

ECO-Forum Legal Contact Points

Aarhus Convention Compliance Committee
United Nations Economic Commission for
Europe - Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland

Brussels, Geneva, Kiev, Vienna
23 March 2015

Re: Development of a new procedure for the pre-admissibility of communications from the public.

Dear Chair and Dear Members of the Aarhus Convention Compliance Committee

At the Open Dialogue, last July 2014, at the 5th meeting of the Parties to the Convention in Maastricht, it has been agreed by you and the Parties that all the documents you are receiving for a potential new communication from the public should be made public before your decision about pre-admissibility. This is a major change in your practice, as the communications were until now made public only after having being provisionally admitted and communicated to the concerned Party.

This new practice has been applied and tested right from your first session after the MOP, in September and has evolved during the December session. You are now proposing to apply for the admission of new communications, *mutatis mutandis*, a similar procedure as the one fixed in Decision I/7 for the information gathering, the findings and recommendations, with an open discussion before a decision made in a close meeting by the Compliance Committee.

In order to contribute to the discussion you will have in your 48th session, starting in Geneva on the 24th March, we are submitting to your attention a comment, attached to this letter, with some legal views and proposals.

Generally speaking, we would not like to see a complicated new procedure be developed for the admissibility of new communications, which would require additional resources and time for all concerned.

The use of closed sessions for pre-admissibility decisions raises a number of questions in relation to:

- o Legal considerations (see attachment, part A)
- o Practicalities of the procedure (see attachment, part B)
- o The possible unfairness of a procedure, where Parties have a possibility to appeal positive pre-admissibility decisions all along the procedure, while a negative decision, taken behind closed doors, is final for a communicant.

Any new admissibility procedure should be considered also in the light of other trends, including the focus on the exhaustion of domestic remedies in the new version of the Guide of the Compliance Committee. On this point, we would like to remind the Committee that too restrictive interpretation concerning the exhaustion of domestic remedies would weaken the “non-confrontational” and “non remedial” nature of the procedure. Any practice too similar to the one of a Court, strictly applied, would make the procedure more confrontational and “supranational”.

We do recognize value of the proposal of the Committee to avoid pressure. However, we wish to see a fair and practical procedure as a result of this.

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Comment on a possible new procedure for the pre-admissibility of communications from the public to the Aarhus Convention Compliance Committee

A. Legal considerations on : Closed sessions v. entitlement to participate

Can the Compliance Committee discuss and take decision on pre-admissibility in a closed session?

For the purpose of this analysis two broad categories are distinguished: “parties to the case” (communication and a party concerned) and any other “observer or the public”. The reason is that the parties to the case have specific procedural rights stemming from the consideration of a case.

I. Observers and the public

1. The Decision I/7 does not deal with the openness/closeness of the meetings of the Compliance Committee. There is no requirement for the meetings to be public or conditions for this. This issue is dealt in the rule of procedure of which decision I/7 is a complement. The processes described in paragraph 32, ie the practice of holding them in open session, reflects precisely the more general principle of meetings being open unless there is a specific reason for them to be closed. The decision to implement paragraphs 32 and 33 by holding, respectively, open and closed sessions, which we consider reasonable, was included by the Committee in its modus operandi and has been welcomed at successive sessions of the MOP.
2. Given absence of any requirements on this in the Decision I/7, we must refer to the Rules of Procedure (RoP) of the Meeting of the Parties of the Convention to understand status of observers and grounds to limit their participation.
3. Indeed, the Committee’s Guide says that “as a general rule, the rules of procedure of the MoP3 shall be applied mutatis mutandis. Rules 19, 20, 24 to 27, 29 to 42, 44, 46 and 48 are considered to be the most relevant to the Committee (MP.PP/C.1/2003/2 para. 11).
4. Relevant RoP of MOP state that:
 - a. Representatives of any of the organizations referred to in rule 5, paragraph 2 (e) [i.e. observer NGOS], shall be entitled to participate in the proceedings of any meeting governed by these rules, unless one third of the Parties present at that meeting objects to the participation of representatives of that organization (Rule 6.2)
 - b. The meetings of the Parties shall be open to members of the public, unless the Meeting of the Parties, in exceptional circumstances, decides

otherwise especially to protect the confidentiality of information pursuant to the Convention (Rule 7.1)

5. Conclusion: The meetings of the Compliance Committee shall be open to observers and the public, unless there is a specific objection or decision in a particular situation. Any rule that would be general and that would deny the right to participate would not be in line with the RoP of the MOP. The only exceptions are those agreed in decision I/7.

II. Parties to the case

6. Section IX “Entitlement to participate” of the Decision I/7 provides for certain rights of the party concerned by communication/referral/submission and a party/member of the public making such communication/referral/submission. It is clear that the same regime applies to any kind of complaint: communication, referral or submission and there is no need to distinguish between them for the purpose of this analysis.
7. Section IX key purpose is to ensure fair process when dealing with communications. The key principle is “entitlement to participate”, which means:
 - a. Party and communicant are entitled to participate in the discussions of the committee with respect to that communication (para.32)
 - b. Party and communicant shall not take part in the preparation and adoption of any findings, any measures or any recommendations by the Committee (para.33).
 - c. Draft findings, measures and recommendations shall be sent to communicant and party for their comments (para.34).
8. Given the requirements of para 32, the only legal ground to limit participation of the parties to the case in the Committee’s handling of the communication shall meet two criteria: it shall involve (1) “preparation or adoption” of (2) only “findings, measures or recommendations”.
9. Clearly, a preliminary determination on admissibility of the communication is not a “recommendation” or “measure” in the context of the Decision I/7. The measures are listed in paragraphs 36 and 37, and recommendations are part of the “measures” possibly taken by Meeting of the Parties (para.37) and/or Compliance Committee (para.36).
10. The Decision I/7 does not define what the term “findings” means and uses the term only in the context of Section IX. Therefore, the concept of “findings” is yet to be established.

11. There are two possible sources to be analyzed in order to understand the concept of findings: decisions on compliance by the Meeting of the Parties and reports by the Compliance Committee.
- a. MOP decisions, when endorsing the findings of the Compliance Committee, never dealt with the admissibility issues explicitly. Both “non-compliance” and “no non-compliance” findings endorsed or noted by the Compliance Committee primarily focus on the findings on (non-) compliance with the Convention.
 - b. Compliance Committee reports, especially addenda dealing with specific cases, do not contain a specific section “findings”, instead relevant section is titled “consideration and evaluation by the Committee’.
 - c. In all cases, the Compliance Committee uses the term “determination” for pre-admissibility decisions.

The main rationale for the findings to be prepared and adopted without the presence of the parties concerned as provided in paragraph 33 is so that the Committee may exercise its independence of thought without undue pressure from either the communicant or the Party concerned. This rationale is no less relevant for the determination on admissibility as for the discussion on the merits of the case. Therefore, under certain conditions.

It is important to note the differing implications of preliminary determinations on admissibility being held in closed session in cases where a communication is deemed inadmissible as compared with those where it is deemed admissible. In the former case, the communication is rejected and there is no further opportunity to challenge the Committee’s conclusion that the communication was inadmissible (in fact, it is not really a ‘preliminary’ determination at all). In the latter case, because the process continues, the Party concerned may argue during the discussion on the substance of the case that the communication was actually inadmissible – and there are examples of where this was done, sometimes with success.¹ This important asymmetry needs to be taken into account when finding a solution which is fair to all parties.

12. Conclusions:

- a. **Participation of observers and the public in the meetings of the Compliance Committee is subject to the decision establishing the body taken in conjunction with the Rules of Procedures of the Meeting of Parties, applied *mutatis mutandis*. No general rule can be applied by a subsidiary body to hold closed sessions unless directly provided by these decisions/rules.**
- b. **Exclusion of the parties to the case during the preliminary determination of admissibility (except in the special cases covered by para. 30 of the annex to decision I/7) can only be on the basis of para.33 of the annex to Decision I/7/.**

¹ E.g. [ACCC/C/2009/39](#).

- c. If the determination of admissibility is considered to be encompassed by the term 'findings' and therefore subject to the para.33, it also needs to be subject to paragraph 34, i.e. subject to consultations with the parties. The same would then apply to final determination of admissibility.**
- d. Having regard to the asymmetry referred to in previous paragraph, but at the same time to the need to avoid an unduly burdensome system, a differentiated approach could be taken according to whether the communication is determined to be admissible or inadmissible. Where the preliminary determination is of admissibility, the communication could be processed according to the current procedures, because the preliminary determination of admissibility can be challenged during the discussion of the communication. Where a communication is preliminarily be determined to be inadmissible, there should be a further opportunity, pursuant to paragraph 34, to object to the preliminary determination.**

GENERAL CONCLUSION:

- i - Determination of the pre-admissibility of communications in a closed session must be in line with the requirements of the general Rules of Procedure taken in conjunction with Decision I/7, otherwise it contradicts them. Any limitation to the general principle of openness must be grounded on a valid legal argument and legitimated by a clear purpose.**
- ii - If the Compliance Committee wants to follow such a path for new communications, its decision can only be based *mutatis mutandis* on the annex to Decision I/7 and must therefore ensure compliance with both paragraphs 33 and 34.**

B. Proposals for provisional admission of new communications

13. If the ACC continues on the path to decide new cases of provisional admission in closed meetings, then it needs to establish a genuine procedure, relying, *mutatis mutandis*, on the principles and operations described in Decision 1/7, in particular paragraphs 33 and 34 .

There needs to be specific temporal sequences:

Before the examination by the Committee:

14. Communications that will be taken into account by the ACC will be those received 2 business weeks or 15 days before a session of the Committee. All those who arrived after will be considered only at the following session.
15. The communication shall be prepared by the secretariat and reviewed by the President and the Vice President (e) (s), to postpone those that are not understandable or that lack important information. In these cases, clarifications or additional information are requested to communicants, in order to be submitted to the Committee at the next session. There is no additional mail exchanges after that. These communications are automatically submitted to the Committee for provisional admission. These communications are not put on line until then. This review is purely technical and based on the good readability and understanding of the communication. Nothing else.
16. Communications that do not pose a problem of understanding are put online on a Committee web page dedicated to the new communications to be considered for provisional admission. This Web page must indicate without any terminological ambiguity that these communications have not yet been considered by the Committee and are pending. This is to avoid any confusion or error on the exact status of these communications.
17. The posting of these communications is equivalent to an information given to all stakeholders (Parties to the Convention, NGOs, etc.)

The review by the Committee

18. The ACC reviews the provisional admission of new communications at the beginning of its sessions. The date and time of this review is clear, without abbreviations, on the Committee's website and on the ACC work program.
19. The list of new communications examined is indicated in the Committee's work program or in a separate document, available two weeks before the session.
20. The committee discusses each communication in public. It hears the arguments that one or more Parties, or the communicant or observers may have about communication, with regard to the admissibility criteria described in Decision

1/7 and only on these criteria. No substantive discussion can take place during these exchanges. The discussion of a communication may not exceed 15 minutes.

21. Written submissions on the provisional approval may be submitted to the Committee at this session or just after, if the Committee specifically requested to someone to do so. Not after.
22. The Committee deliberates and takes the provisional admission decision or refusal in a closed meeting during the session.
23. The Committee orally communicate its decisions at the end of the session, before the adoption of the report of the session. It can answer comprehension questions, but no substantive discussion of these decisions can take place at that time.

After review by the Committee

24. In order to be consistent with the substance of § 34 of Decision I/7, the refusal of a provisional admission is communicated in writing to the communicant during the two weeks after the session, at the same time as the notifications of the provisionally accepted communications.
25. The refusal must contain sufficiently detailed argumentation to substantiate the determination of inadmissibility, i.e. it should not just refer to the criteria which have been met/not met but should precisely indicate how they were met/not met.
26. If the communicant whose communication was refused wants to comment or to point to a misunderstanding about of his/her communication, he/she can send a letter to that effect to the Secretariat within a specified time limit. The concerned Party is also informed about this new information. The communication is then discussed at the following session. In case of further refusal by the Committee, the procedure is then closed.
27. If needed the communicant may then submit a new communication (but should consider the reasons for the previous refusal, to avoid any further refusal, which would logically be almost automatic.)
