether actions of EIB concerning the decision-making process fell within the scope of and were in compliance with article 6 of the Convention.

A. Access to environmental information

28. As stated on previous occasions, the Committee does not feel bound to address all arguments raised by a communicant or Party concerned, and notes that the absence of any comment on argumentation presented by one or other of the parties concerned should not be taken to imply agreement (see ECE/MP.PP/2005/13, para. 13). The following points are those which the Committee considers it useful to address.

B. Environmental information

29. With regard to the question of whether the information sought by the communicant was environmental information, the two requests are considered separately.

30. With regard to the communicant’s request of 5 April 2006 for (inter alia) a copy of the finance contract:

(a) The request made for the finance contract concerned the disclosure of the full document and did not mention “environmental information” as such. The Committee notes

⁴ Letter dated 19 June 2007, supplied by the Party concerned.

that the grounds for refusing the request provided by EIB in its message of 28 April 2006, namely that the document was confidential, were incorrect as the document was already in the public domain. It has to be noted in the context that the documents requested are in general not environmental information and only some parts of the documents – as the Party concerned stated in its response – relate to the environment;

(b) The argument of the Party concerned that almost none of the finance contract constitutes environmental information in the sense of the Convention appears to be based on a narrow interpretation of the definition of “environmental information”. That definition includes “factors ... and activities or measures ... affecting or likely to affect the elements of the environment...” A list of examples of types of “activities or measures” that fall within the definition (“administrative measures, environmental agreements, policies, legislation, plans and programmes”) is preceded by the word “including”, implying that this is a non-exhaustive list and recognizing that other types of activities or measures that affect or are likely to affect the environment are covered by the definition. Thus, financing agreements, even though not listed explicitly in the definition, may sometimes amount to “measures ... that affect or are likely to affect the elements of the environment”. For example, if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information. Therefore, whether the provisions of a financing agreement are to be regarded as environmental information cannot be decided in a general manner, but has to be determined on a case-by-case basis;

(c) In paragraph 23 of its submission of 5 August 2008, the position of the Party concerned implies that the condition for environmental information to be released is that no harm to the interests concerned is identified. The Party concerned apparently bases this statement on article 4, paragraph 4 (d), of the Convention, which states that a request for information may be refused if the disclosure would adversely affect “the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest”. The Committee wishes to point out that this exemption may not be read as meaning that public authorities are only required to release environmental information where no harm to the interests concerned is identified. Such a broad interpretation of the exemption would not be in compliance with article 4, paragraph 4, of the Convention which requires interpreting exemptions in a restrictive way, taking into account the public interest served by disclosure. Thus, in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure.

31. With regard to the communicant’s request of 9 September 2007 for a copy of the Framework Agreement:

(a) The grounds for refusing the request provided by EIB in its message of 8 October 2007, namely that the document was already in the public domain, turned out to be erroneous, as the Bank subsequently acknowledged. However, even if the document had not been in the public domain, this would not have been a legitimate ground under the Convention for the Bank to refuse to provide environmental information.

(b) One of the grounds for refusing the request provided by the Bank in its message of 8 November 2007, namely that a third party, the Albanian authorities, had not authorized the release of the document, does not constitute a legitimate basis under the Convention for failing to provide environmental information, and no linkage was made between the lack of such authorization and one or other of the exemptions permitted under the Convention in regard to environmental information.

(c) A second argument put forward by EIB in its message of 8 November 2007 to justify not providing the information was that the document requested did not concern environmental information which would be covered by the Convention. It has to be noted that the Party concerned in its response stated that the Finance Contract of 2004 and the Framework Agreement of 1998 do not contain “environmental information” with the possible exceptions of Article 6.08 of the Finance Contract and Schedule A.1 (technical description of the project). Thus, according to the Party concerned, the overwhelming part of the requested documentation did not contain environmental information, and only two provisions could be considered to fall within the scope of article 4 of the Convention. It should be noted in this context that the handling of the request was complicated by it being a request for the disclosure of the above mentioned document in full without specifying that environmental information was being sought. Although EIB did not disclose the requested document at once, the full document was disclosed before the communicant sought to use any of the available review procedures with respect to the initial refusal of environmental information.

(d) When refusing to provide environmental information, a public authority is required under the Convention (art. 4, para. 7) to provide information on access to the review procedures available in accordance with article 9. As EIB did not treat the request as concerning environmental information as such, it appears that the Bank did not provide such information to the communicant. The fact that the communicant approached the European Ombudsman – rather than the Bank’s Inspector General, which would have been the more appropriate next step – was presumably a consequence of this. The European Ombudsman did not find sufficient reasons to investigate the broad allegations made by the communicant concerning misconduct (including corruption) by EIB. Nevertheless, EIB supplied the requested documents to the communicant in full and did not limit them to “environmental information” at a later stage.

32. With respect to the points made in paragraphs 30 (b) and (c) and 31 (c) above, given that the information requested was eventually provided to the requester, the Committee has not considered it necessary to examine in detail the documents which were the subject of the information requests. It consequently does not reach any conclusion on how much of the documentation could be considered as containing “environmental information” or to what extent any “environmental information” contained in the documentation could have been considered as falling within an exempt category.

33. The Committee considers it important to point out the aforementioned deficiencies in the handling of the information requests in order to clarify the obligations under the Convention with regard to environmental information and thereby contribute to better implementation of its provisions. However, it does not consider that in every instance where a public authority of a Party to the Convention makes an erroneous decision when implementing the requirements of article 4, this should lead the Committee to adopt a finding of non-compliance by the Party, provided that there are adequate review procedures. The review procedures that each Party is required to establish in accordance with article 9, paragraph 1, are intended to correct any such failures in the processing of information requests at the domestic level, and as a general rule, it is only when the Party has failed to do so within a reasonable period of time that the Committee would consider reaching a finding of non-compliance in such a case. Decisions on such a question need to be made on a case-by-case basis. In the present case, the requested information was provided, albeit with some delay, and thus the matter was resolved even before there was any recourse to the review procedures available to the communicant.

C. Filing an information request

34. Another issue under discussion is whether the request made concerns “environmental information” or other information, as this determines whether the provisions of the Convention apply at all. Indeed, at a more general level this distinguishes the issue of whether or not the information requested from a public authority is environmental information from other issues (e.g. whether it falls within an exempt category, or has been provided within the relevant time frame). If a request is made for information that does not obviously fall within the definition of environmental information and the request does not indicate that the information that is being requested is environmental information, the public authority may not recognize it as such, and therefore may be unaware of the associated legal obligations, or the potential legal obligations.

35. Therefore, while the Convention does not require a person making an information request to explicitly refer to (a) the Convention itself, (b) the implementing national legislation or (c) even the fact that the request is for environmental information, any or all such indications in the request would, in practice, facilitate the work of the responsible public authorities and help in avoiding delays. This is particularly so where only part of the requested information constitutes environmental information as defined in article 2, paragraph 3, of the Convention, or where the relevance of the requested information to the environment might not be obvious at first glance.

D. Public participation in decisions on specific activities

36. In regard to the alleged non-compliance with article 6 of the Convention, the decisions in question are decisions concerning the financing of a specific project. The decision on whether to permit a proposed activity listed in annex I was taken by the Albanian authorities. The Committee has held with respect to communication ACCC/C/2005/12 that the EIA procedure undertaken by the Albanian authorities was not in compliance with the provisions of article 6 of the Convention. EIB has no legal authority of its own to undertake its own EIA procedure on the territory of a State, as this would constitute an administrative act falling under the territorial sovereignty of the respective State. The Bank has to rely on the procedures undertaken by the responsible authorities of the State. The Committee considers that in general a decision of a financial institution to provide a loan or other financial support is legally not a decision to permit an activity, as is referred to in article 6 of the Convention. Moreover, it is to be noted that the decisions on financial transactions were taken by EIB before the Convention entered into force for the European Community.

IV. Conclusions

37. As regards the alleged non-compliance in regard to article 4 of the Convention, the Committee finds that the European Community is not in a state of non-compliance. The requests for information covered, inter alia, copies of the Framework Agreement and the Loan Agreement. The Committee notes that even though the requests were of a rather general nature and did not specify that environmental information was being sought, EIB provided (albeit with some delay) the requested information in full, including information that was not environmental information, and thus the matter was resolved before recourse to any review procedures was taken.

38. As regards the alleged non-compliance with article 6 of the Convention, the Committee also finds the European Community not to be in a state of non-compliance, for the reasons given in paragraph 36.

