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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-eighth meeting
Geneva, 15–18 June 2010

Report of the Compliance Committee on its Twenty-eighth meeting

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Introduction

1. The twenty-eighth meeting of the Compliance Committee was held from 15 to 18 June 2010 in Geneva.

A. Attendance

2. All members were present with the exception of Mr. Gerhard Loibl. Members having declared a conflict of interest with respect to particular cases did not participate in closed sessions deliberating on those cases. In addition, representatives of the Governments of Austria and Belarus participated.

3. The non-governmental organization (NGO) Earthjustice (Switzerland) participated as an observer.

4. Representatives from the Municipality of Szentgotthárd (Hungary) and the University of Oregon (United States of America) also participated.

B. Organizational matters

5. The Chair of the Compliance Committee, Mr. Veit Koester, opened the meeting. The Chair welcomed Ms. Ella Behlyarova as Secretary to the Convention since 1 June 2010.

6. The Committee adopted its agenda as set out in document ECE/MP.PP/C.1/2010/3.

I. Matters arising from the previous meeting

7. The Committee discussed the draft guidelines on independence and impartiality of Committee members which had been prepared by the Chair, with the assistance of the secretariat, in accordance with the Committee's instructions at its twenty-sixth meeting (ECE/MP.PP/C.1/2009/8, para. 6). The Committee discussed the general approach that such guidelines should have, bearing in mind that the objective of adopting guidelines was to protect the Committee and its work. In light of the Committee's discussion, the Committee instructed the Chair, assisted by the secretariat, to prepare a new draft for the consideration of the Committee at its twenty-ninth meeting.

8. Further to the information provided at the Committee's twenty-seventh meeting (ECE/MP.PP/C.1/2010/2, paras. 9–10), the secretariat informed the Committee that the extraordinary session of the Meeting of the Parties (ExMoP) to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) had taken place on 19 and 22 April 2010 in Geneva, Switzerland. Due to the extraordinary circumstances resulting from the eruption of an Icelandic volcano, which had caused major disruption to air traffic in Europe, many delegations had not been able to travel to Geneva to attend the session. That had resulted in a situation in which there had not been a quorum and thus no formal decisions had been able to be taken at that time. The agenda, including the establishment of an official mandate from the Meeting of the Parties to produce the Committee's documentation as official documentation of the United Nations, had been provisionally adopted.

9. The delegations present at the ExMoP had discussed the matter and had taken a decision ad referendum, subject to approval at the resumed session of the Meeting of the

Parties on 30 June 2010 (ECE/MP.PP/2010/L.2, paras. 22–28). By that decision, the Meeting had requested the secretariat to continue to produce the agendas, meeting reports and findings of the Compliance Committee as official documents so that they would be available in the three official languages, without recourse to additional extrabudgetary resources. At the same time, the Meeting, mindful of the capacity constraints faced by United Nations Conference Services and of the consequent need to limit the volume of official documentation produced under the Convention, had instructed the Committee to undertake every effort to keep its documents as short as possible, restricting its findings to the essential facts, argumentation and conclusions.

10. However, the Meeting had recognized that the Committee's findings provided valuable guidance on the interpretation of the Convention. It had furthermore recognized that the combined length of the findings adopted at future meetings of the Committee were likely to regularly exceed the applicable United Nations length limits, leading to a frequent need for waiver requests to be submitted, which in turn would entail a significant administrative burden and delays in the release of the documents. It had therefore requested the United Nations Economic Commission for Europe (UNECE) Executive Secretary to seek a solution with the Division of Conference Management whereby, should it prove necessary for the Committee to exceed applicable length limits in producing its reports and findings, either the length limit could be applied separately to each set of findings or a general waiver could be granted for the findings of the Committee, on the understanding that every effort would be made to minimize the length of findings to the extent possible.

11. The Committee welcomed the provisional decision made by the Meeting of the Parties. It also noted that it was already undertaking considerable efforts to limit the length of its documents; but, due to the legal nature of its findings, that exercise was at times very difficult, and often efforts to shorten and adapt its findings to the United Nations length limits would jeopardize the quality of the legal reasoning provided.

II. Submissions by Parties concerning other Parties

12. The secretariat informed the Committee that no new submissions had been made by Parties concerning compliance by other Parties.

III. Submissions by Parties concerning their own compliance

13. The secretariat informed the Committee that no submissions had been made by Parties concerning problems with their own compliance.

IV. Referrals by the secretariat

14. No referrals had been made by the secretariat.

V. Communications from members of the public

15. With regard to communication ACCC/C/2008/23 (United Kingdom of Great Britain and Northern Ireland), the Committee, following further clarification it had received from the communicant on 10 April 2010 and from the Party concerned on 12 April 2010, had completed its draft findings by using its electronic procedure and they had been sent to the Party concerned and the communicant for comment in accordance with the procedure set out in paragraph 34 of the annex to decision I/7. It noted that the deadline for the parties to

comment had not elapsed and that it would take into account any comments when finalizing the findings using its electronic decision-making procedure.

16. With regard to communication ACCC/C/2008/27 (United Kingdom), the Committee agreed to continue its deliberations on the matter using its electronic decision-making procedure, with a view to completing its draft findings and, as appropriate, recommendations, which would then be sent for comment to the Party concerned and the communicant.

17. With regard to communications ACCC/C/2008/28 (Denmark) and ACCC/C/2008/31 (Germany), the secretariat informed the Committee that there no additional information had been received.

18. With regard to communication ACCC/C/2008/32 (European Union),¹ the Committee agreed to continue its deliberations on the matter at its twenty-ninth meeting, with a view to completing its draft findings and, as appropriate, recommendations, which would then be sent for comment to the Party concerned and the communicant.

19. With regard to communication ACCC/C/2008/33 (United Kingdom), the Committee agreed to continue its deliberations on the matter using its electronic decision-making procedure, with a view to completing its draft findings and, as appropriate, recommendations, which would then be sent for comment to the Party concerned and the communicant.

20. Using its electronic procedure, the Committee had completed its work on the draft findings on ACCC/C/2008/35 (Georgia). The draft had been sent to the Party concerned and the communicant for comments on 12 May 2010, in accordance with the procedure set out in paragraph 34 of the annex to decision I/7. The Party concerned had provided comments on 1 June 2010.

21. The Committee proceeded to finalize its findings on ACCC/C/2008/35 in closed session, taking into account the comments received from the Party concerned, and agreed that they should be published as an addendum to the meeting report. It requested the secretariat to send the finalized findings to the Party concerned and the communicant.

22. Using its electronic procedure, the Committee had completed its work on the draft findings on ACCC/C/2009/36 (Spain). The draft had been sent to the Party concerned and to the communicant for comments on 28 April 2010, in accordance with the procedure set out in paragraph 34 of the annex to decision I/7. The Party concerned had provided comments on 28 May 2010 and the communicant had provided comments on 5 May 2010.

23. The Committee proceeded to finalize its findings on ACCC/C/2009/36 in closed session, taking into account the comments received from the Party concerned and the communicant, and agreed that they should be published as an addendum to the meeting report. It requested the secretariat to send the finalized findings to the Party concerned and the communicant.

24. The Committee completed its work on the preparation of draft findings with respect to communication ACCC/C/2009/37 (Belarus) in closed session. Due the issue of confidentiality, the Committee requested the secretariat to send the draft first to the communicant, with a one week deadline to comment on whether it agreed that the information could become public through the draft findings, and then subsequently to both the Party concerned and the communicant for comment in accordance with the procedure

¹ As of 1 December 2009, the European Union succeeded the European Community in its obligations arising from the Convention (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community).

set out in paragraph 34 of the annex to decision I/7. The Committee would take into account any comments when finalizing the findings at its twenty-ninth meeting.

25. Due to the fact that Mr. Gerhard Loibl, the curator of communication ACCC/C/2009/38 (United Kingdom), was not present at the meeting, the Committee postponed the continuation of its deliberations on the matter to its twenty-ninth meeting.

26. The Committee then entered into discussion in open session on communication ACCC/C/2009/39 (Austria), with the participation of representatives of the Party concerned and the communicant. The communication had been submitted by the Municipality of Szentgotthárd (Hungary). It contained allegations of non-compliance by Austria with the provisions of articles 6 and 9 of the Convention, in relation to a decision by the Austrian authorities to permit the construction and operation of a household and commercial waste incinerator in Burgenland, Austria, located on the border with Hungary and close to the Municipality of Szentgotthárd.

27. The Committee did not confirm immediately that the communication was admissible. Further to a discussion of the communication with the Party concerned and the communicant in an open session, the Committee deliberated in closed session and determined that the communication was manifestly unreasonable, because the communicant, having been awarded the status of “neighbour” under Austrian legislation, had submitted all its comments to the competent authorities during the permitting procedure. In the view of the Committee, the communicant had failed to substantiate that it was not able to participate in the different stages of the environmental decision-making procedure; or to what extent its important objections to the project were not considered during that procedure. The Committee informed the parties of the outcome and also asked the secretariat to send a letter to the parties to that effect.

28. With regard to communication ACCC/C/2009/41 (Slovakia), the Committee began to prepare draft findings in closed session and agreed to continue its deliberations on the matter at its twenty-ninth meeting with a view to completing its draft findings and, as appropriate, recommendations, which would then be sent for comment to the Party concerned and the communicant.

29. With regard to communication ACCC/C/2009/43 (Armenia), the Committee took note of the letter of the communicant of 7 June 2010, containing clarification of some facts of the communication and with additional allegations of non-compliance by the Party concerned. The Committee decided to consider the points raised by the communicant only to the extent that they related to the scope of the communication, as discussed with the communicant and the Party concerned at the Committee’s twenty-seventh meeting. It then began to prepare draft findings in closed session and agreed to continue its deliberations on the matter at its twenty-ninth meeting with a view to completing its draft findings and, as appropriate, recommendations, which would then be sent for comment to the Party concerned and the communicant.

30. With regard to communication ACCC/C/2009/44 (Belarus), the Committee noted that further to the questions it had decided to send to the parties for clarification, the deadline of 31 July 2010 had not elapsed and that neither the Party concerned nor the communicant had yet replied. The Committee confirmed that it would discuss the substance of the communication at its twenty-ninth meeting.

31. Further to its decision at its twenty-seventh meeting, at the request of the communicant, to defer making any preliminary determination on the admissibility of communication ACCC/C/2010/45 at that meeting, the secretariat reported that it had received no response to its letter of 12 February 2010 to the communicant seeking further details regarding the communication. The Committee requested the secretariat to write to the communicant requesting him to indicate whether or not he intended to proceed with the

communication and, if so, to resubmit the communication in a more appropriate format before the twenty-ninth meeting of the Committee. Failing its resubmission in a more appropriate format, the communication would not be considered and the file would be closed, due to the absence of corroborating information required under paragraph 19 of the annex to decision I/7 and of collaboration from the communicant in dealing with the issues raised by the communication.

32. With regard to communication ACCC/C/2010/46 (United Kingdom), which had not been considered admissible at the Committee's twenty-seventh meeting, the Committee took note of the letter of the communicant of 1 June 2010 asking for further clarification on the decision of the Committee. In the view of the Committee, its letter to the communicant, dated 7 April 2010, detailing the outcome of the deliberations at the twenty-seventh meeting, was clear and no additional clarification was needed.

33. At its twenty-seventh meeting, the Committee had agreed to defer making any preliminary determination on the admissibility of communication ACCC/C/2010/47 (United Kingdom) until additional information had been submitted. The Committee had requested further clarification from the communicant on 7 May 2010. By letter of 8 June 2010, the communicant's representative had indicated that the communicant was not in a position to provide a full response to the questions raised because doing so might prejudice the communicant's ongoing domestic court proceedings. The communicant asked whether the deadline by which she must respond to the questions might be deferred for a three-month period or else kept confidential until that time. Having considered the response, the Committee determined that the communication would not be considered and the file would be closed, on the grounds that it could not proceed under paragraph 19 of the annex to decision I/7, because the communicant could not provide corroborating information.

34. With regard to communication ACCC/C/2010/48 (Austria), the Committee noted that the deadline of 8 September 2010 had not elapsed, and that the Party concerned had not yet commented on the allegations in the communication. Further to the request of the Committee on 8 April 2010, the communicant had provided further clarification through a revised version of its communication, which had been received on 2 June 2010. Having received the revised version of the communication, the Party concerned enquired whether it would be possible to have an extension in responding to the allegations of the communication. The Committee, at its twenty-eighth meeting, after considering the possibility of an extension, invited the Party concerned to address the allegations of the communication and to reply to some additional questions within the set deadline of 8 September 2010. The Committee confirmed that it would discuss the substance of the communication at its twenty-ninth meeting.

35. With regard to communication ACCC/C/2010/49, the secretariat reported that, as instructed by the Committee at its twenty-seventh meeting, it had informed the communicant that the Committee had not found it possible to consider the communication in its current format. The secretariat reported that there had been no further correspondence from the communicant since then. The Committee agreed that the secretariat should write to request the communicant to indicate whether or not they intended to proceed with the communication, and if so, to resubmit the communication in a more appropriate format before the twenty-ninth meeting of the Committee. Failing its resubmission in a more appropriate format, the communication would not be considered and the file would be closed due to the absence of corroborating information required under paragraph 19 of the annex to decision I/7 and of collaboration from the communicant in dealing with the issues raised by the communication.

36. One new communication (ACCC/C/2010/50) had been received since the previous meeting. Due to the late arrival of that communication, which had only arrived shortly before the meeting, and in light of its workload, the Committee was not in a position to

examine it in sufficient detail so as to hold a comprehensive discussion on preliminary admissibility. It therefore agreed to postpone its discussion to its next meeting. The Committee, however, expressed some concerns with regard to the fact that communications were regularly arriving shortly before its meetings, and referred to its modus operandi.

VI. Follow-up on specific cases of non-compliance

37. With respect to decision III/6e (Turkmenistan), the secretariat informed the Committee of its discussions with the Government of Turkmenistan regarding the proposed mission by the Compliance Committee in late 2010. The Committee asked the secretariat to continue liaising with Turkmenistan in preparation for the mission. The Committee also noted that Turkmenistan had still failed to submit the draft revised Act on Public Associations, which was due to be submitted at the request of the Committee by 1 February 2010, and asked the secretariat to follow up with the Government of Turkmenistan on that point.

38. The Committee noted that Ukraine had still failed to submit a copy of the draft decree of the Cabinet of Ministers of Ukraine "On approval of public participation in decision-making in the field of environmental protection", as requested by the secretariat at its twenty-sixth meeting. The Committee expressed concern and asked the secretariat to follow up with the Government of Ukraine on that point.

39. The Committee also noted that the deadlines for the submission of the progress reports related to decisions of the Meeting of the Parties III/6a (Albania), III/6b (Armenia), III/6c (Kazakhstan), III/6d (Lithuania), III/6e (Turkmenistan) and III/6f (Ukraine) would fall after its twenty-ninth meeting but before its thirtieth meeting.

VII. Programme of work and calendar of meetings

40. The Committee confirmed that it would hold its twenty-ninth meeting from 21 to 24 September 2010; its thirtieth from 14 to 17 December 2010; and its thirty-first from 22 to 25 February 2011. The Committee also preliminarily decided that it would hold its thirty-second meeting back-to-back with the fourth session of the Meeting of the Parties in June 2011.

VIII. Any other business

41. The secretariat informed the Committee of decision I/2 on Review of Compliance adopted by the first session of the Meeting of the Parties to the Pollutant Release and Transfer Register Protocol to the Aarhus Convention, which had been held from 20 to 22 April 2010. Mr. Merab Barbakadze, a member of the Committee, had been elected to serve in a personal capacity on the Compliance Committee of the Protocol.

42. The secretariat informed the Committee of the correspondence between UNECE management with the Treaty Section of the United Nations Office of Legal Affairs, following the depositing by Guinea-Bissau of its instruments of ratification for several UNECE treaties, including the Aarhus Convention. The Committee took note of the information.

43. In light of its significant workload and its concerns with regard to the completeness, clarity and/or relevance of the information in several communications it had received, the Committee discussed the introduction of a de minimis principle and of summary proceedings in its modus operandi, as explained in the following paragraphs.

44. The Committee had from time to time received communications that, while they broadly appeared to fulfil the admissibility requirements of paragraph 20 of the annex to decision I/7, after careful consideration had been revealed to be inadmissible by interpretation and analogy regarding the criteria for admissibility set out in subparagraphs (b) on “abuse of the right to make such communications” and (c) regarding communications that were “manifestly unreasonable”. With the purpose of focusing on communications that raised important aspects of non-compliance, the Committee discussed that matter at its twenty-eighth meeting; it decided to apply the criteria for admissibility of “abuse of the right to make such communications” and “manifestly unreasonable” in such a manner so that communications which the Committee deemed to be insignificant in light of their purpose and function would be determined inadmissible as *de minimis*.

45. Also, the Committee had recently been confronted with allegations of non-compliance concerning a Party reflecting the same legal issues upon which it had already deliberated in a previous communication relating to the same Party (but not to the same facts). In that regard, the Committee noted that, the Party concerned had already worked with the Committee to fully meet compliance. Bearing in mind that according to the Convention the compliance review mechanism was not a redress mechanism, and on the basis of the freedom awarded to the Committee by the Meeting of the Parties to “consider any [...] communications” according to paragraph 20 of the annex to decision I/7, without specifying the process, the Committee reflected upon its experience and the practical dimension of its role and decided that, in cases which were determined to be preliminarily admissible, but where the legal issues raised by the communication had already been tackled by the Committee, summary proceedings could apply as follows:

(a) The Committee would send a letter to the communicant informing them about the process;

(b) The Committee would notify the Party concerned, reminding it of the previous findings and recommendations and requesting it to provide information on the progress achieved on the previous recommendations;

(c) The Committee would record the outcome of the process and its consideration in the report, focusing on the progress, if any, in the law and implementation of the Convention by the Party concerned.

46. The Committee decided to introduce a *de minimis* principle and summary proceedings in its *modus operandi* and to include information on that decision in its report to the fourth session of the Meeting of the Parties.

47. In response to the above procedural decisions, Earthjustice agreed to the summary proceeding approach but disagreed with the *de minimis* procedure. In its view, admissibility was a technical discussion and should not include discussion on the merits of the communications. Moreover, the *de minimis* criterion was introducing one more obstacle for communicants, and was not clear enough to be considered as being solely a technical criterion.

IX. Adoption of the report and closure of the meeting

48. The Committee adopted the report of the meeting. The Chair then closed the meeting.
