

## Overview of possible general issues on compliance contained in the findings adopted since MOP4

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### 1. Procedural issues:

#### a. Structuring and substantiating of communications/Parties' responses

##### i. C54 (EU)

90. As the Committee held in its findings on communication ACCC/C/2009/37 concerning compliance by Belarus (ECE/MP.PP/2011/11/Add.2, para. 69), the Party concerned is obliged to ensure that each public authority possesses the environmental information which is relevant to its functions. The Committee considers that, given that the Party concerned does not have in place a proper regulatory framework for the implementation of article 7 of the Convention with respect to NREAPs, it might well not have possessed the relevant environmental information. However, the Committee considers that the communicant, due to the unstructured manner of the information provided, has insufficiently substantiated which of the allegations related to article 4 or article 5 of the Convention are attributable to the Party concerned.

##### ii. C53 (UK)

71. The Committee decides not to consider the communicant's allegations on access to justice, because those — both in relation to its access to information and public participation rights — were not sufficiently substantiated through the written and oral submissions.

#### b. Other procedural issues:

- i. One communication where there were two Parties concerned (C68 (EU and UK));
- ii. In two cases, the Party concerned expressly said they do not agree with the Committee making recommendations (C53 (UK)), (C31 (Germany));
- iii. Exhaustion of domestic remedies.

### 2. Substantive issues – general provisions

#### a. EU institutions as public authorities under article 2

##### i. C32 (EU)

71. When determining how to categorize a decision, and act or an omission under the Convention, its label in the domestic law of a Party is not decisive (cf. ACCC/C/2005/11, para. 29).

72. While the Committee does not rule out that some decisions, acts and omissions by the EU institutions — even if labelled “regulation” — may amount to some form of decision-making under articles 6–8 of the Convention, it will not carry out any examination on this issue. Rather, for the Committee, when examining the general jurisprudence and the interpretation of the standing criteria by the EU Courts, it is sufficient if it can conclude that some decisions, acts and omissions by the EU institutions are such as to be covered by article 9, paragraph 3, of the Convention. That is the case if an act or omission by an EU institution or body can be (a) attributed to it in its capacity as a public authority, and (b) linked to provisions of EU law relating to the environment.

73. The Greenpeace case, although decided before the Convention was in force, is a pertinent example of a case where an EU institution acted as a public authority, and its decision was challenged for contravening provisions of EU law relating to the environment. In this case, individuals as well as established environmental associations challenged and sought the annulment of the Commission's decision to

provide financial assistance from the European Regional Development Fund for the construction of two power stations without requiring the conduct of an EIA.

74. Thus, without ruling out that other acts and omissions by EU institutions may also be covered by article 9, paragraphs 2 or 3, of the Convention, the Committee is convinced that for at least some acts and omissions by EU institutions, the Party concerned must ensure that members of the public have access to administrative or judicial review procedures, as set out in article 9, paragraph 3.

**b. EU responsibility for Member States' compliance with the Convention**

**i. C54 (EU)**

76. In the present case the "relevant public authority" which is to identify the public that may participate, according to article 7 of the Convention, is to be understood as referring not to the Party concerned, but to the public authorities of Ireland, which is not a Party to the Convention. The question, however, remains what obligations rest on the Party concerned. The Committee finds that in this respect two issues arise: first, whether the legal framework of the Party concerned is compatible with the Convention; and, second, whether the Party concerned has fulfilled its responsibility to monitor that its member States, including Ireland, in implementing EU law properly meet the obligations resting on them by virtue of the EU being a party to the Convention.

79. The template adopted on the basis of article 4, paragraph 2, of Directive 2009/28/EC determines how member States are to adopt NREAPs. The template comprises minimum requirements that member States are to comply with in the preparation of their NREAPs. Among these requirements are reporting obligations related to public participation (see para. 23 above). The Committee finds that these requirements are of a very general nature and do not unequivocally point member States, including Ireland, in the direction of the requirements of the Convention when adopting plans or programmes relating to the environment based on EU law, in casu, plans related to renewable energy and, more in particular, NREAPs.

80. A proper regulatory framework for the implementation of article 7 of the Convention would require Member States, including Ireland, to have in place proper participatory procedures in accordance with the Convention. It would also require Member States, including Ireland to report on how the arrangements for public participation made by a Member State were transparent and fair and how within those arrangements the necessary information was provided to the public. In addition, such a regulatory framework would have made reference to the requirements of article 6, paragraphs 3, 4 and 8, of the Convention, including reasonable time-frames, allowing for sufficient time for informing the public and for the public to prepare and participate effectively, allowing for participation when all options are open and how due account is taken of the outcome of the public participation.

84. Proper monitoring by the Party concerned of the compatibility of Ireland's NREAP with article 7 of the Convention would have entailed that the Party concerned evaluate Ireland's NREAP in terms of the elements mentioned in paragraph 80 above. The Party concerned thus should have ascertained whether the targeted consultation and the public participation engaged in when Ireland adopted its NREAP met the standards of article 7 of the Convention, including whether reasonable time frames were employed and whether the public consultation was properly announced in Ireland. The Party concerned cannot deploy its obligation to monitor the implementation of article 7 of the Convention in the development of

Ireland's NREAP by relying on complaints received from the public, as it suggested it does during the public hearings conducted by the Committee.

85. Based on the above considerations, the Committee finds that the Party concerned does not have in place a proper regulatory framework and/or other instructions to ensure implementation of article 7 of the Convention by its member States, including Ireland, with respect to the adoption of NREAPs. The Committee also finds that the Party concerned, in practice, by way of its monitoring responsibility, failed to ensure proper implementation of article 7 of the Convention by Ireland with respect to the adoption of its NREAP. The Committee thus finds that the Party concerned in both these respects is in non-compliance with article 7 of the Convention.

**c. Use of legislation to permit projects**

**i. C61 (UK)**

54. In this respect, the Committee also notes that the hybrid bill process is a process under the Parliament, the body that traditionally manifests the legislative powers in a democratic state. Article 2, paragraph 2, of the Convention, excludes from the definition of a public authority "bodies or institutions acting in a ... legislative capacity". In the present case, however, the Parliament is no longer "acting" in a legislative capacity, but rather as the "public authority" authorizing a project.

**3. Substantive issues - Access to information**

**a. Access to raw data**

**i. C53 (UK)**

73. While not engaging in the discussion of whether the data collected and/or the equipment used by the Party and the communicant were reliable or not, the Committee

finds it appropriate to consider the issue of the nature of "raw data" and whether access to

such raw data may be refused.

74. The definition and scope of "environmental information" under the Convention is broad. Article 2, paragraph 3, provides an indicative list of what would constitute environmental information and mentions that environmental information means any information, without qualifying the form of the information or whether such information

may be in the form of "raw" or "processed" data.

75. The Committee finds that raw data on the state of the air and the atmosphere constitute environmental information according to article 2, paragraph 3 (a), of the Convention. Accordingly, public authorities should ensure access to the requested information as required by article 4 of the Convention.

76. The Committee considers whether public authorities may refuse a request for access to raw environmental data on the basis of an exception listed in article 4, paragraphs 3 and 4. The Convention does not provide a clear definition of the "materials in the course of completion". Domestic legislation may provide for specific guidance on how air quality data should be collected, ingested and processed before they are further considered and studied. This guidance has been developed with a view to mitigating the effect of various factors that might impact on the values collected, and to allowing for the calculation of representative average values on the basis of the multiple values — collected at different times over a long period of time

— which might have fluctuated significantly due to the presence of diverse conditions and factors (heat, pressure, etc.).

77. In respect to the requested data, the Committee finds that the Party concerned, by not disclosing the raw data at the request of the communicant, failed to comply with article 4, paragraph 1, of the Convention. Should the authority have any concerns about disclosing the data, they should provide the raw data and advise that they were not processed according to the agreed and regulated system of processing raw environmental data. The same applies for the processed data, in which case the authorities should also advise on how these data were processed and what they represent.

#### **4. Substantive issues - Public participation**

##### **a. Categorization of activities under the Convention**

###### **i. C61 (UK)**

52. The Committee first examines the nature of the hybrid bill and whether it falls under article 6 or article 8 of the Convention. As already established in previous findings, this must be determined on a contextual basis, taking into account the legal effects of the act, while its label under the domestic law of the Party concerned is not decisive (cf. the Committee's findings concerning communication ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para. 29; and concerning communication ACCC/C/2006/17 (European Community), ECE/MP.PP/C.1/2008/5/Add.10, para. 42).

53. The legal effect of the Crossrail Act, following the hybrid bill procedure, is the authorization of a project, the Crossrail. The Act is processed as a "hybrid bill" because of the magnitude of the project, affecting national interests in general. Had it been an executive regulation or an act introducing legislative changes applicable to all, it would have been processed following the public bill process. As such, it does not fall under article 8 of the Convention, because, while the system of the Party concerned — recognizing the cross-cutting impact of such a large project on various spheres of national policy, including transport, economy, employment, etc. — opts for a procedure that passes through Parliament, the act ultimately permits a specific activity. Therefore, the Act is a decision falling under article 6 of the Convention.

##### **b. EIA screening decisions – article 6(1)(b)**

###### **i. C45, C60 (UK)**

75. Article 6, paragraph 1 (b), of the Convention requires Parties, in accordance with national law, to apply the provisions of article 6 to decisions on proposed activities not listed in annex I to the Convention which may have a significant effect on the environment. Parties to this end are to determine whether the proposed activity is subject to article 6 of the Convention. As the Committee found in communication ACCC/C/2010/50 (ECE/MP.PP/C.1/2012/11, para. 82), the outcome of an EIA screening decision is a determination under article 6, paragraph 1 (b), of the Convention.

###### **ii. C50 (Czech Republic)**

82. With respect to the communicant's allegations that the Czech legal system fails to provide for judicial review of EIA screening conclusions, article 6, paragraph 1 (b), of the Convention requires Parties to determine whether an activity which is outside the scope of annex I, and which may have a significant effect on the environment, should nevertheless be subject to the provisions of article 6. Therefore, when this is determined for each case individually, the competent authority is required to make a determination which will have the effect of either creating an obligation to carry out a public participation procedure in accordance with article 6 or exempting the activity in question from such an obligation. Under Czech law, that determination is in practice made through the EIA screening conclusions. As such, the Committee

considers the outcome of the EIA screening process to be a determination under article 6, paragraph 1 (b).

**c. OVOS expertiza and the Convention's public participation requirements**

**i. C59 (Kazakhstan)**

44. Here, the Committee recalls its observations with regard to the nature of the OVOS/expertiza system as a development control mechanism followed in many countries of Eastern Europe, the Caucasus and Central Asia (cf., findings on communication ACCC/C/2009/37 concerning compliance by Belarus (ECE/MP.PP/2011/11/Add.2, para. 74)). In the view of the Committee, the OVOS and the expertiza in this system should be considered jointly as the decision-making process constituting a form of environmental impact assessment procedure.

**d. Early public participation, when all options are open (art. 6, para. 4)**

**i. C44 (Belarus)**

75. The legal framework and the facts of the present case show that the public participation process was scheduled to take place when the location for the project had already been selected. The submissions of the Party concerned, and also the letters of the Ministry of Energy dated 1 June 2007, 8 May 2008 and 13 January 2009 (see annexes 2, 3 and 4 to the communication), show that extensive assessment and feasibility studies had already been under way, including the study for the selection of the project location, since 2007 (see information contained in annex 2 dated 1 June 2007), while a number of acts had been adopted towards implementation of the project (see para. 18 above).

76. The public participation process for the NPP was part of the EIA (OVOS) procedure undertaken by the developer. The question that arises is whether public participation at that stage was not limited, given that advance preparations for the project had been undertaken since at least 2007 and that the project site and the developer — which had established project offices near the site (project documentation was accessible there) — had been selected. It appears that the option of not building the NPP at the particular location was no longer open for discussion.

77. As already noted in the past (findings on communication ACCC/C/2006/16 concerning Lithuania, ECE/MP.PP/2008/5/Add.6, para. 71, and findings on communication ACCC/C/2006/17 concerning the European Community, ECE/MP.PP/2008/5/Add.10, para. 51), the requirement for “early public participation when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain degree of discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details related to specific environmental standards. Within each and every such procedure where public participation is required, it should be provided early in the procedure, when all options are open and effective public participation can take place.

78. The Committee has not been provided with any evidence that the public was involved, in forms envisaged by the Convention, in previous decision-making procedures which decided on the need for NPP and selected its location. Once the decision to permit the proposed activity in the Ostrovets area had already been taken without public involvement, providing for such involvement at a following stage could under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide for “early public participation when all options are open” (see also findings on communication ACCC/C/2005/12 concerning Albania, ECE/MP.PP/C.1/2007/4/Add.1, para. 79; and findings on communication ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, paras. 61–63). This is the case even if a full EIA procedure is being carried out. Providing for public participation only at the stage of the EIA (OVOS) procedure for the NPP, with one hearing on 9 October 2009, effectively reduced the public's input to only commenting on how the environmental impact of the NPP could be mitigated, and precluded the public from having any input on the decision on whether the NPP installation should be at the selected site in the first place, since the decision had already been taken. Therefore, the Committee finds that the Party concerned failed to comply with article 6, paragraph 4, of the Convention.

**ii. C45, C60 (UK)**

81. The Committee emphasizes that article 6, paragraph 4, of the Convention requires “early public participation, when all options are open and effective public participation can take place”, both in relation to activities under article 6 of the Convention and in relation to plans and programmes under article 7 of the Convention. If the adoption of local investment plans, or other developments, were to prejudice public participation in the planning procedure as envisaged by article 6, paragraph 4, in relation to article 6 or 7 of the Convention, this would engage the responsibilities of the Party concerned under these provisions of the Convention. If this were the case, the Party concerned would also be obliged to ensure all-inclusive public participation, i.e., not limited to the involvement of private sector, in this early stage of planning.

82. According to the information before the Committee, the practice for the preparation of the local investment plans has not crystallized across the Party concerned and largely depends on the discretion of the authority to engage public participation of all stakeholders. Therefore, the Committee is not in a position to conclude whether the Party concerned fails to comply with its obligations arising from article 7. However, given the growing significance of the cooperative endeavours between public and private actors for the preparations of local investment plans, and in view of the object and purpose of the Convention, the Committee considers that participation of the public in the preparation of the local investment plans and related procedures is highly appropriate.

**e. Public participation not just at EIA stage**

**i. C50 (Czech Republic)**

70. While Czech law provides for wide public participation at the EIA stage, it limits opportunities for public participation after the conclusion of the EIA. The Committee stresses that environmental decision-making is not limited to the conduct of an EIA procedure, but extends to any subsequent phases of the decision-making, such as land-use and building permitting procedures, as long as the planned activity has an impact on the environment. Czech law limits the rights of NGOs to participate after the EIA stage, and individuals may only participate if their property rights are directly affected. This means that individuals who do not have any property rights, but may be affected by the decision, are excluded. Although the Party concerned contends that the results of the EIA procedure are taken into

account in the subsequent phases of the decision-making, members of the public must also be able to examine and to comment on elements determining the final building decision throughout the land planning and building processes.

**f. Identification of public concerned**

**i. C50 (Czech Republic)**

66. While narrower than the definition of “the public”, the definition of “the public concerned” under the Convention is still very broad. Whether a member of the public is affected by a project depends on the nature and size of the activity. For instance, the construction and operation of a nuclear power plant may affect more people within the country and in neighbouring countries than the construction of a tanning plant or a slaughterhouse. Also, whether members of the public have an interest in the decisionmaking depends on whether their property and other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity. Importantly, this provision of the Convention does not require an environmental NGO as a member of the public to prove that it has a legal interest in order to be considered as a member of the public concerned. Rather, article 2, paragraph 5, deems NGOs promoting environmental protection and meeting any requirements under national law to have such an interest.

67. A tenant is a person who holds, or possesses for a time, land, a house/apartment/office or the like, from another person (usually the owner), usually for rent. An activity may affect the social or environmental rights of the tenants, especially if they have been or will be tenants for a long period of time. In that case, to a certain extent, the interests of the tenants would amount to the interests of the owners. Although the relationship of the tenant to the object is always intermediated, since tenants, even shortterm tenants, may be affected by the proposed activity, they should generally be considered to be within the definition of the public concerned under article 2, paragraph 5, of the Convention and should therefore enjoy the same rights as other members of the public concerned.

**ii. C50 (Czech Republic)**

70.....In addition, even if, as the Party concerned contends, the scope of stakeholders with property rights is interpreted widely to include the most distant owners of land plots and other structures, individuals with other rights and interests are still excluded from the public participation process. Therefore, the Committee finds that through its restrictive interpretation of “the public concerned” in the phases of the decision-making to permit activities subject to article 6 that come after the EIA procedure, the Czech legal system fails to provide for effective public participation during the whole decision-making process. Thus the Party concerned is not in compliance with article 6, paragraph 3, of the Convention.

**g. Identification of public concerned in activities with potential wide environmental impacts, eg nuclear**

**i. C44 (Belarus)**

62. Without examining the general legal framework, the Committee makes the following general observations. The distinction between “national” and “local” activities, for the purpose of public participation, as such, is not contrary to the Convention. However, the designation of a project as “national” or “local” should be the responsibility of the public authorities and not of the developer. Moreover, a project of such a magnitude and potential environmental impact as the NPP at issue

can by no means be subjected to participatory procedures designed for the local level only.

**h. Public participation not limited to environmental aspects**

**i. C50 (Czech Republic)**

70.....Moreover, public participation under the Convention is not limited to the environmental aspects of a proposed activity subject to article 6, but extends to all aspects of those activities.

**i. Access to full EIA Report**

**i. C44 (Belarus)**

68. As far as access to the full EIA Report is concerned, the understanding of the Committee is that access to this document was limited only to the examination at the premises of the Directorate, while the provision of the electronic copy of this report was refused because of the economic interest of the developer.

69. Emphasizing that overall economic interests, as such, are not sufficient in order to reasonably restrict access to environmental information, and considering that the Party concerned did not successfully invoke any of the exemptions referred to in article 4, paragraph 4, to justify why this information was restricted, as well as the fact that a significant part of the information was not available in the form requested, the Committee recalls its findings in communication ACCC/C/2009/36 (paras. 60–61), where, although it recognized that article 6, paragraph 6, refers to giving “access for examination” of the information that is relevant to decision-making, it also noted that article 4, paragraph 1, requires that “copies” of environmental information be provided. In the Committee’s view “copies” does, in fact, require that the whole documentation be available close to the place of residence of the person requesting information, or entirely in electronic form, if this person lives in another town or city. According to the facts presented in this case, access to information was restricted to the site of the Directorate of the NPP in Minsk only and no copies could be made. For these reasons, the Committee finds that the Party concerned failed to comply with article 6, paragraph 6, and article 4, paragraph 1 (b), of the Convention.

74. The Committee notes, however, that the public was not duly informed that in addition to the preliminary EIA Report (about 100 pages long), which was made available to the public, there was also the full version of the EIA Report (more than 1,000 pages long). In this respect, the Committee finds that the Party concerned failed to comply with article 6, paragraph 2 (d) (vi), of the Convention.

80. The Committee refers to its findings on access to information in paragraphs 68 and 69 above. In addition, failing to inform the public about the possibility to examine the full EIA Report when notifying the public under article 6, paragraph 2, and informing it only during the hearing about this document, deprives the public in practice of its right under article 6, paragraph 6. Therefore, the Committee considers that by not informing the public in due time of the possibility of examining the full EIA Report, which is a critical document containing important details about a proposed project, the Party did not comply with article 6, paragraph 6, of the Convention

**j. Role of developer**

**i. C44 (Belarus)**

64. In the above context, and reiterating its findings in ACCC/C/2009/37 concerning the role of the developer in the procedure, the Committee stresses that it is not in compliance with the Convention for the authority responsible for taking the decision (including the authorities responsible for the expertiza conclusions) to be provided only with the summary of the comments submitted by the public. The Convention requires that the full content of all the comments made by the public (whether those claimed to be accommodated by the developer or those which are not accepted) be submitted to such authorities.

81. Article 6, paragraph 7, aims at ensuring that the procedures for public participation allow for the submission of any comments, information, analyses or opinions from the public. It is for the public to judge the relevance of such comments for the activity.

82. In the present case, members of the public were impeded in their attempts to submit comments and disseminate them to the public attending the hearing. The Party concerned claims the developer/organizer of the hearings did not accept the material. At this point, the Committee would like first to reiterate its finding in communication ACCC/C/2009/37 (para. 104 (d)), that by making the developers rather than the relevant public authorities responsible for organizing public participation, including the collection of comments, the Belarusian legal framework fails to comply with article 6, paragraph 7, of the Convention. Furthermore, while no provision of the Convention prevents organizers of the hearing from making arrangements to keep a certain order in distributing documents during the hearing, by no means are they entitled to be provided with the discretion as to whether to allow the public to submit their comments and corroborating documents in written form and to distribute them during the hearing.

**ii. C59 (Kazakstan)**

45. Considering the role of the developer in the OVOS, including in the public participation procedure, under the legislation of the Party concerned, the Committee stresses that the developers or the consultants hired by them, as “project proponents” may not ensure all the conditions necessary to guarantee the proper conduct of the public participation. The Committee thus draws the attention of the Party concerned to the fact that reliance solely on the developer to provide for public participation is not in line with the provisions of the Convention (cf. ECE/MP.PP/2011/11/Add.2, para. 80; and findings on communication ACCC/C/2006/16 concerning Lithuania (ECE/MP.PP/2008/5/Add.6, para. 78)), and that due responsibility must be undertaken by the public authorities during the public participation procedure. As noted earlier by the Committee, “these observations regarding the role of the developers (project proponents) shall not be read as excluding their involvement, under the control of the public authorities, into the organization of the public participation procedure (for example conducting public hearings) or imposing on them special fees to cover the costs related to public participation” (ECE/MP.PP/2011/11/Add.2, para. 81).

54. The Committee further notes that the OVOS report was made available only on the website of the developer, which is not in accordance with the Convention, even if in this case the developer was a public authority, i.e., the Ministry of Transport and Communication. Rather, the OVOS report should have been made available to the public by the decision-making authority, which in this case was the Ministry of Environment. Therefore, the Committee finds that the Party concerned is not in compliance with article 6, paragraph 6, of the Convention.

61. The Committee notes that, although the procedure for dealing with public comments at the OVOS stage is clear, the key function of assessing the comments received at this stage and incorporating them in the OVOS report, as appropriate, rests solely with the developer. This means that the comments received from the public are sent to the developer, who is in charge of making amendments to the OVOS report and then returning it to the public authority.

62. The Committee does not possess sufficient information on the practical application of the scheme just outlined to conclude whether its features amount to a systematic inconsistency and, therefore, a failure of the Party concerned to comply with article 6, paragraph 8. The Committee considers that the regulatory framework of the Party concerned, according to which the developer is in charge of managing the outcome of the public participation procedures, creates a risk that all public comments are not taken duly into account. However, given the information before it, the Committee is not able to determine whether in this case there was any further outcome of the public participation, besides the comments accepted, that could have been taken into account in the expertiza conclusion. Therefore, the Committee is not in a position to assess whether the Party concerned was in compliance with article 6, paragraph 8, of the Convention in this particular case.

**k. Closed group consultations**

**i. C44 (Belarus)**

84. The fact that, prior to the hearing of 9 October 2009, a significant number of employees from the private and public sector had been given the opportunity to discuss the Preliminary EIA Report and that the Public Coordination Committee on the Environment had also examined the EIA Report are not sufficient measures. In this respect, the Committee wishes to underline that any discussions in closed groups (for example, within certain professional groups or employees of certain enterprises) or in closed advisory groups can not be considered as public participation under the Convention and in particular cannot substitute for the procedure under article 6 of the Convention. In order to meet the requirements of article 6 such a procedure must be in principle open to all members of the public concerned, including NGOs, and subject only to technical restrictions based on objective criteria and not having any discriminatory nature.

**l. Timing and duration of public hearing (also C69 Romania)**

**i. C44 (Belarus)**

83. With regard to the timing of the public hearing, the Committee observes that organizing only one hearing on a work-day and during working hours indeed effectively limits the possibility of the public to participate and submit comments. If it was absolutely necessary to organize only one hearing on a work-day and during working hours, the Party concerned should have taken the measures to ensure that people who were prevented from participating due to their employment commitments would be able to participate otherwise, such as by viewing the recorded hearing and submitting comments later.

**m. Absence of binding requirement to take due account**

**i. C50 (Czech Republic)**

71.....According to the Environmental Assessment Act (art. 10, sect. 1) the EIA opinion "is issued also based on the public comments". Furthermore, the same act (art. 10, sect. 4) provides that "without the opinion it is not possible to issue a

decision needed for carrying out a project". However, Czech law does not require that the authorities issuing the permitting decision fully uphold the content of the EIA opinion. While the EIA procedure provides for public participation, the Committee considers that the above legal framework does not ensure that in the permitting decision due account is taken of the outcome of public participation. In the light of the above, the Committee finds that the Party concerned fails to comply with the requirement in article 6, paragraph 8, of the Convention to ensure that due account is taken in the decision of the outcome of the public participation.

**5. Substantive issues - Access to justice**

**a. Label under national law not decisive with respect to access to justice**

**i. C58 (Bulgaria)**

53. In addition, in examining access to justice with respect to the different types of acts before it (SEA statements, spatial plans or construction and exploitation permits), the Committee bears in mind that whether a decision should be challengeable under article 9 is determined by the legal functions and effects of a decision, not by its label under national law (c.f. findings on communication ACCC/C/2005/11 concerning Belgium (ECE/MP.PP/C.1/2006/4/Add.2), para. 29 and findings on communication ACCC/C/2006/16 concerning Lithuania (ECE/MP.PP/2008/5/Add.6), para. 57).

**b. Access to justice regarding tiered decision-making – article 9(2)**

**i. C58 (Bulgaria)**

77. 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 the Convention if the previous decision is subject to judicial review upon appeal of the final decision (see also para. 60 above). 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.

**c. Access to justice regarding EIA screening conclusion / determination under article 6(1)(b)**

**i. C50 (Czech Republic)**

82....Article 9, paragraph 2, of the Convention requires Parties to provide the public 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 thus finds that, to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1 (b), members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process. Since this is not the case under Czech law, the Committee finds that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

**ii. C45, C60 (United Kingdom)**

83. As mentioned above, the outcome of an EIA screening decision is a determination under article 6, paragraph 1 (b), of the Convention. These determinations thus are subject to the requirements of article 9, paragraph 2, of the Convention. This entails that members of the public concerned, as defined in article 9, paragraph 2, of the Convention, "shall have access to a review procedure before a court of law and/or another independent and impartial body established by law, to

challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6.”

**d. Access to justice regarding EIA/SEA statement**

**i. C58 (Bulgaria)**

54. According to the communicant, the legislation as well as the court practice of the Party concerned is unclear and ambiguous as to whether the SEA statements (which represent mandatory prerequisites for the adoption of spatial plans) are subject to judicial review. In most cases mentioned by the communicant, the appeals against SEA statements were found inadmissible by the courts on the basis that such statements did not represent a final act, but a preliminary administrative act, which would be subject to review together with the final act (e.g., the spatial plans). At the same time, since according to the communicant environmental organizations and other members of the public do not have standing to challenge a decision to adopt a spatial plan (see paras. 37 ff. above), SEA statements cannot be appealed by members of the public at all, at any stage.

55. The Party concerned explained that that SEA procedure is, according to the EPA, integrated into the procedure for the elaboration and adoption of spatial plans. The authorities responsible for approving the plan or programme are obliged to take into consideration (“reckon”)<sup>1</sup> the SEA statement. With respect to judicial review of the SEA statements, the position of the Party concerned seems to be that the SEA statements are (or should be) subject to judicial review, under the general standing provisions of the Administrative Procedure Code, as confirmed by recent case law.

56. The Committee considers it necessary to distinguish between the cases when an SEA statement substitutes the EIA decision for activities (projects) listed in annex I to the Convention and other cases when the SEA procedure takes place.

57. In cases where the SEA procedure substitutes the EIA procedure for annex I activities (and consequently, an SEA statement is issued instead of an EIA decision), the SEA procedure should be considered as an integral part of the decision-making procedure in the sense of article 6 of the Convention. Consequently, the members of the public concerned should have access to judicial review of the SEA statement under the conditions of article 9, paragraph 2, of the Convention.

58. In other cases, the SEA procedure forms a part of the process for the preparation of a plan relating to the environment according to article 7 of the Convention. The possibility of members of the public to challenge the SEA statement should then be ensured in accordance with article 9, paragraph 3, of the Convention.

66. As mentioned above, the SDA explicitly prevents any person from challenging the General Spatial Plans in court (see para. 21 above). Such explicit provision can hardly be overcome by jurisprudence. Therefore, the Committee concludes that Bulgarian legislation effectively bars all members of the public, including environmental organizations, from challenging General Spatial Plans. As a result, members of the public, including environmental organizations, are also prevented from challenging the SEA statements for General Spatial Plans, as these statements are considered as “preliminary acts”, which are not subject to judicial review in a

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<sup>1</sup> *Original FN 20*: See EPA article 82, paragraph 4 (translation provided by the communicant).

separate procedure (see paras. 58–60 above). Therefore, the Party concerned fails to comply with article 9, paragraph 3, of the Convention.

70. The SDA provides standing to challenge Detailed Spatial Plans to the directly affected owners of real estate. Environmental organizations and other members of the public do not have the possibility of challenging these plans in court. The case-law presented by the communicant confirms this approach (see paras. 22 and 40 above). Besides, members of public have no possibility to challenge the SEA statements for the Detailed Spatial Plans within the scope of an appeal challenging these plans: they can challenge neither the fact that an SEA statement was not issued prior to approval of the Detailed Spatial Plan nor the disrespect of conditions set out in the SEA statement. This situation constitutes non-compliance of the Party concerned with article 9, paragraph 3, of the Convention.

71. The communicant also alleges that, under certain conditions, the SEA statements for the “small scale” Detailed Spatial Plans can substitute individual EIA decisions for specific activities and that this includes activities listed in annex I. In such a situation, the SEA statement together with the small scale Detailed Spatial Plan has the legal function of a decision whether to permit an activity listed in annex I to the Convention. If such is the case, and the scope of persons entitled to challenge the Detailed Spatial Plan excludes environmental organizations, this also implies a failure to comply with article 9, paragraph 2, of the Convention.

**e. Access to justice regarding permits**

**i. C58 (Bulgaria)**

73. .... According to the law, the authority issuing the final permit should respect the EIA decision and the conditions contained in it. In practice, however, when the construction or exploitation permit does not fully follow the conclusions of the EIA decision, environmental organizations or other members of the public concerned cannot ask the court to annul the final permit for that reason.<sup>2</sup> The same applies, according to the communicant, in situations when the construction or exploitation permit is issued while an EIA decision does not exist at all, either because it has never been issued or because it was cancelled by the court.

78. The current case differs from the hypothetical situation outlined in the previous paragraph. The members of the public concerned, including environmental organizations, can challenge in court the EIA decision, i.e., the first decision issued in the tiered process. However, they are not entitled to appeal the final permit, which, after it is issued, subsumes the EIA decision, i.e., it includes the conditions and measures of the EIA decision. This situation gives rise to a number of concerns with respect to access of members of the public concerned to effective judicial review with regard to permitting the activities listed in annex I to the Convention.

79. First, the communicant informs the Committee of situations in practice where construction or exploitation permits for activities listed in annex I to the Convention were issued without a prior EIA procedure, although this was required by law (see the cases referred to above in paras. 43–44). The communicant asserts that in these cases there was a lack of access to justice for the members of the public concerned. The Party concerned emphasizes that a construction or exploitation permit, issued without a prior mandatory EIA decision, as well as implementation of an activity on the basis of such permits, would be illegal. Be that as it may, since environmental

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<sup>2</sup> *Original FN 21*: See examples provided by the communicant gives examples in its letter of 6 March 2012

organizations, as well as other members of the public concerned, do not have access to a review procedure before a court of law or another independent and impartial body established by law to challenge such final permits for annex I activities, when EIA decisions are missing, the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

80. Secondly, there are situations where the EIA statements are issued and these are subject to appeal, but the subsequent/final decisions are not subject to appeal by members of the public concerned, including organizations, even if those decisions are not in conformity with the conditions and measures contained in the EIA decision. This means that even if all the environmental aspects of a proposed activity were covered by the EIA decision, there is no possibility for members of the public, including environmental organizations, to challenge the legality of a final permit that did not respect that EIA decision. Therefore, the Party concerned fails to comply with article 9, paragraph 2, in conjunction with paragraph 4, of the Convention.

81. Thirdly, at least for one category of annex I activities (tourism and recreation projects according to annex 2, para. 12, of the EPA), it was demonstrated to the Committee that the EIA decision can be substituted by the SEA statement (see para. 30 above). Since the SEA statements are not subject to judicial review, there is, in such cases, absolutely no possibility for the members of the public concerned to challenge any decision during the permitting process of such activities in court. This, according to the Committee, also constitutes failure by the Party concerned to comply with article 9, paragraph 2, of the Convention.

**f. Access to justice with respect to spatial plans**

**i. C58 (Bulgaria)**

64. However, the characteristics of the General Spatial Plans indicate that that these plans are binding administrative acts, which determine future development of the area. They are mandatory for the preparation of the Detailed Spatial Plans, and thus also binding, although indirectly, for the specific investment activities, which must comply with them. Moreover, they are subject to obligatory SEA and are related to the environment since they can influence the environment of the regulated area. Consequently, the General Spatial Plans have the legal nature of acts of administrative authorities which may contravene provisions of national law related to the environment and the Committee reviews access to justice in respect to these plans in the light of article 9, paragraph 3, of the Convention.

69. Bearing in mind their characteristics, as summarized above, the Committee considers Detailed Spatial Plans as acts of administrative authorities which may contravene provisions of national law related to the environment. In this respect, , article 9, paragraph 3, of the Convention applies also for the review of the law and practice of the Party concerned on access to justice with respect to the Detailed Spatial Plans. It follows also that for Detailed Spatial Plans the standing criteria of national law must not effectively bar all or almost all members of the public, especially environmental organizations, from challenging them in court (cf. findings on communication ACCC/C/2005/11 Belgium).

**g. Review of procedural/substantive legality under article 9(2)**

**i. C50 (Czech Republic)**

81. The situation as described by the parties indicates that under Czech law individuals may seek review of the procedural and limited substantive legality of

decisions under article 6; and that NGOs may seek the review only of the procedural legality of such decisions. In the light of the limited right of review of NGOs, the Committee finds that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

**h. Right to challenge violations of national law – article 9(3)**

**i. C50 (Czech Republic)**

84. Under article 9, paragraph 3, of the Convention, members of the public have the right to challenge violations of provisions of national law relating to the environment. It is sufficient that there is an allegation by a member of the public that there has been such a violation (see findings on communication ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4). Moreover, it is not necessary that the alleged violation concern environmental law in a narrow sense: an alleged violation of any legislation in some way relating to the environment, for example, legislation on noise or health, will suffice.

**i. Standing - Standing to challenge decisions under article 9(2)**

**i. C58 (Bulgaria)**

However, for the activities (projects) to be implemented, subsequent permits must be issued after the EIA decisions, namely the construction and/or exploitation permits according to the SPA. With respect to these permits, legislation (for the construction permits) and case-law (for the exploitation permits) limit access to the judicial review to the investor and directly affected neighbours. This, according to the communicant, constitutes non-compliance with the Convention.

**ii. C50 (Czech Republic)**

75. The Committee recalls its earlier findings on communication ACCC/C/2005 (Belgium) regarding the definition of standing under the Convention, where it held that, 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” (ECE/MP.PP/C.1/2006/4/Add.2, para. 33). Hence, in exercising their discretion, Parties, 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.

76. However, in the absence of evidence of court jurisprudence to corroborate the communicant's submission, the Committee cannot conclude that the Party concerned fails to comply with the Convention with regard to standing of individuals under article 9, paragraph 2. The Committee notes that if Czech courts systematically interpret section 65 of the Administrative Justice Code 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.

77. With respect to the rights of NGOs to seek review procedures, the communicant did not provide case law in support of its allegations. During the discussions, it was agreed by both parties that NGOs have some rights — although not as broad as during the EIA procedure — as parties to the procedures and may seek review. Specifically, NGOs that have already submitted written comments during the EIA

procedure or that have been a party to a previous authorization procedure have standing in the subsequent procedures (see also para. 39 above). The Committee recalls that 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.

78. While Czech law may not be fully clear and consistent in all respects as regards standing of NGOs, the Committee notes that NGOs are not able to participate during the entire decision-making procedure, since for NGOs standing after the conclusion of the EIA stage is linked to the exercise of their rights during the EIA procedure or other procedures prior to the decision/authorization. The Committee finds that this feature of the Czech legislation limits the rights of NGOs to access review procedures regarding the final decisions permitting proposed activities, such as building permits. In this respect the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

**j. Standing – impairment of right – article 9(2)**

**i. C48 (Austria)**

63. In the view of the Committee the standing criteria for individuals set by Austrian legislation do not seem to run counter to the objectives of the Convention regarding wide access to justice. However, the definition of “neighbours” may be limiting the rights of “persons that temporarily stay in the vicinity of the project and do not have any in rem rights” (EIA Act, art. 19(1)1), such as tenants or individuals that work in the vicinity, unless they could claim that they “may be threatened or disturbed through the construction, the operation or the existence of a project” (EIA Act, art. 19(1)1). The information provided does not sufficiently substantiate the allegations, e.g., by reference to relevant case-law, to the extent that the Committee finds the Party not to comply with article 9, paragraphs 2 and 3, in these respects. Despite this, the Committee finds that the information before it raises some concern as to how this provision of the EIA Act may be interpreted and applied. Therefore, the Committee encourages courts of the Party concerned to interpret and apply the provisions relating to locus standi for individuals in the light of the Convention’s objectives.

**k. Standing – article 9(3)**

**i. C58 (Bulgaria)**

69. Bearing in mind their characteristics, as summarized above, the Committee considers Detailed Spatial Plans as acts of administrative authorities which may contravene provisions of national law related to the environment. In this respect, article 9, paragraph 3, of the Convention applies also for the review of the law and practice of the Party concerned on access to justice with respect to the Detailed Spatial Plans. It follows also that for Detailed Spatial Plans the standing criteria of national law must not effectively bar all or almost all members of the public, especially environmental organizations, from challenging them in court (cf. findings on communication ACCC/C/2005/11 Belgium).

**ii. C50 (Czech Republic)**

84. ....With respect to noise exception permits, Czech law, as interpreted by Czech courts, stipulates that only the applicant for the permit or the operator may be a party to the permit procedure and, according to Czech jurisprudence, this also defines standing before the courts.

85. While article 9, paragraph 3, of the Convention accords greater flexibility to Parties in its implementation as compared with paragraphs 1 and 2 of that article, the Committee has previously held (*ibid.* and findings on communication ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2) that the criteria for standing may not be so strict that they effectively bar all or almost all environmental organizations or members of the public from challenging acts of omissions under this paragraph. It is clear from the oral and written submissions of the parties, that if an operator exceeds some noise limits set by law, then no member of the public can be granted standing to challenge the act of the operator (private person) or the omission of the authority to enforce the law. In addition, it is evident that in cases of land-use planning, if an authority has issued a land-use plan in contravention of urban and land-planning standards or other environmental protection laws, a considerable portion of the public, including NGOs, cannot challenge this act of the authority. The Committee finds that such a situation is not in compliance with article 9, paragraph 3, of the Convention.

**I. Standing for NGOs under article 9 (3)**

**i. C48 (Austria)**

67. The communicant alleges that Austrian legislation in general denies standing to individuals and NGOs to challenge acts or omissions of public authorities or private persons, when such acts contravene Austrian environmental law. A list of laws was provided to the Committee outlining the possibilities for the public concerned to seek standing as provided for by article 9, paragraph 3, of the Convention. The Party disagrees that individuals and NGOs are denied standing and refers to the wording of the provision, “where they meet the criteria, if any, laid down in national law”, and to the possibility to seek judicial review under article 9, paragraph 3, through an ad hoc citizen group, an NGO or the Ombudsman for the Environment (see paras. 37–48 above).

68. Article 9, paragraph 3, applies to a broad range of acts or omissions, while at the same time it allows for more flexibility — as compared to article 9, paragraphs 1 and 2 — by 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.

69. The Committee has considered the criteria for standing under article 9, paragraph 3, in several cases. For instance, in communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, para. 35) it noted that:

[T]he Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“*actio popularis*”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, 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 or omissions that contravene national law relating to the environment.

It further held that “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” (ibid., para. 36). In addition, in communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4, para. 29), the Committee held that the criteria laid down in national law cannot be so strict “that they effectively bar all or almost all environmental organizations or other members of the public from challenging act or omissions that contravene national law relating to the environment”.

70. 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 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” (see ibid., para. 30).

71. While they may provide standing for neighbours, a number of Austrian environmental laws presented to the Committee<sup>3</sup> do not provide standing for NGOs at all. Moreover, in addition to these sectoral environmental laws which do not provide locus standi to NGOs, there seem to be rather limited avenues available to NGOs to actually challenge acts and omissions by public authorities that contravene provisions of its national law relating to the environment. These avenues include: (a) when the procedure envisaged by the sectoral law at issue is consolidated with the EIA or IPPC procedure; (b) under the environmental liability laws; and, in any event, (c) through the Ombudsman for the Environment, who according to the sectoral or provincial legislation, may or may not have the right to access the courts. The administrative procedures failing, there is a possibility for those affected to seek civil remedies.

72. The Committee, in evaluating the compliance of Austrian law with the Convention, considers the general picture described by the parties. It understands that, in effect, under Austrian law, there is insufficient possibility for a members of the public to challenge an act or omission of a public authority, if the procedure is not consolidated under the EIA or IPPC procedures, or if they cannot prove that they may be adversely affected by environmental damage so as to benefit from the laws transposing the EU Environmental Liability Directive. In addition, members of the public who cannot prove that they are affected by a project have insufficient means of recourse to civil remedies.

73. In the view of the Committee, outside the scope of the EIA and IPPC procedures and environmental liability, the conditions laid down by the Party concerned in its national law are so strict that they effectively bar NGOs from challenging acts or omissions that contravene national laws relating to the environment (cf. findings in previous cases referred to in paras. 69 and 70 above). The fact that there is a possibility that the procedure laid down under the sectoral

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<sup>3</sup> *Original FN 10*: See common table submitted by the Party concerned and the communicant on 15 February 2011 (additional information on standing for the public in Austrian legislation, annex).

environmental laws may be consolidated in the framework of the EIA or IPPC procedure for the purposes of a large project or that environmental liability and civil law remedies may apply, under conditions, does not compensate for the failure to fulfil the requirements of article 9, paragraph 3, concerning other acts and omissions.

74. The Party concerned emphasizes the importance of the institution of the Ombudsman for the Environment and the possibility for a member of the public, including an NGO, to ask the Ombudsman to take on its claims. The Committee notes, however, that according to the table prepared by the communicant and agreed by the Party concerned, the authority of the Ombudsman for the Environment may be limited, as it does not have standing in procedures of many sectoral laws relating to the environment other than the EIA and IPPC procedures, environmental liability, nature conservation procedures and waste management. Moreover, the Ombudsman has discretion whether or not to bring a case to court despite the request of a member of the public, including an NGO.

75. In the light of the considerations set out above, the Committee finds that the Party concerned, in failing to ensure standing of environmental NGOs to challenge acts or omissions of a public authority or private person which contravene provisions of national law relating to the environment, is not in compliance with article 9, paragraph 3, of the Convention.

**m. Standing - "directly and individually concerned" – article 9, para. 3**

**i. C32 (EU)**

81. The Committee will first focus on the jurisprudence established by the ECJ, based on the Plaumann test. If access to the EU Courts appears too limited, the next question is whether this is compensated for by the possibility of requesting national courts to ask for preliminary rulings by the ECJ.

82. As pointed out in paragraph 20 above, the judgement in the Plaumann case, decided in 1963, established what was to become a consistent jurisprudence with respect to standing before the EU Courts. When interpreting the criteria of being directly and individually concerned by a decision or a regulation (TEC article 230, paragraph 4), the ECJ held that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".

83. The Plaumann test has been maintained in the ECJ jurisprudence. In the field of the environment, the EU Courts have in no case accepted standing to any individual or civil society organization unless the matter concerned a decision addressed directly to that person. In two cases relating to the environment, i.e., the Greenpeace case and the Danielsson case, the EU Courts did not grant standing to the applicant, despite the possibility of reinterpreting the provision in question. The communicant has also referred to other cases, such as the UPA cases, the Jégo-Quéré case and the EEB cases, to show that the ECJ has not endeavoured to alter its jurisprudence.

84. The ECJ applied the criteria of direct and individual concern in the Greenpeace case, in which the applicants, including an environmental NGO and local residents, challenged a decision of the Commission to finance the construction of two coal-

fired power plants on the Canary Islands on the grounds that this decision contravened EU legislation relating, inter alia, to environmental impact assessment. In this case, members of the public did indeed try to challenge an act issued by an EU authority for contravening EU law relating to the environment. However, the organization was not granted standing, and the case was dismissed. The Court held that the challenged decision was “a measure whose effects [were] likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned”.<sup>4</sup>

85. The ECJ reasoned in the same vein in the Danielsson case:

“Even on the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, that circumstance alone would not be sufficient to distinguish them individually in the same way as a person to whom the contested decision is addressed [...] since damage of the kind they cite could affect, in the same way, any person residing in the area in question.”<sup>5</sup>

86. It is clear to the Committee that TEC article 230, paragraph 4, on which the ECJ has based its strict position on standing, is drafted in a way that could be interpreted so as to provide standing for qualified individuals and civil society organizations in a way that would meet the standard of article 9, paragraph 3, of the Convention. Yet, the cases referred to by the communicant reveal that, to be individually concerned, according to the ECJ, the legal situation of the person must be affected because of a factual situation that differentiates him or her from all other persons. Thus, persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation. The consequences of applying the Plaumann test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ.

87. Without having to analyse further in detail all the cases referred to, it is clear to the Committee that this jurisprudence established by the ECJ is too strict to meet the criteria of the Convention. While the WWF-UK case was initiated after the entry into force of the Convention for the Party concerned, for the reasons stated in paragraph 63, the Committee decides not to make a specific finding on whether the decision of the EU Courts in the WWF-UK case amounted to non-compliance with the Convention (and accordingly does not examine whether the contested EU regulation on fishery in the WWF-UK case is as such a challengeable act under article 9 or the Convention). Yet, the Committee considers with regret that the EU Courts, despite the entry into force of the Convention, did not account for the fact that the Convention had entered into force and whether that should make a difference in its interpretation and application of TEC article 234.

88. Without prejudicing the forthcoming examination of the Aarhus Regulation and any other relevant internal administrative review procedure (see para. 10), the Committee is also convinced that if the examined jurisprudence of the EU Courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraph 3, of the Convention. However, since this conclusion is based on court cases that were initiated before the entry into force of the Convention and

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<sup>4</sup> *Original FN 41*: Greenpeace, CFI Order of 9 August 1995 T-585/93, para. 54.

<sup>5</sup> *Original FN 42*: See footnote 14 above at para. 71.

since the Committee is not examining the Aarhus Regulation or any other internal administrative review procedure, the Committee does not make a finding of non-compliance by the Party concerned with article 9, paragraph 3, of the Convention in this case.

**n. Costs of access to justice – article 9(4)**

**i. C57 (Denmark)**

45. With respect to the communicant's second allegation under article 9, paragraph 4, the Committee finds its approach in ACCC/C/2008/33 (United Kingdom) to be appropriate with respect to the current communication also, i.e., to assess compliance with article 9, paragraph 4, by considering the system as a whole and in a systemic manner. The Committee considers that in order to do this a number of considerations need to be taken into account.

46. In this regard, the rights granted to the public by the Convention and its three pillars aim not only at the protection of the individual right to a healthy environment, but also at improving the environment (preambular para. 7) and enhancing the quality and the recognizes the importance of the role that environmental NGOs can play in environmental enforcement of environmental decisions (preambular para. 9). The Convention explicitly recognizes the importance of the role that environmental NGOs can play in environmental protection (preambular para. 13). The Committee also considers that, in keeping with the objective set out in preambular paragraph 7 and article 1 to protect and improve the environment for the benefit of present and future generations, concomitant implementation of the rights under the Convention, in general, should be strengthened over time.

47. With regard to the submission by the Party concerned, that Denmark is a high income country and therefore the fees charged under the new law are not prohibitively expensive, the Committee considers that the relationship between average individual net income and NGOs' financial capacity to have access to justice is not clear. Moreover, the financial capacity of any particular NGO to meet the cost of access to justice, as in this case, may depend on a number of factors, including the amount of the membership fee, the number of members and the amount of resources allocated for access to justice activities in comparison with other activities, among other factors. For this reason, the Committee does not find the submission by the Party concerned to be persuasive.

48. When assessing if the new fees regime is "prohibitively expensive", apart from the amount of the fee as such, the Committee considers the following aspects of the system as a whole to be particularly relevant: (a) the contribution made by appeals by NGOs to improving environmental protection and the effective implementation of the Danish Livestock Act; (b) the expected result of the introduction of the new fee on the number of appeals by NGOs to NEAB; and (c) the fees for access to justice in environmental matters as compared with fees for access to justice in other matters in Denmark.

49. According to the statistics provided by the Party concerned (see para. 21 above), it is evident that NGO efforts resulted in the repeal of a large number of illegal decisions, a halt on many potentially environmentally harmful activities, and the imposition of measures for limiting other harmful effects on the environment. These statistics alone provide sufficient evidence of the contribution made by appeals by

NGOs to improving environmental protection and the effective implementation of the Danish Livestock Act.

50. It is the communicant's strongly put submission that the increased fees for NGOs will result in a decrease in the number of environmental appeals filed by NGOs before NEAB. Moreover, the Explanatory Note to the bill introducing the new fees regime explicitly states: "the number of appeals submitted by organizations and enterprises is expected to decrease".<sup>6</sup> Therefore, the Committee finds that the new fees system was intended to, and is likely to, result in a decrease of the number of appeals filed against environmental decisions by NGOs.

51. The Committee has been provided information by the Party concerned regarding the cost to appeal administrative decisions before other similar quasi-judicial bodies in the Party concerned, including those concerned with patients' rights (health), consumer issues, energy supply and tax matters. The Committee notes that such appeals are either free of charge or have fees of considerably less than DKK 3,000, whereas higher fees are charged for appeals concerning matters regarding primarily commercial interests, such as competition, patent and trademark rights. The Committee also notes that NGO appeals before NEAB have more the nature of appeals to the first group of bodies than appeals regarding primarily commercial interests.

52. Based on the above three considerations, the Committee finds that the fee of DKK 3,000 for NGOs to appeal to NEAB is in breach of the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive.

**o. Timeliness of review procedures (art. 9, para. 4)**

**i. C48 (Austria)**

59. The national legislation of the Party concerned requires that if the authority does not provide any answer to the request for information within two months and it further fails to provide official notification within the next six months, the information requester has to proceed with the devolution request and only after it has received a response to its devolution request, can it seek a review procedure. This means that, if the requester believes that its request was not properly addressed by the authorities, it may have to wait for longer than one year after its initial request for information until it can access a review procedure. Therefore, the Committee finds that the Party concerned fails to ensure access to a timely review procedure with respect to requests for information, as required by article 9, paragraph 4 of the Convention.

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<sup>6</sup> *Original FN 14*: See footnote 2, paragraph 4.1.2.