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Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date

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Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

REPORT ON THE SEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case of information requested from Kazatomprom
(Communication ACCC/C/2004/01 by Green Salvation (Kazakhstan))

Adopted by the Aarhus Convention's Compliance Committee on 18 February 2005

Introduction

1. On 7 February 2004, the Kazakh non-governmental organization Green Salvation submitted a communication to the Committee alleging non-compliance by Kazakhstan with its obligations under article 4, paragraphs 1 and 7, article 6, paragraph 6, and article 9, paragraph 1, of the Aarhus Convention.

2. The communication concerned access to information related to the proposed draft act on the import and disposal of radioactive waste in Kazakhstan held by the National Atomic Company Kazatomprom. The communicant claims that its right to information was violated

when a request to Kazatomprom for information purporting to substantiate a proposal to import and dispose of foreign radioactive waste was not answered. Subsequent appeal procedures in courts of various jurisdictions and instances failed, in the communicant's view, to meet the requirements of article 9, paragraph 1, of the Convention. According to the communication, the lawsuits were rejected first on grounds of jurisdiction and subsequently on procedural grounds as the courts did not acknowledge the right of a non-governmental organization to file a suit under article 9, paragraph 1, in its own name rather than as an authorized representative of its members. The communication is available in full at http://www.unece.org/env/pp/pubcom.htm.

3. The communication was forwarded to the Party concerned on 17 May 2004, following a preliminary determination as to its admissibility.

4. A response was received from the Party concerned on 27 October 2004, indicating, inter alia, that:

(a) The communicant did not fall under the definition of "the public concerned" within the meaning of article 2, paragraph 5, of the Convention for the type of decision-making process in question;

(b) As of the end of 2002, the information requested by the communicant from Kazatomprom did not relate to any ongoing decision-making procedure, as the matter was not under consideration by the Government;

(c) The National Atomic Company Kazatomprom did not fall under the definition of "public authority" within the meaning of article 2, paragraph 2, of the Convention.

5. The Party alleged that, as a consequence, the communication did not satisfy the formal requirements of admissibility for review of compliance under the Convention. However, it did welcome possible recommendations from the Compliance Committee, which could be used to improve both practice and legislation in Kazakhstan in the relevant field.

6. The Committee at its fourth meeting (MP.PP/C.1/2004/4, para. 18) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the arguments put forward by the Party concerned in its response and having further consulted with both parties at its sixth meeting, the Committee confirms the admissibility of the communication, deeming the points raised by the Party concerned to be of substance rather than related to admissibility.

7. In accordance with paragraph 34 of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicant on 1 February 2005. Both were invited to provide comments, if any, by 14 February 2005. Comments were received from both the Party concerned. The Committee, having reviewed the comments, took them into account in finalizing its findings and recommendations by amending the draft where the comments, in its opinion, affected the presentation of facts or its consideration, evaluation or conclusions.

I. SUMMARY OF FACTS [1]

8. In 2001, the President of the National Atomic Company Kazatomprom, Mr. M. Jakishev, proposed for consideration by the Parliament a legislative amendment which would allow the

import and disposal of foreign low- and medium-level radioactive waste in Kazakhstan[2]. Mr. Jakishev's statement in the press referred to a feasibility study justifying the proposed amendments.

9. On 11 November 2002, the Ecological Society Green Salvation requested Mr. Jakishev, in writing, to provide the calculations justifying his statement to the press.

10. Having received no response, the communicant challenged the refusal to provide the information requested, filing a lawsuit with one of the Almaty district courts on 4 February 2003.

11. Between 12 February 2003 and 23 May 2003, seven determinations were issued by judges of various courts in an attempt to determine the jurisdiction of the lawsuit. The case was heard on merit starting from 23 May 2003. At the hearing on 28 May 2003, a representative of the defendant (Kazatomprom) presented the court with a copy of the feasibility study of the disputed project. However, the case was dismissed on 13 June 2003 on procedural grounds for lack of standing. The decision stated, in particular, that, as an environmental non-governmental organization, the plaintiff could represent in court only the interests of its individual members and that it had failed to present a power of attorney from the individuals whose interest it represented.

12. The decision was unsuccessfully appealed to six instances, including three offices of the public prosecutor.

II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

13. Kazakhstan deposited its instrument of ratification of the Convention on 11 January 2001. The Convention entered into force for Kazakhstan on 30 October 2001.

14. The Convention, as an international treaty ratified by Kazakhstan, has direct applicability in the Kazakh legal system. All the provisions of the Convention are directly applicable, including by the courts.

15. The issue raised by the Party concerned of whether the draft amendments were still under consideration as of October 2002 (para. 4 (b) above) would have relevance only with regard to the application of article 8 of the Convention. The Committee does not feel, however, that it needs to address this issue, as the facts presented in the communication relate primarily to the matters covered by articles 4 and 9 of the Convention.

16. The communicant is a non-governmental organization working in the field of environmental protection and falls under the definition of "the public", as set out in article 2, paragraph 4, of the Convention.

17. The National Atomic Company Kazatomprom is a legal person performing administrative functions under national law, including activities in relation to the environment, and performing public functions under the control of a public authority. The company is also fully owned by the State. Due to these characteristics, it falls under the definition of a "public authority", as set out in article 2, paragraphs 2 (b) and 2 (c).

18. Information requested from Kazatomprom, in particular the feasibility study of the draft amendments, falls under the definition of article 2, paragraph 3 (b), of the Convention.

19. It is, therefore, the opinion of the Committee that, as a public authority in the meaning of article 2, paragraphs 2 (b) and 2 (c), Kazatomprom was under an obligation to provide the environmental information requested by the communicant pursuant to article 4 and that failure to do so was not in conformity with that article.

20. The Committee has noted the information provided by the Party concerned that it is a general practice for an information request to include reasons for which such information is requested. Article 4, paragraph 1 (a), of the Convention explicitly rules out making such justification a requirement. In this regard, the Committee notes with appreciation the Memo on Processing Public Requests for Environmental Information, prepared by the Ministry of the Environment of Kazakhstan and the Organization for Security and Co-operation in Europe (OSCE), issued in 2004. The Memo clearly states that a request for information does not need to be justified. In the Committee's opinion, practical implementation of the Memo would be important for changing the current practice and, furthermore, might bring about compliance with all the provisions of article 4.

21. The Convention, in its article 9, paragraph 1, requires the Parties to ensure that any procedure for appealing failure to access information is expeditious. However, as the time and number of determinations with regard to jurisdiction in this case demonstrate, there appears to be lack of regulations providing clear guidance to the judiciary as to the meaning of an expeditious procedure in cases related to access to information.

22. Finally, as events described in paragraph 11 above demonstrate, the requirement of article 9, paragraph 1, to ensure that any person (including a legal person, as set out in the definition of the public in article 2, paragraph 5, of the Convention) whose request for information under article 4 has not been dealt with in accordance with the provisions of that article has access to an expeditious review procedure, has not been properly transposed into the national legislation. Nor, it appears, was there any guidance issued to the judiciary with regard to the direct applicability of the Convention's provisions.

23. The Committee considers that the underlying reason for non-compliance with the requirements of articles 4 and 9, paragraph 1, as described in paragraphs 16 to 19 and 21 to 22 above, was a failure by the Party concerned to establish and maintain, pursuant to the obligation established in article 3, paragraph 1, a clear, transparent and consistent framework to implement these provisions of the Convention, e.g. by providing clear instructions on the status and obligations of bodies performing functions of public authorities, or regulating the issue of standing in cases on access to information in procedural legislation.

III. CONCLUSIONS

24. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

A. Main findings with regard to non-compliance

25. The Committee finds that, by having failed to ensure that bodies performing public functions implement the provisions of article 4, paragraphs 1 and 2, of the Convention, Kazakhstan was not in compliance with that article.

26. The Committee also finds that the lengthy review procedure and denial of standing to the non-governmental organization in a lawsuit on access to environmental information was not in compliance with article 9, paragraph 1.

27. The Committee further finds that the lack of clear regulation and guidance with regard to the obligations of bodies performing public functions to provide information to the public and with regard to the implementation of article 9, paragraph 1, constitutes non-compliance with the obligations established in article 3, paragraph 1, of the Convention.

B. Recommendations

28. The Committee, pursuant to paragraph 35 of annex to decision I/7 and taking into account the cause and degree of non-compliance, recommends to the Meeting of the Parties to:

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, request the Government of Kazakhstan to submit to the Compliance Committee, not later than the end of 2005, a strategy, including a time schedule, for transposing the Convention's provisions into national law and developing practical mechanisms and implementing legislation that would set out clear procedures for their implementation. The strategy might also include capacity-building activities, in particular for the judiciary and public officials, including persons having public responsibilities or functions, involved in environmental decision-making;

(b) Recommend the Government of Kazakhstan to provide officials of all the relevant public authorities on various levels of administration with training on the implementation of the Memo on Processing Public Requests for Environmental Information and to report to the Meeting of the Parties, through the Compliance Committee, no less than four months before the third meeting of the Parties on the measures taken to this end;

(c) Request the secretariat or, as appropriate, the Compliance Committee, and invite relevant international and regional organizations and financial institutions, to provide advice and assistance to Kazakhstan as necessary in the implementation of these measures.

Notes

[1] This chapter includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee

[2] It is the understanding of the Committee that at the time when the Committee considered the communication, the draft legislative amendment was not anymore under consideration by the Government of Kazakhstan.

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Compliance Committee

REPORT ON THE SEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case construction of high-voltage power line
(Communication ACCC/C/2004/02 by Green Salvation (Kazakhstan))

Adopted by the Aarhus Convention's Compliance Committee on 18 February 2005

Introduction

1. On 17 March 2004, the Kazakh non-governmental organization Green Salvation submitted a communication to the Committee alleging violation by Kazakhstan of its obligations under article 6, paragraphs 2 to 4 and 6 to 8, and article 9, paragraphs 3 and 4, of the Aarhus Convention.

2. The communication alleged that the Party concerned had failed to provide for an adequate public participation procedure in accordance with article 6 of the Convention in a permitting

procedure for the construction of high-voltage overhead electric power lines in the Gornyi Gigant district in Almaty. Various court proceedings had thus far failed to resolve the matter. The communication is available in full at http://www.unece.org/env/pp/pubcom.htm.

3. The communication was forwarded to the Party concerned on 17 May 2004, following a preliminary determination as to its admissibility. A reply from the Party concerned received on 27 October 2004 disputed the claim of non-compliance on the grounds that the construction of such power lines was not an activity of a type covered by article 6, paragraph 1 (b), of the Convention in accordance with the legislation of Kazakhstan. The reply also questioned the admissibility of the communication, notably on the grounds that the decision-making process for the power line had commenced before the Convention entered into force.

4. The Committee at its fourth meeting (MP.PP/C.1/2004/4, para. 18) had determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned (for full statement of preliminary determination on admissibility, see http://www.unece.org/env/pp/compliance/C2004-02/admissibility.doc). At its sixth meeting, it took note of the aforementioned reservations of the Party concerned but considered that significant events had taken place since the entry into force and was not persuaded to reverse its opinion. The determination was therefore confirmed. The Party concerned has indicated its willingness to discuss the issues of compliance raised and its openness to receiving recommendations on the issue.

5. The Committee discussed the communication at its sixth meeting (15-17 December 2004), with the participation of representatives of both the Party concerned and the communicant, both of whom provided additional information.

6. In accordance with paragraph 34 of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicant on 1 February 2005. Both were invited to provide comments, if any, by 14 February 2005.Comments were received from both the Party concerned and the communicant. The Committee, having reviewed the comments, took them into account in finalizing its findings and recommendations by amending the draft where the comments, in its opinion, affected the presentation of facts or its consideration, evaluation or conclusions.

I. SUMMARY OF THE FACTS[1]

7. On 18 March 1997, Kazakhstan adopted the Law on Ecological Expertise, which establishes an environmental impact assessment (EIA) procedure and requires, in article 15, paragraph 2, that the results of taking public opinion into account should be presented as part of the final ecological expertise report.

8. On 19 January 2001, the Mayor of Almaty adopted a decision to proceed, subject to obtaining the necessary permits, with the planning and construction of a 110-kV overhead transmission line to replace a faulty cable.

9. The first conclusion of an environmental expertise (EE) report on the construction of high-voltage power lines in the Gornyi Gigant district was issued on 3 April 2001. However, the Ministry of Natural Resources and Environmental Protection (renamed the Ministry of Environmental Protection in August 2002) reviewed this in December 2001 and ordered a new EE, on the grounds that the previous one had been undertaken without including the results of taking public opinion into account as required under article 15 of the Law on Ecological Expertise.

10. A second EE was undertaken in January 2002 by the Almaty Territorial Environmental Protection Board. However, in May 2002, the Ministry again deemed the EE to be in violation of article 15 of the Law on Ecological Expertise due to its failure to take account of public opinion, and revoked the EE pending clarification of all the circumstances related to the complaints of the local population. Meanwhile, the construction had already started in May 2002 and continued despite the Ministry's revocation of the EE.

11. In June 2002, in the light of concerns about the impact of the project on public health and the significant adverse public response from those living in the area, the Ministry instructed the Board to hold public hearings on the project. The hearings took place on 4 July 2002. However, the residents living in the immediate vicinity of the construction were not invited to them. In their absence, the hearings adopted a decision in support of the construction of the power line. The report of the hearings states that the decision took account of the interests of different groups. However, it also shows that the different groups taken into consideration included only organizations that, according to the communicant, were interested in the construction of the power line and not residents of the street where the power line would be located.

12. In August 2002, the Ministry, having received and been satisfied with the results of the public hearings, cancelled its earlier decision to suspend the EE conclusion of January 2002, considering the process now to be lawful.

13. Several court cases were started on behalf of the local residents challenging the decision to proceed with the construction. Approaches were also made to the prosecution service, members of parliament and administrative bodies. These did not succeed in overturning the decision or preventing the construction of the power line.

14. The overhead power line was built by the end of October 2002.

15. On 28 February 2004, the Minister of Environmental Protection issued Order N 68-? approving the "Instruction on the procedure for environmental impact assessment (EIA) of economic and other activities". In accordance with this Instruction, construction of certain high-voltage electric power lines falls under types of activities that may have a significant impact on the environment and therefore require EE. The Instruction applies to any power line of 220 kV or more and a length of 15 km (i.e. the threshold corresponds to that in para. 17 of annex I to the Convention). It would therefore not apply to the power line constructed at Gornyi Gigant. The new Instruction sets out requirements for public participation, whereas the previous Temporary Instruction on EIA did not provide specific procedures for public participation in EIA.

16. The Committee understands that the 1997 Law on Ecological Expertise remains in force. During the discussion, the representative of Kazakhstan informed the Committee that the EE process was limited to the consideration of pollution and waste issues. However, in the opinion of the Committee, neither the 1997 Law itself nor the Instruction issued in 2004 is limited in that way.

17. The communicant alleges that, aside from the Law on Ecological Expertise, other legislative and regulatory instruments relevant to the construction of the Gornyi Gigant power line, notably the Environmental Protection Act, the Law on Land, the Regulations for the Protection of Electrical Networks with a Voltage of more than 1000 V, and the Building Standards and Regulations, were breached in the decision-making process and/or by the decision itself. It also provides evidence that this view is supported by various expert bodies such as the Scientific Centre for Hygiene and Epidemiology and the National Centre for Labour Hygiene and Occupational Diseases.

II. CONSIDERATION AND EVALUATION

18. Kazakhstan deposited its instrument of ratification of the Convention on 11 January 2001. The Convention entered into force for Kazakhstan on 30 October 2001.

19. The Convention, as an international treaty ratified by Kazakhstan, has direct applicability in the Kazakh legal system. All the provisions of the Convention are directly applicable, including by the courts.

20. Whether or not public participation in accordance with the procedures set out in article 6, paragraphs 2 to 9, of the Convention was required in connection with the decision to construct the Gornyi Gigant power line depends upon whether that activity falls within the scope of activities determined by article 6, paragraph 1.

21. The Committee notes that the size of the power line (110 kV and 1 km in length) falls below the threshold set out in paragraph 17 of annex I (220 kV and 15 km in length). Therefore, paragraph 17 does not provide a basis for deeming the activity to be subject to article 6, paragraph 1 (a).

22. Annex I, paragraph 20, requires that, if public participation is provided under an EIA procedure in accordance with national legislation, the provisions of article 6 shall apply. Article 15, paragraph 2, of the Law on Ecological Expertise of Kazakhstan requires the results of taking public opinion into account, according to a procedure to be adopted by the central executive body in the sphere of environmental protection, to be presented as part of an ecological expertise, among other documents. The Ministry in its letter of 17 December 2004 argued that the specific procedure of the central executive body did not exist in 2002 (at the time that the EE in question was being undertaken). However, article 15 of the Law itself does, in the view of the Committee, provide for public participation in the sense of annex I, paragraph 20. The fact that the Ministry itself recognized, in December 2001 and then in May 2002, that both the first and the second ecological expertises violated article 15 of the Law on Ecological Expertise because "the project was accepted for assessment without the results of a survey of public opinion," and that the Almaty Territorial Environmental Protection Board, under instruction from the Ministry, subsequently introduced some

elements of public participation into the process, bears this out. The Committee therefore considers that such an EIA procedure does exist in Kazakh legislation, as part of the 1997 Law on Ecological Expertise; that consequently the activity in question does fall within the scope of annex I, paragraph 20; and that a decision to permit such an activity does therefore fall within the scope of article 6, paragraph 1.

23. The Committee considers that the procedures followed by the Almaty Territorial Environmental Protection Board in January 2002 and July 2002 were not in line with the requirements of article 6, paragraph 2, of the Convention. The residents living along the proposed route of the power line were obviously among the "public concerned" and, as such, they should have received notice of the hearings, including all the details required under article 6, paragraph 2. Despite this, it appears that they were not invited to the July hearings.

24. The Committee notes that the failure to notify members of the public concerned in accordance with article 2, paragraph 5, may also have effectively denied them the possibility to avail of the rights provided for under other provisions of article 6. If a key group of members of the public most directly affected by the activity was not informed of the process and not invited to participate in it, it follows that they did not receive notice in "sufficient time" as required under article 6, paragraph 3, and that in practice they did not have the opportunities for early and effective participation that should have been available in accordance with paragraph 4 or to provide input in accordance with paragraph 7. Similarly, if no public notice of the planned hearings or other participation opportunities was given, and if affected local residents were not invited to the hearing, whatever views they might have had to offer could not have been taken into account as required by article 6, paragraph 8.

25. Aside from any consequential problems arising from a failure to implement paragraph 2, some other provisions of article 6 may have been breached even with respect to those members of the public that did receive notification of the hearings in accordance with the requirements of paragraph 2. For example, the fact that construction started before the July hearings were held is clearly not in conformity with the requirement under article 6, paragraphs 3 and 4, for "reasonable time frames" and "early public participation, when all options are open." Furthermore, it appears that the responsible authorities treated the outcome of the hearings as if it were the outcome of public participation. This would have been more acceptable if the hearings had genuinely involved all key groupings within the public concerned. As it was, the views of those who were not invited to participate in the hearings, which apparently were expressed in other ways and were well known to the authorities, do not appear to have been taken into account.

26. The communicant also claims that article 6, paragraph 6, was not complied with but did not substantiate this claim with specific arguments. The Committee therefore has no basis on which to conclude that there was any failure to comply with that provision.

27. The Committee also considers that there is inconclusive evidence that the public lacked access to justice and therefore finds no basis on which to conclude that article 9 of the Convention was not complied with. Although the communicant was not satisfied with the decisions of the courts, having an adverse court decision does not in itself necessarily translate into a denial of access to justice.

While appeal processes in the case in question were indeed overall lengthy, this seems to be primarily due to the different interpretations of the then existing legal provisions by various judicial instances, rather than the procedures being unfair, costly or inequitable. The matter is, in the Committee's opinion, therefore more linked with a lack of a clear legal framework in the context of article 3, paragraph 1, of the Convention, than a lack of access to justice under article 9.

28. While noting that the Convention has direct effect according to Kazakh law, the Committee also notes the obligation under article 3, paragraph 1, on each Party to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. Regulations implementing the Convention's provisions, including timely, adequate and effective notification of the public concerned, early and effective opportunities for participation, and the taking of due account of the outcome of the public participation, would help to avoid ambiguity in the future. Such regulations could be developed with input from the public. The content of such regulations should also be communicated effectively to public authorities.

29. The Committee considers it to be beyond the scope of its mandate to examine the claim by the communicant and other expert bodies that other regulations were breached through the construction of the power line (see para. 17). However, it notes that if the local residents had had the full opportunities to be involved in the decision-making process as they should have had if article 6 of the Convention had been properly applied, they might then have been better placed to exercise their right to 'challenge the substantive and procedural legality' of the decision in accordance with article 9, paragraph 2, of the Convention. In this sense, therefore, the possibility that the decision itself breached other regulations has some relevance, but the violation of those regulations, if established, would not necessarily constitute non-compliance with the Convention.

30. The Committee notes with some concern the fact that the EE process, being limited to the consideration of waste and pollution issues (see para. 16), does not necessarily address all significant environmental effects. While it is a moot point whether this constitutes non-compliance with article 6, it is certainly within the spirit of article 6 that the permitting process (or the combination of permitting processes) for activities covered by article 6 should address all significant types of effects of such activities on the environment (see, for example, art. 6, para. 6 (b)). Limiting the (combined) scope of the permitting processes to just some types of environmental effects could significantly undermine the efficacy of that article.

31. Finally, the Committee notes with appreciation the efforts of the Ministry in December 2001 and May-June 2002 to attempt to introduce some elements of public participation in a process that was defective in that respect. It further notes that Kazakhstan's failure to comply with the Convention in this particular case stems directly from the fact that public participation was, in the view of the Committee, required under the Law on Environmental Expertise, thereby bringing the activity in question within the scope of annex I, paragraph 20. Because the applicability of paragraph 20 is contingent on there being national requirements for public participation, it is one of those provisions of the Convention that does not necessarily contribute to a level playing field or a common set of standards. In other words, a country which had no public participation requirement with respect to EIA for such an activity would not be in non-compliance in such a case, and yet its

system would be less in harmony with the objective of the Convention than that of Kazakhstan. This is certainly an important mitigating factor in considering the gravity of any non-compliance arising with respect to that particular provision.

III. CONCLUSIONS

32. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

A. Main findings with regard to non-compliance

33. The Committee finds that the Government of Kazakhstan did not comply fully with article 6, paragraph 1 (a), and annex I, paragraph 20, of the Convention, and, in connection with this, article 6, paragraphs 2, 3, 4, 7 and 8.

34. The Committee considered but did not reach a firm conclusion on the question as to whether the activity in question would be covered by article 6, paragraph 1 (b).

35. The Committee did not find any basis on which to conclude that article 6, paragraph6, and article 9 were not complied with.

B. Recommendations

36. The Committee, pursuant to paragraph 35 of the annex to decision I/7 and taking into account the cause and degree of the non-compliance, recommends that the Meeting of the Parties should:

(a) Recommend to the Government of Kazakhstan, with a view to fully implementing article 3, paragraph 1, of the Convention, to:

(i) Adopt and implement regulations setting out more precise public participation procedures covering the full range of activities subject to article 6 of the Convention, without in any way reducing existing rights of public participation;
(ii) Ensure that public authorities at all levels, including the municipal level, are fully aware of their obligations to facilitate public participation;
(iii) Consider introducing stronger measures to prevent any construction work going ahead prior to the completion of the corresponding permitting process, with the required level of public participation;

(b) Invite the Government of Kazakhstan to submit a report to the Meeting of the Parties, through the Compliance Committee, no less than four months before the third meeting of the Parties on the measures taken to implement the recommendations in subparagraph (a);

(c) Request the secretariat or, as appropriate, the Compliance Committee, and invite relevant international and regional organizations and financial institutions, to provide advice and assistance to Kazakhstan as necessary in the implementation of these measures;

(d) Undertake to review the situa tion at its third meeting; and

(e) Mandate the Working Group of the Parties to develop guidance on the scope of the permitting processes in which the public participation procedures set out in article 6 should apply, having in mind the environmental focus of the Convention, and to present such guidance for endorsement by the Parties at their third meeting.

Note

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

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Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

REPORT ON THE SEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Ukraine with the obligations under the Aarhus Convention in the case of Bystre deep-water navigation canal construction
(submission ACCC/S/2004/01 by Romania and
communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine))

Adopted by the Aarhus Convention's Compliance Committee on 18 February 2005

Introduction

1. On 5 May 2004, the Ukrainian non-governmental organization Ecopravo-Lviv submitted a communication to the Committee alleging non-compliance by Ukraine with its obligations under article 1 and article 6, paragraphs 2 to 4 and 6 to 9, of the Aarhus Convention.

2. The communication concerned a proposal to construct a navigation canal in the Danube Delta passing through an internationally recognized wetland. The communicant claimed that by failing to provide for proper public participation in a decision-making process on State 'environmental expertisa' linked with the technical and economic evaluation of the proposed

project and to provide access to documentation relevant to the process, the Party had failed to comply with its obligations under article 6 of the Convention. The communicant had sought redress in two instances of the domestic court system, winning in the first instance and losing in the appellate court. The full text of the communication is available at http://www.unece.org/env/pp/pubcom.htm.

3. The communicant submitted supplementary information on 1 December 2004, listing several additional facts of alleged non-compliance, in particular with regard to interpretation by the courts and the Ministry of Environment of the domestic requirements on public participation in the environmental impact assessment (EIA) process. A reference was also made to the findings of the special fact-finding mission led by the European Commission with regard to the project in question. The text of the report is available at http://europa.eu.int/comm/environment/enlarg/bystroe_project_en.htm.

4. On 7 June 2004, the Government of Romania made a submission alleging failure by Ukraine to comply with the provisions of article 6, paragraph 2 (e), of the Convention by failing, in the opinion of the submitting Party, to ensure that the public affected by the Bystre Canal project in the Danube Delta was informed early in the decision-making procedure that the project was subject to a national and transboundary environmental impact assessment procedure.

5. In a letter to the Committee dated 26 November 2004, the submitting Party provided further information. It reiterated its claim that the Party concerned was not in compliance with article 6, paragraph 2 (e), when read in conjunction with article 2, paragraph 5, or with article 6, paragraph 7, and article 3, paragraph 9, of the Convention. In support of its position, it cited inter alia the failure of the Party concerned to involve various non-governmental organizations, including Ukrainian, Romanian and international ones, that had expressed interest in or concern about the canal, in the decision-making on any of the phases of the project.

6. The representative of the Romanian Government further clarified during the discussion at the Committee's sixth meeting that the submission was also intended to address Ukraine's failure to comply with article 6 vis-à-vis its own citizens. He also stated that the Ukrainian Government had already been well aware of the concerns of the Romanian public with regard to the project prior to the final decision on the project's feasibility.

7. The communication was forwarded to the Government of Ukraine on 18 May 2004 and the submission on 17 June 2004. The secretariat received a letter from the Agency for Protected Areas of Ukraine on 23 September 2004 indicating that the Party would require more time than the initial three-month period to respond. The letter also informed the Committee that public opinion on the project was divided with local population tending to support and some of the NGOs opposing it; the opinions had been transmitted to the contractor developing the EIA of Phase I of the project in 2004. No further correspondence was received from the Party concerned before the expiry of the six-month period, nor did the Party concerned provide information to or participate in the meeting of the Committee at which the matter was discussed.

8. The Committee, having noted that the communication and submission were closely related in their subject matter, considered them side-by-side at its sixth meeting on 15-17 December 2004. However, taking into account the related process of establishing an inquiry commission under the Espoo Convention aimed at determining whether the activity was likely to have a

significant transboundary environmental impact, it agreed that it would consider the question of compliance with the part of article 6, paragraph 2 (e), relating to environmental impact assessment in a transboundary context in the light of the findings of the inquiry procedure being undertaken under the Espoo Convention. That inquiry is expected to establish whether or not the activity was indeed subject to a transboundary environmental impact assessment procedure. It therefore agreed to defer discussions on those aspects of the submission and communication and to restrict its discussions to other aspects.

9. The Committee at its fourth meeting (MP.PP/C.2/2004/04, para. 18) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. This determination has not been challenged in any way. The Committee therefore confirms the admissibility of the communication.

10. The Committee discussed the communication at its sixth meeting (15-17 December 2004), with the participation of representatives of the Party making the submission and the communicant.

11. In accordance with paragraph 34 of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to both the Parties concerned and the communicant on 1 February 2005. The Parties concerned and the communicant were invited to provide comments, if any, by 14 February 2005. Comments were received from the communicant. The Committee, having reviewed the comments, took them into account in finalizing its finding and recommendations by amending the draft where the comments, in its opinion, affected the presentation of facts or its consideration, evaluation or conclusions.

I. SUMMARY OF FACTS[i]

12. The matter concerns approval by the government of Ukraine of construction of the deep-water navigation canal in the Bystre arm in the Ukrainian part of the Danube river delta. The permitting process has been divided into three phases: feasibility study, approval of phase I and approval of phase II of the project. Each stage undergoes an approval process on the basis of a comprehensive State expertisa that includes environmental expertisa (an evaluation and, where appropriate, approval of the EIA by an authorized public authority). The Communication and the submission relate primarily to the decision-making on the project's feasibility study. However, both the communicant and the submitting Party maintain that subsequent decision-making on the phases of the project, while having certain formal improvements in the procedure, continuously failed to ensure effective participation as required by article 6 of the Convention.

13. The project in question potentially affects a nature conservation area of national and international importance and has clearly generated a great interest among both the Ukrainian and international civil society.

14. In its letters to the Ministry of Environment dated 30 April 2003 and 3 June 2003, the communicant expressed its interest in the decision-making process in question. The communicant has been in regular contact with the Ministry with regard to the issue of the canal construction since then.

15. The communicant lists several instances where it was refused access to documentation on the project either as a whole or in part. According to the report of the EU fact-finding mission, referred to in the supplementary information and the additional information provided by the submitting Party, several other organizations, including national, foreign and international organizations, both governmental and non-governmental, have been refused access to information of the types referred to in article 6, paragraph 6, of the Convention.

16. The Ministry of Environment, in its reply to a request for information from the communicant dated 18 June 2003, stated that materials developed in the course of an EIA were the property of the developer and therefore the Ministry was not in a position to provide access to such information. A similar response, as the report of the European Commission indicates, was given to subsequent requests for this documentation submitted by various organizations.

17. On 3 July 2003, the project investor published an environmental impact statement in the regional newspaper. No information with regard to the public participation procedure or other relevant information referred to in article 6, paragraph 2, of the Convention was provided.

18. The Ministry of Environment approved the conclusions of the State environmental expertisa on 10 July 2003, seven days following the first notification about the project.

19. On 7 August 2003, the Ministry of Environment sent a reply to the communicant's request for a copy of the conclusions of the State Environmental Expertisa, including a two-page summary of the conclusions and refusing to provide the whole document for technical reasons.

20. The Government of Ukraine notified the Government of Romania of the intended project in October 2003, following the conclusion of the decision-making procedure on the project's feasibility study.

21. Phase I of the project was approved in May 2004 and the construction works began immediately. Phase I of the project was concluded in August 2004. By October 2004, the EIA for phase II had not been finalized.

22. On 13 October 2004, the Ministry of Environment in its written response to the second appeal filed by the communicant with the High Commercial Court of Ukraine stated that the assertion of the plaintiff that Ukrainian legislation provided for an obligation to ensure public participation in the state environmental expertisa was ungrounded. The court held that in accordance with Ukrainian legislation, the public authorities were not obliged to ensure public participation in decision-making with regard to EIA.

II. CONSIDERATION AND EVALUATION

23. Ukraine deposited its instrument of ratification of the Convention on 18 November 1999. The Convention entered into force for Ukraine on 30 October 2001.

24. The Convention, as an international treaty ratified by Ukraine, has direct applicability in the Ukrainian legal system. All the provisions of the Convention are directly applicable, including by the courts.

25. The decision-making process in question concerns construction of a deep-water navigation canal of a type that falls under paragraph 9 of annex I to the Aarhus Convention and therefore falls under article 6, paragraph 1 (a), of the Convention, triggering also the application of other provisions of that article.

26. The communicant is a non-governmental organization working in the field of environmental protection and falls under the definitions of the public and the public concerned as set out in article 2, paragraphs 4 and 5, of the Convention. Foreign or international non-governmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.

27. With regard to the facts included in paragraph 6 above, there is, in the opinion of the Committee, sufficient evidence that there were members of the public, both in Romania and in Ukraine, interested in or concerned about the project that had to be notified in accordance with article 6, paragraph 2, of the Convention.

28. Considering the nature of the project and the interest it has generated, notification in the nation-wide media as well as individual notification of organizations that explicitly expressed their interest in the matter would have been called for. The Party, therefore, failed to provide for proper notification and participation in the meaning of article 6 of civil society and specifically the organizations, whether foreign or international, that indicated their interest in the procedure. With regard to the Romanian NGOs and individuals, such notification and participation could have been undertaken by Ukraine via the Romanian authorities, as there is sufficient evidence to suggest that the Ukrainian Government was well aware of the concerns expressed to the Romanian authorities by citizens and organizations in Romania. The Committee, however, notes that, generally speaking, there are no provisions or guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making, and that such guidance, seems to be needed, in particular, in cases where there is no requirement to conduct a transboundary EIA and the matter is therefore outside the scope of the Espoo Convention.

29. The timeline, as reflected in paragraphs 15 and 16 above, failed to allow the public to study the information on the project and prepare and submit its comments. It also did not allow the public officials responsible for making the decision sufficient time to take any comments into account in a meaningful way, as required under article 6, paragraph 8.

30. In this regard, the information provided in the report of the EU-led fact-finding mission (annex 10) as to what seems to be a regular practice of short-cutting the decision-making procedure by providing parts of the EIA for evaluation and approval by the decision-making authority in the course of EIA development and prior to any information being publicly available is of particular concern. Lack of clear domestic regulation of the time frames and procedures for commenting seem to be at the heart of this problem.

31. With regard to the facts described in paragraph 14 above, public authorities should possess information relevant to its functions, including that on which they base their decisions, in accordance with article 5, paragraph 1, and should make it available to the public, subject to exemptions specified in article 4, paragraphs 3 and 4. The issue of ownership is not of relevance in this matter, as information is used in a decision-making by a public authority and should be

provided to it for that purpose by the developer. The fact that such misinterpretation took place again points to a lack of clear regulatory requirements in the national legislation.

32. Moreover, article 6, paragraph 6, of the Convention is aimed at providing the public concerned with an opportunity examine relevant details to ensure that public participation is informed and therefore more effective. It is certainly not limited to publication of an environmental impact statement. But had some of the requested information fallen outside the scope of article 6, paragraph 6, of the Convention, it would be still covered by the provisions of article 4, regulating access to information upon request.

33. Finally, information within the scope of article 4 should be provided regardless of its volume. In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for supplying such information, in accordance with article 4, paragraph 8, of the Convention.

34. Lack of clarity or detail in domestic legislative provisions, in particular, with regard to issues discussed in paragraphs 30 and 31 above, demonstrate, in the view of the Committee, that the Party concerned has not taken the necessary measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention, as required by article 3, paragraph 1.

35. The Committee finds that by refusing to provide the text of the decision along with the reasons and considerations on which it is based and not indicating how the communicant could have access to it, the Party concerned did not comply with its obligations under the second part of article 6, paragraph 9, to make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

36. The communication also includes the allegation as to non-compliance with article 1. The Committee notes that a non-compliance with the operative provisions of the Convention is not in conformity with the objective of the Convention as defined in article 1.

III. CONCLUSIONS

37. Having considered the above, the Committee adopts the following findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

A. Main findings with regard to non-compliance

38. The Committee finds that, by failing to provide for public participation of the kind required by article 6 of the Convention, Ukraine was not in compliance with article 6, paragraph 1 (a), and, in connection with this, article 6, paragraphs 2 to 8, and article 6, paragraph 9 (second sentence).

39. The Committee finds that, by failing to ensure that information was provided by the responsible public authorities upon request, Ukraine was not in compliance with article 4, paragraph 1, of the Convention.

40. The Committee also finds that the lack of clarity with regard to public participation requirements in EIA and environmental decision-making procedures for projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making available information in the context of article 6, indicates the absence of a clear, transparent and consistent framework for the implementation of the Convention and constitutes non-compliance with article 3, paragraph 1, of the Convention.

B. Recommendations

41. The Committee, taking into account the cause and degree of the non-compliance, and noting with regret that no response to either the submission or the communication was provided by the Party concerned pursuant to the requirements set out in the annex to decision I/7, recommends to the Meeting of the Parties pursuant to paragraph 35 of the annex to decision I/7 to:

(a) Request the Government of Ukraine to bring its legislation and practice into compliance with the provisions of the Convention and include information on the measures taken to that effect in its report to the next meeting of the Parties;

(b) Pursuant to paragraph 37 (b) of the annex to decision I/7, request the Government of Ukraine to submit to the Compliance Committee, not later than the end of 2005, a strategy, including a time schedule, for transposing the Convention's provisions into national law and developing practical mechanisms and implementing legislation that sets out clear procedures for their implementation. The strategy might also include capacity-building activities, in particular for the judiciary and public officials involved in environmental decision-making;

(c) Mandate the Working Group of the Parties to develop for consideration at the third meeting of the Parties guidance to assist Parties in identifying, notifying and involving the public concerned in decision-making on projects in border areas affecting the public in other countries but not requiring transboundary EIA under the Espoo Convention which includes procedures for public participation.

Note

[i] This chapter includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee.

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Compliance Committee

REPORT ON THE SEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Hungary with the obligations under the Aarhus Convention in the case of Act on the Public Interest and the Development of the Expressway Network (Communication ACCC/C/2004/04 by Clean Air Action Group (Hungary)).

Adopted by the Aarhus Convention's Compliance Committee on 18 February 2005

Introduction

1. On 7 May 2004, the Hungarian non-governmental organization Clean Air Action Group submitted a communication to the Committee alleging non-compliance by Hungary with its obligations under article 6 and article 9, paragraphs 2 to 4, of the Aarhus Convention.

2. The communication concerned the alleged incompatibility of the new Hungarian Act on Public Interest and Development of the Expressway Network (hereafter Expressway Act) with the provisions of the Aarhus Convention. The alleged non-compliance related to the special process of decision-making established by the Act for construction of expressways. According to

the communicant, the procedure established by the Act notably differs from procedures for decision-making on other specific activities with potential adverse effects of the same significance, inter alia with regard to decision-making authority, the practicalities of ensuring public participation procedures, the status of the decision, timeframes, and procedures for appeal. The full text of the communication is available at http://www.unece.org/env/pp/pubcom.htm.

3. The communicant submitted supplementary information on 16 September 2004 with regard to a new decree that was adapted by the Hungarian Ministry of Economic Affairs and Transport as an implementing regulation for the Expressway Act. The information provided was, in particular, related to the reduced role of and tighter deadlines for expert input by the environmental inspectorate in the decision-making process carried out by the transport authorities.

4. The communication was forwarded to the Government of Hungary on 18 May 2004. The secretariat received a letter from the Ministry of Environment and Water of Hungary on 23 September 2004 indicating that the Party would require more time than the initial five-month period to respond. On 26 November 2004, the Party provided a full response disputing that the provisions of the Expressway Act challenged by the communicant were in non-compliance with the Convention.

5. The Committee at its fourth meeting (MP.PP/C.1/2004/4, para. 18) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. The overall admissibility of the communication was not challenged. The Committee therefore confirms the admissibility of the communication.

6. The Committee discussed the communication at its sixth meeting (15-17 December 2004), with the participation of representatives of both the Party concerned and the communicant, both of whom provided additional information.

7. In accordance with paragraph 34 of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to both the Party concerned and the communicant on 1 February 2005. Both were invited to provide comments, if any, by 14 February 2005. Comments were received from both the Party concerned and the communicant. The Committee, having reviewed the comments, took them into account in finalizing the decision by amending the draft where the comments, in its opinion, affected the presentation of facts or its consideration, evaluation or conclusions.

I. SUMMARY OF FACTS [1,2]

8. The matter concerns Act CXXVIII/2003 on Public Interest and Development of the Expressway Network in the Republic of Hungary. The Act establishes a special decision-making procedure for the construction of expressways. This procedure, according to the communicant, in some respects short-cuts the traditional permitting procedure by, inter alia:

(a) Establishing a special incorporated company responsible for the construction of expressways, thus allowing a higher possibility of commercial confidentiality provisions being applied, despite the significant public interest in and environmental impact of expressway construction;

(b) Reducing the permitting procedure by cutting out the preliminary environmental assessment (scoping) phase for decisions on modification of existing roads into expressways and therefore limiting public participation in the decision-making as a whole, notwithstanding the fact that general EIA legislation requires public consultation to commence in this phase of the process;

(c) Providing an insufficient and non-extendable time of 90 days for the decision-making procedure, and therefore failing to allow sufficient time for public participation in accordance with article 6, paragraph 3, of the Convention;

(d) Establishing that the final decision on the road track is taken by a ministerial decree and therefore limiting the possibility of appealing the decision under article 9, paragraph 2, of the Convention;

(e) Establishing that a first instance decision of an environmental authority can only be appealed within the same authority and that a second instance decision is immediately executable, thus undermining any future judicial appeal procedure and failing to ensure adequate and effective remedies and, in particular, injunctive relief, in accordance with article 9, paragraph 4, of the Convention;

(f) Establishing that for a court to suspend a decision the plaintiff must demonstrate a considerable interest or that the public interest is at stake, therefore also failing to ensure effective remedy in accordance with article 9, paragraph 4;

(g) Restricting the involvement of environmental authorities in the overall permitting process,[3] in particular, after the decision on the environmental impact.

II. CONSIDERATION AND EVALUATION

9. Hungary deposited its instrument of ratification of the Convention on 3 July 2001. The Convention entered into force for Hungary on 30 October 2001.

10. Establishment of a special company for construction of expressways does not in itself constitute a breach of obligations under the Convention, in the Committee's view. In this regard, the Committee takes note of the fact that the company is established by the Act, is State-owned and would, therefore fall under the definition of the public authority in accordance with article 2, paragraphs 2 (b) and (c). In Committee's view this in itself limits the scope of application of the commercial confidentiality exemption.

11. With regard to the issue of reduced environmental impact assessment procedure for modification of existing roads into expressways, the Committee notes that the Convention does not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed to do so would be particularly difficult, taking into account the great variety of approaches to conducting EIA that exist in the region. However, article 6, paragraph 4, requires early participation when all options are open and the participation can be effective. This requirement would clearly apply to the decision-making in question. Indeed, removing this phase might lead to removing the important opportunity for the public to participate in identifying the criteria on which to base the detailed EIA. However, in the absence of practice in implementing Section 4, paragraph 9, of the Act, it is difficult for the Committee to evaluate whether the new abridged procedure meets the requirements of article 6, paragraph 4.

12. With regard to the timeframe allocated for the decision-making, the Committee considers that 90 days provided for by the Act should, under normal circumstances be sufficient to provide for public involvement, in particular taking into account that this is currently the maximum deadline for such procedures under existing Hungarian legislation. The Committee, however, takes note of the communicant's arguments with regard to complexity of the subject matter of the decision-making and the difficulties authorities have to conclude the process within existing timelines. The provision of the Act and its application need to be kept under review by the Party and evaluated on the basis of the effectiveness of participation.

13. The Committee notes that in accordance with the Act, the final siting decision is taken by a ministerial decree and that this limits the possibilities of appealing these decisions under article 9, paragraph 2, of the Convention. However, it does not believe that such a system necessarily conflicts with article 9, paragraph 2, as long as there are appeal possibilities with regard to the environmental part of the decision.

14. The Committee indeed has some concerns with regard to the effect of the combination of some of the Expressway Act provisions, in particular, those described in paragraphs 8 (e) and (f) above, might have on the adequacy and effectiveness of remedies, in accordance with article 9, paragraph 4, of the Convention. Where individual provisions are not in themselves in conflict with the requirements of the Convention, one cannot exclude a possibility that their cumulative effect might lead to non-compliance. However, in this particular case the Committee is not convinced that the cumulative effect provides sufficient grounds for establishment of non-compliance.

15. Exclusion of environmental authorities from the decision-making on construction permits for expressways, as referred in paragraph 8 (g) above, can potentially have negative effect on the environmental quality of the final decision and various aspects of the construction, moreover as this exclusion also entails a de-facto exclusion of the rights of NGOs under the Hungarian Environmental Protection Act to represent the public concerned vis-à-vis environmental authorities. However, the matter as such falls outside of the scope of the Convention.

16. The Committee therefore believes that the Act does not, prima facie, fall below the standard set by the Convention's provisions. However, there is some uncertainty as to whether its practical application will ensure a process that is in line with the requirements of the Convention. This will depend to a great degree on the Party concerned.

17. Notwithstanding this conclusion, the Committee notes with some concern the fact that while not falling below the level of the Convention, the Act substantially reduces the level and quality of public participation in decision-making of this category in comparison with previous Hungarian legislation. It also appears to provide public participation opportunities, which compare poorly with those established by administrative lex generalis. While certain special provisions might be required due to specifics of various types of decision-making, the rights of the public should not be compromised to accommodate other interests, whether private or public, in particular with regard to projects of such potential environmental significance. The Committee, having in mind the objective of the Convention and the provisions of article 3, paragraphs 5 and 6, expresses its concern about such a tendency.

18. The Committee does not exclude the possibility when determining issues of non-compliance to take into consideration general rules and principles of international law, including international environmental and human rights law,[4] which might be relevant in context of interpretation and application of the Convention. However, there is an existing provision in the Convention, demonstrating that negotiating parties considered the issue of the relationship between the existing rights and the rights provided by the Convention itself (art. 3, para. 6) but that they did not wish to completely exclude a possibility of reducing existing rights as long as they did not fall below the level granted by the Convention. However, the wording of article 3, paragraph 6, especially taken together with article 1 and article 3, paragraph 5, also indicates that such reduction was not generally perceived to be in line with the objective of the Convention.

III. CONCLUSIONS

19. Having considered the above, the Committee adopts the following findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

A. Summary of findings with regard to non-compliance

20. The Committee finds that, while the contested new Hungarian legislation on the development of the expressway network reduces the opportunities for public participation in decision-making on this type of specific activity as well as the opportunities for access to justice in this regard in comparison with previously existing legislation in this field, it does not, prima facie, fall below the minimum level of public participation and access to justice required by the Convention. However, the consequences of the new legislation as regards compliance with the Convention may also depend on its practical implementation. The Committee, therefore, suggests that the Government of Hungary should keep the matter under review.

B. Recommendations

21. The Committee recommends that the Meeting of the Parties should urge Parties to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision-making and access to justice in environmental matters, even if such measures would not necessarily involve any breach of the Convention and should recommend to Parties having already reduced existing rights to keep the matter closely under review.

Notes

[1] This chapter includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee.

[2] At a very late stage in the preparation of its findings the Committee was presented with information from the communicant alleging that the Hungarian Government had submitted to the Parliament a new legislative proposal which would have the effect of further curtailing public rights to participation. It should be noted that the Committee did not take this into account when adopting its findings and recommendations.

[3] The comment provided by the Party concerned (para. 7 above) suggests that the procedure referred to in paragraph 8 (g) relates to road construction licensing.

[4] The comments provided by the commu nicant (para. 7), in particular, referred to article 5, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and the principles of non-retrogression.

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ECONOMIC COMMISSION FOR EUROPE

Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

REPORT ON THE SEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Turkmenistan with the obligations under the Aarhus Convention in the case of Act on Public Associations
(Communication ACCC/C/2004/05 by Biotica (Republic of Moldova))

Adopted by the Aarhus Convention's Compliance Committee on 18 February 2005

Introduction

1. On 15 March 2004, the secretariat, having become aware of certain information in the public domain on Turkmenistan's new Act on Public Associations and in line with its mandate under paragraph 17 of the annex to decision I/7, wrote to the Government of Turkmenistan to seek further information on the matter. The Government of Turkmenistan acknowledged the letter by reply dated 26 March 2004 but did not provide a substantive reply to the questions raised.

2. On 10 May 2004, the Moldovan non-governmental organization Biotica submitted a communication to the Committee alleging non-compliance by Turkmenistan with its obligations under article 3, paragraphs 4 and 9, of the Aarhus Convention.

3. The communication concerned the newly adopted Act of Turkmenistan on Public Associations. The communicant claims that through the adoption of the Act in November 2003, a new regime for registration, operation and liquidation of non-governmental organizations, the Party is in breach of the provisions of article 3, paragraph 4, of the Convention which requires it to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and to ensure that its national legal system is consistent this obligation. It also alleges non-compliance by the Party with its obligation under article 3, paragraph 9, to provide the possibility for the public to exercise their rights under the Convention without discrimination as to citizenship, nationality, domicile or location of an entity's registered seat. The communication included several attachments, including opinions of an international organization.

4. The Communicant in its communication asked that part of it should be kept confidential. The Commission held that this request should be honoured on the basis of paragraph 29 of decision I/7 (see MP.PP/C.1/2004/4, paragraph 30). The redacted text of the communication is available at http://www.unece.org/env/pp/pubcom.htm.

5. The communication was forwarded to the Party concerned on 18 May 2004, following preliminary determination as to its admissibility. No further correspondence was received from the Party concerned before the expiry of the six-month period; nor did the Party concerned provide information to or participate in the meeting of the Committee at which the matter was discussed.

6. The Government of Turkmenistan also failed to reply to the correspondence from the secretariat within the deadline set out in paragraph 17 of the annex to decision I/7. However, the Committee decided to take up the matter within the context of dealing with the communication, which covered the same topic, rather than pursuing it on the basis of a referral by the secretariat.

7. The Committee at its fourth meeting (MP.PP/C.1/2004/4, para. 18) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. This determination has not been challenged in any way. The Committee therefore confirms the admissibility of the communication.

8. The Committee discussed the communication at its sixth meeting (15-17 December 2004). Neither the communicant nor the Party concerned expressed interest in attending the discussion.

9. In accordance with paragraph 34 of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to both the Party concerned and the communicant on 1 February 2005. The Party concerned and the communicant were invited to provide comments, if any, by 14 February 2005. Comments were received from the communicant. The Committee, having reviewed the comments, took them into account in finalizing the decision by amending the findings and recommendations where the comments, in its opinion, affected the presentation of facts or the its consideration, evaluation or conclusions.

I. SUMMARY OF FACTS[1]

10. On 21 October 2003, a new Act on Public Associations was adopted in Turkmenistan. The Act repealed the former Act on Public Associations of 12 November 1991. Some parts of the new Act raised concerns on the international level about the situation of non-governmental organizations (NGOs), including environmental ones.

11. The Act contains, inter alia, the following provisions:

(a) Article 5 of the Act stipulates that only citizens of Turkmenistan may serve as founders, members or participants (if membership is not provided by the charters) of the public association, except where otherwise stated by the Act, or by other Acts on separate types of public associations. The Act itself only allows foreign nationals to be members of international associations;

(b) Article 13, paragraphs 3 and 4, of the Act determine that associations whose Activities, in accordance their with statutory goals, are spread throughout the whole territory of Turkmenistan or most of its velayats, are recognized as nation-wide public associations whereas local public associations are those whose activities, in accordance with their statutory goals, are spread throughout the territory of velayat, city, etrap, settlement or village;

(c) Article 15 of the Act establishes that while five Turkmen citizens can establish a public association, for registration of a national association, five hundred founding members are required;

(d) Article 17, paragraph 3, of the Act prohibits activities by non-registered public associations. Any person, conducting an activity on behalf of a non-registered public association shall be liable in accordance with the legislation of Turkmenistan;

(e) Article 28, paragraph 2, of the Act stipulates that the Ministry of Justice of Turkmenistan may cancel the registration of a public association if it had switched to mainly entrepreneurial operations, or if the realization of the association's goal, as stipulated by its charter, becomes impossible. Paragraph 3 of the same article further establishes that if a public association receives more than two written notifications or instructions in one year to cease violating national legislation, or if it fails to present to the Ministry Justice updated data which is subject to registration in a year, then the Ministry may submit to the court an application for the liquidation of the association;

(f) Article 2, paragraph 3, of the Act stipulates that if international agreements to which Turkmenistan is a Party establish rules other than those contained in the Act, then the rules of the international agreements are applicable;

(g) Article 32 of the Act states that public associations can be liquidated for, inter alia, violation of national legislation as well as for failure to inform the authorities about any changes in the data required for registration.

12. The new Act entered into force on 21 November 2003. According to the information available to the Committee, the information about the implementation of the Act is as follows:

(a) After this time, the Ministry of Justice of Turkmenistan abolished the majority of nature protection nongovernmental organizations in Turkmenistan, and left only one environmental public association, the Society for Nature Protection, as part of an overtly acknowledged policy to have only one NGO per sector;

(b) Shortly after the new Act on Public Associations came into force, the activities of certain environmental NGOs were stopped by respective courts upon the request of the Ministry of Justice, on the basis of article 28, paragraph 2, and article 32, even without any written notifications requesting to cease violation of national Act having been issued, which is against the rules of article 28 of the new Act;

(c) The Ministry of Justice has not been willing to receive any new requests for registration of public associations, referring to the workload of re-registration of old associations;

(d) There was no legal remedy for challenging the decisions of the Ministry referred to in paragraphs (b) and (c).

II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

13. Turkmenistan deposited its instrument of accession to the Convention on 21 June 1999. The Convention entered into force for Turkmenistan on 30 October 2001.

14. In establishing the facts of the case, the Committee, in addition to examining the information provided in the communication, also considered some other information in the public domain, such as an analysis done by the International Center for Non-profit Act (ICNL). The analysis is available on http://www.icnl.org/car/Acts/TM_PA_Act_Comments_ICNL_11_14_2003.doc

15. The communication seems to generally address the restrictive nature of the Act. The Committee, therefore, has endeavoured to assess the conformity of the Act with the Convention from that perspective.

16. As described in paragraph 11 (a) above, the Act in its article 5 largely limits membership in Turkmen public associations to citizens of Turkmenistan. Non-governmental organisations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public. Furthermore, certain rights accorded to the 'public concerned' (e.g. under art. 6, paras. 2, 5 and 6, and art. 9, para. 2) are guaranteed to a greater extent with respect to registered environmental NGOs than they are for individual members of the public, who might have to demonstrate that, for example, their material interests are directly affected in order to be recognized as the 'public concerned' Thus the exclusion of foreign citizens and persons without citizenship from the possibility to found and participate in an NGO might constitute a disadvantageous discrimination against them. The Committee is, therefore, of the opinion that article 5 of the Act is not in compliance with article 3, paragraph 9, of the Convention.

17. With regard to the territorial restrictions on the operation of NGOs, evaluation of these provisions in the context of the whole Act, especially comparing them to article 21 on rights of public associations, does not indicate restriction on the local public associations in entering into regional or national level actions if it is in connection with the defence of their local interest.

18. Article 13 in conjunction with article 15 of the Act appears to limit the territorial field of operation, especially with respect to nation-wide organizations which are required to have a rather large membership: only organizations with over 500 members can conduct nation-wide Activities. It poses a question as to whether this might in fact limit the exercise of participation and access to justice rights under the Convention to the territory of a municipality.

19. Since the majority of the regional and national environmental issues naturally concern the local environmental protection interests, the territorial field of operation of the local NGOs seems not to be significantly restricted. If the new legislation were to exclude local NGOs as such from participation in decision-making on projects in other parts of the country or on nation-wide projects, programmes, etc., this would not be in conformity with the Convention. However, since there is no sufficient evidence of Actual implementation of article 13 in conjunction with article 15, the Committee finds it difficult to establish at this stage whether the provisions as such might constitute non-compliance with article 6 and article 9, paragraph 2, in conjunction with article 2, paragraph 5, of the Convention.

20. With regard to article 17, paragraph 3, of the Act, the Committee observes that the Convention does not exclude the possibility for Parties to regulate and monitor to a certain degree Activities of non-governmental organizations within their jurisdiction, and that there is no requirement in it to either regulate or de-regulate activities of non-registered organizations. Thus the matter is within the sovereign powers of each Party. However, any such regulation should be done in a way that does not frustrate the objective of the Convention or conflict with its provisions. Having regard to the arguments set out in paragraph 16 above, it should not prevent members of the public from more effectively exercising their rights under the Convention by forming or participating in NGOs.

21. In this regard, the combination of a prohibition of non-registered associations with overly difficult registration procedures and requirements existing under the Turkmen Act on Public Associations does appear to present a genuine obstacle to the full exercise of the rights of the public. Indeed, it is difficult to see how this combination is compatible with the requirement under article 3, paragraph 4, of the Convention on each Party to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation. Taking into account the facts presented in paragraph 12 above, the Committee finds sufficient evidence that article 17, paragraph 3, of the Act and the way in which it has been implemented are not in compliance with article 3, paragraph 4, of the Convention.

22. The Committee notes that article 2 of the Act establishes precedence of the international agreements over its provisions. The Committee is, however, of the opinion that by enacting, after the entry into force of the Convention, an Act containing provisions that do not comply with the requirements of the Convention, the Party has not ensured that the provisions of the Convention will be complied with. Thus, it has not established the clear, transparent and

consistent framework to implement the provisions of the Convention, as required by article 3, paragraph 1, rather the opposite. This opinion is reinforced by the fact that in practice national authorities and courts are often reluctant to directly apply provisions of an international treaty.

23. Finally, the Committee notes that while some of the provisions analysed are not in compliance with the requirements of the Convention, it is not possible to analyze many other provisions of the Act without more information on how they are being interpreted and implemented. This applies to whether responses from the authorities to non-compliance with the provisions of the Act could lead or are leading to non-compliance with article 3, paragraph 8, of the Convention. The Committee emphasizes in this regard that it has not been possible for it to enter into a dialogue with the Government of the Party concerned, which the Committee deeply regrets.

III. CONCLUSIONS

24. Having considered the above, the Committee adopts findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

A. Main findings with regard to non-compliance

25. The Committee finds that article 5 of the Act on Public Associations is not in compliance with article 3, paragraph 9, of the Convention.

26. The Committee also finds that article 17 of the Act is not in compliance with article 3, paragraph 4, of the Convention.

27. In conclusion, the Committee finds that by enacting provisions that are not in compliance with article 3, paragraph 9, and article 3, paragraph 4, of the Convention, the Party concerned is not in compliance with the requirement of article 3, paragraph 1, to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.

B. Recommendations

28. The Committee, pursuant to paragraph 35 of the annex to decision I/7, and noting with regret that no response to the communication was provided by the Party concerned pursuant to the requirements set out in that annex, recommends to the Meeting of the Parties to:

(a) Request the Government of Turkmenistan to amend the Act on Public Associations with a view to bringing all its provisions into compliance with the Convention;

(b) Recommend that the Government of Turkmenistan should immediately take appropriate interim measures with a view to ensuring that the provisions of the Act are implemented as far as possible in a manner which is in compliance with the requirements of the Convention;

(c) Also recommend that the Government of Turkmenistan should carry out the measures referred to in paragraphs (a) and (b) above with the involvement of the public and, in particular, relevant national and international organizations, including non-governmental organizations;

(d) Furthermore recommend that the Government of Turkmenistan should develop and make publicly available official guidance on the interpretation of the Act, taking into account the relevant provisions and standards of the Convention;

(e) Invite the Government of Turkmenistan to submit a report to the Meeting of the Parties, through the Compliance Committee, no less than four months before the third meeting of the Parties on the measures taken to implement the recommendations in subparagraph (a);

(f) Request the secretariat or, as appropriate, the Compliance Committee, and invite relevant international and regional organizations and financial institutions, to provide advice and assistance to Turkmenistan where this is necessary to overcome obstacles to the implementation of these measures.

Note

[1] This chapter includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee.

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Compliance Committee

Twelfth meeting
Geneva, 14–16 June 2006

REPORT OF THE MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case of access to justice in the court of Medeuski region of Almaty (Communication ACCC/C/2004/06 by Ms. Gatina, Mr. Gatin and Ms. Konyushkova (Kazakhstan))

Adopted by the Compliance Committee on 16 June 2006

INTRODUCTION

1. On 3 September 2004, Ms. Gatina, Mr. Gatin and Ms. Konyushkova of Almaty, Kazakhstan (hereinafter the communicant), submitted a communication to the Compliance Committee alleging non-compliance by Kazakhstan with its obligations under article 9, paragraphs 3 and 4, of the Aarhus Convention.

2. The communication concerns access to justice in appealing the failure of the Almaty Sanitary-Epidemiological Department and Almaty City Territorial Department on Environmental Protection to enforce domestic environmental law with regard to operation of an industrial facility for storage of cement and coal and production of cement-based materials (hereafter "the facility"). The communicants claim that their right of access to administrative or judicial review procedures guaranteed under article 9, paragraph 3, of the Convention were violated when a court repeatedly failed to consider a part of a lawsuit related to the failure to act by the public authorities. The communicants further claim that unjustified delay in review of the claim, failure to notify the plaintiffs of the scheduled court hearing, review by the court of the claim in absence of the parties and failure by the court to inform the plaintiffs of its decision in the case constituted breach of the requirements of article 9, paragraph 4, of the Convention with regard to fair, equitable and timely procedures providing adequate and effective remedies. The communication is available in full at http://www.unece.org/env/pp/pubcom.htm.

3. The communication was forwarded to the Party concerned on 22 October 2004, following a preliminary determination by the Committee as to its admissibility.

4. A response was received from the Party concerned on 18 March 2005, indicating, *inter alia,* that:

(a) By purchasing their residential property in the vicinity of the facility in 1996, the communicants had accepted to reside in an industrial zone;

(b) The environmental inspectorate had been carrying out regular monitoring of the facility in response to the communicant's complaints;

(c) The monitoring had established that since the latest change in ownership of the facility (which occurred earlier in 2004), several pieces of clean-up equipment had been installed in the facility;

(d) The new management of the facility had developed and submitted for approval to the environmental authorities a draft environmental protection plan in 2004;

(e) Administrative penalties in the form of fines had been imposed on the facility for failure to comply with environmental legislation;

(f) Contrary to the communicants' claim, the court decision of 27 June 2002 stated that the parties had been notified of the date and time of the hearing; and

(g) The failure of the court to notify the communicants of the decision in their case fell outside the competence of the Ministry of Environment.

5. In addition to the comments in writing, the representatives of the Party concerned further pointed out, during the discussion at the Committee's eighth meeting, that judicial procedures and the performance of the courts were outside the scope of the authority of the Ministry of Environment.

6. The Committee at its fifth meeting (MP.PP/C.1/2004/6, para. 26) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the response of the Party concerned and having further consulted with both parties at its eighth meeting, the Committee hereby confirms the admissibility of the communication.

7. The Committee discussed the communication at its eighth meeting (22–24 May 2005), with the participation of representatives of both the Party concerned and the communicant, both of whom provided additional information.

8. In accordance with paragraph 34 and with reference to paragraph 36 (b) of the annex to decision I/7, the Committee prepared draft findings and recommendations at its ninth meeting were forwarded for comment to the Party concerned and to the communicant on 18 October 2005. Both were invited to provide comments, if any, by 17 November 2005. Comments were received from the communicant on 9 November 2005. At the request of the Party concerned, the Committee extended the commenting deadline to 1 February 2006. The Party concerned provided its comments on 7 February 2006. The Committee, having reviewed the comments, took them into account in further developing the draft findings and recommendations at its eleventh meeting. It then allowed a further period for comments for the Party concerned before finalizing and adopting them at its twelfth meeting.

I. SUMMARY OF FACTS[1]

9. An industrial facility for storage of cement (6 stationary containers of 25 metres in height and 4,000 tons in volume) and coal (a warehouse with the annual cargo turnover of 48,400 tons) and production of construction materials resumed its operation in 1998, following seven years of inactivity. Tsentrbeton Ltd. facility is located in the immediate proximity of the residential area where the communicants live (with some of the installations within 50 metres of residential houses) in the Djetysuiski district of Almaty.

10. Since 1998, the communicants repeatedly requested the Almaty Sanitary-Epidemiological Department and the Almaty City Territorial Department on Environmental Protection to enforce environmental standards pertaining to the operation of the facility. The communicants maintain that the authorities failed to take successful enforcement measures.

11. On 6 August 2000, seven residents of the area, including the communicants, filed a lawsuit with the district court of Medeu alleging a failure of the Almaty Sanitary-Epidemiological Department and the Almaty City Territorial Department on Environmental Protection to enforce environmental legislation with regard to the facility. The plaintiffs requested the court to, *inter alia:*

[1] This chapter includes only the main facts considered relevant to the question of compliance, as presented to and considered by the Committee.

1) Require the defendants to develop a proper environmental management plan for the facility that would take into account all the relevant requirements of the environmental legislation;
2) Revoke the conclusions of the governmental environmental assessment ("expertise") and the environmental permit issued to the facility as failing to satisfy the requirements of environmental, sanitation and construction legislation; and
3) Require the defendants to provide compensation for pain and suffering caused by their failure to act.

12. On 20 June 2001, the court of first instance rejected the plaintiff's second and third claims, pointing out that as of July 2000, the facility complied with the conditions of its permit, that the authorities in question had addressed all the complaints of the plaintiffs and had taken administrative and other enforcement measures and that therefore no compensation was to be awarded to the plaintiffs. It is not address the first claim.

13. On 7 September 2001, the appellate court reversed the decision of the district court, noting its failure to address the first claim of the plaintiffs. The decision of the appellate court also noted that the district court had failed to properly investigate the matter with regard to both the actual enforcement measures taken by the authorities and the actual environmental performance by the facility and its compliance with the legislative requirements. The case was returned to the district court for review.

14. On 27 November 2001, the district court suspended the review with regard to the third claim pending the outcome of a civil case filed by the communicants against the facility with a different district court. The court's decision again failed to address the first claim and also did not resolve matters raised in the second claim. The appellate court reviewed the case in February 2002 but this time left the decision of the district court standing.

15. On 27 June 2002, despite the fact that the civil case was still pending with a different court, the judge of the district court on her own initiative resumed the hearing of the case with regard to the third claim. It dismissed the case without considering it due to the failure of both parties to appear in court. The court decision refers to multiple notifications of the place, date and time of the hearing being sent to the parties. The communicants however maintain that no such notification was received by any of the seven plaintiffs. The communicants also did not receive a copy of the court's decision until May 2004 when they filed a petition with the district court to resume the hearing of the case. In the course of discussing the communication at the Committee's eighth meeting on 24 May 2005, the representatives of the Party concerned indicated that they were not in a position to verify whether or not the notifications or the decision had been indeed delivered to the communicants in a timely manner.

16. Despite suspension of its environmental permit in 2001, the facility continued to operate. In February 2003, a new environmental assessment of the facility's operation was approved by the environmental authorities. Its conclusions established multiple breaches of Kazakh environmental legislation: e.g. the level of cement dust content in the air exceeding maximum allowed concentration by 114 times, background air pollution exceeding permissible levels (paras. 17.4 and 17.5 of the Conclusions) and existence of residential houses within the prescribed buffer zone (para. 17.1 of the Conclusions). Despite this, the conclusions

conditionally approved operation of the facility subject to effective implementation of measures foreseen in the proposed environmental management plan. The facility however still failed to obtain an environmental permit. In May 2004, the communicants appealed to the Ministry of Environment to take steps to stop the pollution by the enterprise.

17. On 20 July 2004, the communicants filed another lawsuit with the Medeu district court. In the lawsuit they petitioned for a writ to require the Almaty City Territorial Department on Environmental Protection and the City Sanitary-Epidemiological Department to bring a court action for suspension of the facility's operation. The communicants maintain that they were not in a position to directly request injunctive relief for fear of an expensive counter-claim by the facility.

18. On 29 July 2004, the district court rejected the claim, pointing out that while article 77 of the Environmental Protection Law granted the public authorities a right to file a lawsuit to restrict or suspend an activity, it did not establish an obligation to do so. The court considered, *inter alia,* that imposing an administrative fine on the facility provided an alternative course of action for the public authorities in fulfilling their obligations. The decision was subsequently unsuccessfully appealed to the court of second instance and the office of the public prosecutor.

II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

19. Kazakhstan deposited its instrument of ratification of the Convention on 11 January 2001. The Convention entered into force for Kazakhstan on 30 October 2001.

20. The Convention, as a treaty ratified by Kazakhstan, is part of the Kazakh legal system and is directly applicable, including by the courts.

21. Noting that some of the activities described in the communication took place prior to the Convention's entry into force for Kazakhstan, the Committee will only address the activities that took place after 30 October 2001.

22. The communicants' standing was not disputed in any of the court instances. In the Committee's view, this sufficiently establishes that they meet the criteria under Kazakh law for access to review procedures as stipulated in article 9, paragraph 3, of the Convention. The argument of the Party concerned with regard to the communicants' consent to reside in the area (para. 4 above) is not relevant in this consideration. Leaving aside the fact that the purchase of property occurred when the facility was not operational, the communicants do not challenge legitimate operation of the facility, but rather allege failure of the public authorities to bring about compliance with environmental legislation and their own failure to obtain access to justice in the context of the Convention.

23. The Almaty Sanitary-Epidemiological Department and the Almaty City Territorial Department on Environmental Protection both fall under the definition of a "public authority", as set out in article 2, paragraph 2 (a).

24. With regard to the argument presented by the representatives of the Party concerned that they do not have authority over courts (paragraph 5 above), the Committee notes that judicial independence, both individual and institutional, is one of the preconditions in ensuring fairness in the access to justice process. Such independence, however, can only operate within the boundaries of law. When a Party takes on obligations under an international agreement, all the three branches are necessarily involved in the implementation. Furthermore, a system of checks and balances of the three branches is a necessary part of any separation of powers. In this regard, the Committee wishes to point out that, the three branches of power need each to make efforts to facilitate compliance with an international agreement. So, for example, bringing about compliance in the field of access to justice might entail analysis and possible additions or amendments to the administrative or civil procedural legislation by bodies usually mandated with such tasks, such as, for example, ministries of justice. Should such legislation be of primary nature, the legislature would have to consider its adoption. In the same way judicial bodies might have to carefully analyze its standards and tests in the context of the Party's international obligations and apply them accordingly.

25. While the communication presents a lot of information with regard to violations that continually occur in the operation of the facility, as illustrated in paragraphs 9 and 15 above, it is not within the Committee's mandate to assess these alleged violations or verify the information. The Committee will however consider the judicial procedure in question from the point of view of compliance with article 9, paragraphs 3 and 4.

26. With regard to the court decision of 27 November 2001, the court had in front of it three claims: to require the public authorities to take certain actions (i.e. develop a management plan), to revoke the conclusions of the earlier environmental assessment and the related permit and to award compensation of damages. The decision addressed the third claim but failed to address the request for an environmental management plan to be developed for the facility to bring its operation into compliance with the national legislation. It also did not resolve the matter of appeal against the conclusions of the governmental environmental assessment. Without an in-depth analysis of the domestic legislation the Committee is not able to establish whether an omission to develop such a plan would be in contradiction with environmental legislation and therefore fall under article 9, paragraph 3, of the Convention. Should this have been positively established, the failure by the courts to address this claim would constitute a denial of access to judicial review procedures in the meaning of article 9, paragraph 3. The Committee therefore would like to bring the attention of the Party to this situation.

27. The opinion of the appellate instance issued on 7 September 2001 (see para. 13 above) indeed pointed to an earlier first instance decision's failure to address the same particular claim. It refers to the requirement of the Kazakh Civil Procedure Code that all claims presented in a lawsuit have to be addressed by the court. The failure to comply with the Convention, in this particular instance, does not seem to be embedded in the legislative system but rather points to failures in the judicial system.

28. With regard to the decision of the court of first instance of 27 June 2002 and the subsequent developments described in paragraph 13 above, the Committee is of the opinion that a procedure which allows for a court hearing to commence without proper notification of the parties involved (including a confirmation that notifications have indeed been received), cannot

be considered a fair procedure in the meaning of article 9, paragraph 4, of the Convention. Although the court decision refers to the multiple notifications being sent to the plaintiffs, no evidence was presented in support of this by the Party. In absence of such evidence the Committee considers that the claim of the communicants that they were not duly notified has not been reputed. In the view of the Committee the shortcoming lies with the compliance by the courts with the existing requirements of procedural legislation, rather than the legislation itself.

29. The Committee also finds that the failure to communicate the court decision to the parties, as described in paragraph 15, constitutes a lack of fairness and timeliness in the procedure. At the Committee's eighth meeting, the representatives of the Party concerned argued that even if the decision was not communicated directly to the plaintiffs, they still had a possibility to access the text of the decision in the court records. Clearly, while public accessibility of decisions is commendable, it does not in itself satisfy the fairness of the procedure. A fair and timely procedure requires that a decision should be communicated to the parties within a short time to enable them to take further actions, including filing an appeal.

30. The judicial procedures referred to in paragraph 17 above were initiated to challenge the public authorities' failure to act to bring about compliance with national environmental law. In this regard, it is important to distinguish three issues:

(a) Whether the communicant had access to a review procedure in order to challenge the alleged failure of enforcement by the public authorities. The Convention clearly applies here, and it appears that the communicants did have such access, even if the courts' decisions did not go in their favour;

(b) Whether the public authorities were legally obliged (as opposed to merely permitted) to enforce the relevant laws and regulations. The Committee is not in a position to interpret substantive environmental and administrative legislation of the Party where it falls outside the scope of the Convention, nor is it in a position to dispute the court's opinion that the public authority has a right to judge which of the courses of actions available to it are best suited to achieve effective enforcement. The Committee is, generally speaking, reluctant to discuss the courts' interpretations of substantive provisions of environmental or other domestic legislation. However, a general failure by public authorities to implement and / or enforce environmental law would constitute an omission in the meaning of article 9, paragraph 3, of the Convention, even though the specific means proposed by the plaintiff to rectify this failure might not be the only ones or the most effective ones;

(c) Whether the public authorities did in fact effectively enforce the relevant laws and regulations. There is certainly, in the view of the Committee, a freedom for the public authorities to choose which enforcement measures are most appropriate as long as they achieve effective results required by the law. Public authorities of the kind referred to in paragraph 17 above often have at their disposal various means to enforce standards and requirements of law, of which initiation of legal action against the alleged violator is but one. The Committee notes however, that actions with regard to the facility undertaken by the public authorities in the course of the past seven years (e.g. imposing fines) consistently failed to ensure effective results, as demonstrated by the information presented in paragraphs 4 (e), 10 and 16 above.

31. It is the Committee's opinion that the procedures fall under article 9, paragraph 3, of the Convention, triggering also the application of article 9, paragraph 4. Furthermore, it appears that there were significant problems with enforcement of national environmental law. Even though the communicants had access to administrative and judicial review procedures on the basis of the existing national legislation, this review procedure in practice failed to provide adequate and effective remedies and, therefore, was out of compliance with article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.

32. The Committee notes that the more direct route for the communicants to challenge the contravention of environmental laws would have been to take a lawsuit directly against the polluting company, but the communicants were concerned about the financial risk they could face and therefore opted for the second route of taking a lawsuit against the relevant public authorities. This concern over what is known as strategic lawsuits against public participation also point out to obstacles in access to justice.

33. The Committee also notes with regret that whereas the case taken by the plaintiff could have provided a trigger for more effective enforcement of the laws and regulations relating to the environment, the decisions taken by the judiciary as a whole effectively ensured that this did not happen.

III. CONCLUSIONS

34. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

35. The Committee finds that the failure by Kazakhstan to provide effective remedies in a review procedure concerning an omission by the public authority to enforce environmental legislation as well as failure to ensure that courts properly notify the parties of the time and place of hearings and of the decision taken constitutes a failure to comply with the requirements of article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.

B. Recommendations

36. Noting that the Party concerned has agreed that the Committee take the measure listed in paragraph 37 (b) of the annex to decision I/7, the Committee, pursuant to paragraph 36 of the annex to decision I/7, and taking into account the recommendations adopted by the Meeting of the Parties with regard to compliance by Kazakhstan (ECE/MP.PP/2005/2/Add.7), recommends that Kazakhstan:

(a) Additionally include in its strategy, prepared in light of decision II/5a of the Meeting of the Parties, publication of the courts' decisions and statistics related to environmental cases and allocate specific significance to capacity-building activities for the judiciary;

(b) Thoroughly examine, with appropriate involvement of the public, the relevant environmental and procedural legislation in order to identify whether it sufficiently provides judicial and other review authorities with the possibility to provide adequate and effective remedies in the course of judicial review;

(c) Take the findings and conclusions of the Committee into account in further consideration of the specific matter raised by the communicant; and

(d) Include in its report to the Meeting of the Parties to be prepared pursuant to paragraph 8 of decision II/5a of the Meeting of the Parties information on the measures taken to implement these recommendations.

37. The Committee requests the secretariat and invites relevant international and regional organizations and financial institutions, to provide advice and assistance to Kazakhstan as necessary in the implementation of these measures.

38. The Committee resolves to review the matter no later than three months before the third meeting of the Parties and to decide upon what recommendations, if any, to make to the Meeting of the Parties, taking into account all relevant information received in the meantime.

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ECONOMIC COMMISSION FOR EUROPE

Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

Geneva, 29–31 March 2006

REPORT ON THE ELEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Armenia with its obligations under the Aarhus Convention in relation to the development of the Dalma Orchards area
(Communication ACCC/C/2004/08 by the Center for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Center and the Armenian Botanical Society (Armenia))

Adopted by the Aarhus Convention's Compliance Committee on 31 March 2006

INTRODUCTION

1. On 20 September 2004, three Armenian non-governmental organizations (NGOs), the Center for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Center and the Armenian Botanical Society, submitted a

communication to the Committee alleging non-compliance by Armenia with its obligations under article 4, paragraphs 1 and 2; article 6, paragraphs 1–5 and 7–9; article 7; article 8; and article 9, paragraph 2, of the Aarhus Convention.

2. The communication concerns access to information and public participation in the decision-making on modification of land use designation and zoning as well as on the leasing of certain plots in an agricultural area of Dalma Orchards. The communicants claim that their right to information, guaranteed under article 4, paragraphs 1 and 2, of the Convention, was violated by the public authorities' failure to respond to information requests and to provide adequate and complete information. The communicants also claim that, in adopting the relevant decrees, the Government failed to notify the public about the decision-making process; to ensure public participation in it, including by taking account of the public comments; and to publish the adopted decisions. They allege that these omissions constituted failure to comply with multiple provisions of articles 6 and 7 of the Convention. They also allege that adoption of government decrees without a public participation procedure contravenes article 8 of the Convention. They further claim that a failure to address the administrative appeals challenging the relevant decisions and a failure to provide for an appropriate judiciary appeal procedure constitute non-compliance with article 9, paragraph 2, of the Convention. The communication is available in full at http://www.unece.org/env/pp/pubcom.htm.

3. The communication was forwarded to the Party concerned on 22 October 2004 after a preliminary determination of its admissibility.

4. A response was received from the Party concerned on 2 April 2005 indicating that, in accordance with Armenian legislation, government decrees can be challenged only in the Constitutional court. The Party maintained that the other matters addressed in the communication did not fall under the Convention. In its comments on the draft findings and recommendations, the Party provided further information with regard to legislative developments and practical measures underway in Armenia. In particular, it noted proposed changes to the Constitution which will provide members of the public with standing in the Constitutional Court[1], as well as the draft law on Administration, which aims to make decisions such as those described in paragraph 10 below subject to review by the administrative courts. It also mentioned publication of a guide to the implementation of the Convention and a training event for legal professionals organized in 2005.

5. The Committee at its fourth meeting (MP.PP/C.1/2004/6, para. 26) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the arguments put forward by the Party concerned in its response and having further consulted with both parties at its eighth meeting, the Committee hereby confirms the admissibility of the communication, deeming the points raised by the Party concerned to be of substance rather than related to admissibility.

6. The Committee discussed the communication at its eighth meeting (22–24 May 2005), with the participation of representatives of both the Party concerned and the communicants, both of whom provided additional information.

[1] Following the adoption of these recommendations, the Committee became aware that these changes to the Constitution of Armenia had been made (see: http://www.president.am/library/eng/?task=41&id=1).

7. In accordance with paragraph 34 and with reference to paragraph 36 (b) of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicants on 18 October 2005. Both were invited to provide comments, if any, by 17 November 2005. Comments were received from the communicants on 16 November 2005. At the request of the Party concerned, the Committee extended the commenting deadline to accommodate a wider consultation process on the findings and recommendations in the country. The Party concerned provided its comments on 2 February 2006. The Committee, having reviewed the comments, took them into account in finalizing its findings and recommendations by amending the draft where the comments, in its opinion, necessitated changes in the presentation of the facts or the Committee's consideration, evaluation or conclusions.

I. SUMMARY OF FACTS[2]

8. Dalma Orchards is an agricultural area of historical, cultural and environmental value in the south-western part of the Armenian capital, Yerevan. In 1989, the area was included in the Plan for Preservation and Use of Historical and Cultural Monuments. The Plan was approved in 1991 by the Mayor of Yerevan. However, in 2000, this decision was annulled for all sites of historical or cultural value in the city, and no new list has been developed.

9. In December 2003, the district administration rejected a request submitted by the then-lessees of Dalma Orchards for extension of their leases. The rejection letter indicated that the Yerevan municipality already had in place an area development plan. The municipality confirmed the existence of the area development plan at a meeting organized by NGOs. It clarified that the plan had been adopted by the Government of Armenia and was not subject to change.

10. An inquiry into the matter by a group of NGOs identified five decrees with regard to the area in question adopted by the Government of Armenia in the period between March 2003 and March 2004:

(a) Decree 1941-A of 27 March 2003 "On Modifying the Boundaries and Designated Use of the Conservable Land in the Dalma Orchards of Yerevan", ratified by the President of the Republic of Armenia on 29 March 2004;

(b) Decree 503-A of 27 March 2003 "On Providing Lease over Land Plots to the 'Renko Armestate' Limited Liability Company and the 'Frank Muller' Closed Joint-Stock Company without Tender", ratified by the President of the Republic of Armenia on 15 May 2003;

(c) Decree 745-A of 25 June 2003 "On Modifying the Designated Use of Land and Providing Lease over a Land Plot to Tavros Galshoyan and Syranuysh Galshoyan without Tender", ratified by the President of the Republic of Armenia on 25 June 2003;

(d) Decree 1281-A of 11 September 2003 "On Modifying the Designated Use of Land and Providing a Land Plot to the 'Armenian Airways' Closed Joint-Stock Company", ratified by the President on 23 October 2003; and

[2] This chapter includes only the main facts considered relevant to the question of compliance, as presented to and considered by the Committee.

(e) Decree 397-A of 31 March 2004 "On Zoning of Areas and Modifying the Designated Use of Land", ratified by the President on 6 April 2004.

Another decree with regard to the land use on the territory was adopted on 21 October 2004 without prior notice or public consultation.

11. The decrees were adopted as stand-alone acts. No public participation was provided for in the course of the decision-making process. Consequently, any comments provided by the public were provided following the formal adoption of the decrees and were not taken into account. Moreover, stand-alone acts, in accordance with Armenian legislation, are not subject to publication. At the Committee's eighth meeting, the representatives of Armenia confirmed that regulation of the matters in question through stand-alone decrees was not legally required. The communicants maintain that, in accordance with article 7 of the Armenian Land Code, changes of land use designation should be dealt with through normative regulation of general applicability rather than stand-alone acts applying to a defined piece or pieces of land.

12. The types of activity for which the land was designated (e.g. construction of houses, buildings or complexes, other planned activities exceeding the threshold value of 1,000 square metres, and forest restoration) should be subject to an environmental impact assessment (EIA) procedure in accordance with the Armenian Law on Environmental Impact Assessment. This procedure, in turn, requires public participation. It is not clear from the facts presented to the Committee whether a further (article 6-type) permitting process must be undergone, with public participation, before any specific activity can proceed.

13. Several requests for information were sent to various public authorities by the communicants, including:

(a) a letter of 19 March 2004 to the Chairperson of the State Real Estate Cadastre Committee requesting information about the boundaries of Dalma Orchards, the category of land to which Dalma Orchards belonged, the administrative area the land was in, whether there were leases issued for the land on this territory (and, if so, their boundaries) and what plans and programmes had been developed for the area;
(b) a letter of 31 May 2004 to the Mayor of Yerevan requesting information about decisions on the allocation of 533 hectares of land in Dalma Orchards, the duration of leases and proposed activities, whether and in what way the public had been informed of the proposed modifications of the land-use, and whether any public comments had been received; and
(c) a letter of 3 August 2004 to the Mayor of Yerevan requesting access to documents that had served as a basis for the adoption of the government decrees referred to in paragraph 10 above and maps annexed to the decrees, and requesting information as to the location of land plots allocated by the decrees for particular activities.

Some of the requests, such as those mentioned in subparagraphs (a) and (c) above, were not answered at all, while others, such as the letter referred to in subparagraph (b), were answered only partially.

14. On 9 August 2004, the communicants filed a lawsuit with the first-instance district court of Yerevan appealing the five government decrees on grounds of violations of the Aarhus

Convention, the Armenian Law on Environmental Impact Assessment, the Law on Urban Development and the Land Code. They petitioned for a writ to declare the government decree null and void. The lawsuit was determined inadmissible for lack of jurisdiction. In particular, the court specified that the conformity of the government decrees with the Constitution of Armenia could be established only by the Constitutional Court of Armenia. The determination was left standing by the appellate instance.

15. According to Armenian legislation, only three institutions may make appeals to the Constitutional Court: the National Assembly, the Government and the President. The communicants point out that they approached these three institutions prior to or at the time of filing a lawsuit. In their responses to a request from one of the communicants, the Head of the Standing Committee of the National Assembly (letter of 15 June 2004) and the Head of the Department of Expertise of the Ministry of Justice (letter of 12 September 2004) recommended that the communicants appeal the decrees in the court of first instance.

II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

16. Armenia deposited its instrument of ratification of the Convention on 1 August 2001. The Convention entered into force for Armenia on 30 October 2001.

17. The Convention, as an international treaty ratified by Armenia, has direct applicability in the Armenian legal system. All the provisions of the Convention are directly applicable, including by the courts.

18. The communicants are NGOs that fall under the definition of "the public" as set out in article 2, paragraph 4, of the Convention. The Committee considers that all the communicants, being registered NGOs and having expressed an interest in the decision-making process, fall within the definition of "the public concerned" as set out in article 2, paragraph 5.

19. The agencies referred to in the communication with regard to provision of information and public participation in the decision-making process fall under the definition of "public authority" in article 2, paragraph 2 (a), of the Convention.

20. The issuing of government decrees on land use and planning constitutes "measures" within the meaning of article 2, paragraph 3 (b), of the Convention. In the Committee's opinion, the information referred to in paragraph 13 above clearly falls under the definition of "environmental information" under article 2, paragraph 3.

21. It is therefore the opinion of the Committee that, as public authorities within the meaning of article 2, paragraph 2 (a), the State Real Estate Cadastre Committee and the Office of the Mayor of Yerevan were under an obligation to provide the environmental information requested by the communicants pursuant to article 4, paragraph 1, and that their failure to do so or to respond within the time limits indicated in the article was not in conformity with provisions of article 4, paragraphs 1 and 2.

22. The Committee notes that the communicants do not appear to have used domestic appeal procedures to challenge the failure of the public authorities to provide information, and have not provided any information to the Committee as to why they did not do so. They do not cite article 9, paragraph 1, among the articles that they claim have been breached.

23. The government decrees referred to in the communication, in particular decrees 503-A, 745-A (paras. 2 and 3) and 1281-A (para. 2), deal with the designation of land for a particular type of commercial activity. Typically, this would be considered as a type of decision falling within the scope of article 7 of the Convention. However, some of the decrees specify not only the general type of activity (e.g. manufacturing, agriculture) that may be carried out in the designated areas but also the specific activity (e.g. watch-making factory, construction of a diplomatic complex) and even the names of the companies or enterprises that would undertake these activities. These elements are more characteristic of a type of decision falling within the scope of article 6 of the Convention. The implications with respect to articles 7 and 6 are considered in turn in paragraphs 24–27 and 28–33 respectively.

24. Decree 1941-A, provisions of paragraph 1 of decree 745-A and paragraph 1 of decree 1281-A, and decree 397-A, in the Committee's opinion, relate to land-use planning. The first three change the designation of land use in the existing zoning plan, while the fourth adopts the territorial zoning plan of the area and modifies the designated use of lands.

25. In the Committee's view, such plans fall under article 7 of the Convention and are subject to the public participation requirements contained therein, including, *inter alia,* the application of the provisions in paragraphs 3, 4 and 8 of article 6. The Committee therefore finds that the failure to ensure public participation in the preparation of plans such as those referred to in paragraph 21 above constitutes non-compliance with article 7 of the Convention.

26. It is noteworthy that the failure to provide for public participation in this case appears to also contravene Armenian national legislation. The Armenian Law on Environmental Impact Assessment (article 15, paragraphs 3 and 4) requires that, *inter alia,* socio-economic, urban construction, industrial and environmental protection plans, programmes, complex designs and master plans be subject to public hearings and be communicated to the public at least 30 days in advance of the hearing. The law also requires that public opinion be taken into consideration.

27. In the Committee's opinion, the difficulties related to compliance with articles 4 and 7 of the Convention lie not in the lack of a regulatory framework but rather in deficiencies in implementation and enforcement.

28. The extent to which the provisions of article 6 apply in this case depends *inter alia* on the extent to which the decrees (or some of them) can be considered "decisions on specific activities", that is, decisions that effectively pave the way for specific activities to take place. While the decrees are not typical of article 6-type decisions on the permitting of specific activities, some elements of them are (as is mentioned in paragraphs 12 and 23 above) more specific than a typical decision on land use designation would normally be. The Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions. Notwithstanding that, the fact that some of the decrees award leases to individual named enterprises to undertake quite specific activities leads the Committee to believe that,

in addition to containing article 7–type decisions, some of the decrees do contain decisions on specific activities.

29. Another question that arises is whether a further, more detailed permitting process, with public participation, is envisaged for the various specific activities. The information available to the Committee on this point is somewhat ambiguous. The communicants maintain that Armenian legislation requires that an EIA be carried out, with public participation, for such activities (see para. 10). If this takes place, it would certainly help to mitigate the lack of public participation in the formulation of the decrees. However, even if public participation is included at that stage, the scope of the decision on which the public would be consulted would be more limited than should be the case for article 6–type decisions, in the sense that some options (such as the option of not building any watch factory at a particular location) would no longer be open for discussion (cf. article 6, para. 4).

30. If no further permitting process is envisaged, then the question of compliance with article 6 arises more starkly. On the basis of the information available to it, the Committee is not able to identify whether any of the activities concerned fall under the categories listed in paragraphs 1–19 of Annex I to the Convention. It does, however, note that the fact that under the Armenian legislation these activities are subject to an environmental assessment procedure, including public participation, as described in paragraph 12 above, brings them within the scope of paragraph 20 of Annex I of the Convention. Furthermore, the fact that an EIA procedure is foreseen for such acts points to the Armenian legislator's recognition of their potential environmental impact. Thus, the decisions referred to in paragraph 24 above could be seen as subject to article 6, paragraph 1(b) of the Convention.

31. The Party concerned pointed out at the Committee's eighth meeting that, even though the decrees in question had not been published, they could be now accessed through an electronic database. However, in the Committee's view, such an approach does not satisfy the requirement of article 6, paragraph 9, of the Convention to promptly inform the public of the decision.

32. The representatives of Armenia presented no evidence to the Committee that the decision-making on the proposed activities was still at a stage where all options remained open. The Committee therefore concludes that the decision-making with regard to specific activities was not done in accordance with the requirements of article 6, paragraph 1 (b), and, in conjunction with it, article 6, paragraphs 2–9 of the Convention.

33. The Committee also wishes to point out that, on the basis of the information available to it, detailed regulation appears to be lacking where public participation in decision-making on specific activities is concerned. While the Law on Environmental Impact Assessment itself provides some of the details, the elaboration of a more specific procedure in secondary legislation or in the form of guidelines might be advisable.

34. The communicants allege that failure to ensure public participation in the development and adoption of the government decrees referred to in paragraph 10 above constitutes non-compliance with article 8 of the Convention. In the Committee's understanding, however, the decrees in question do not fall under generally applicable legally binding rules. Rather, they

seem to constitute a form of adopting decisions on plans for designation of land (article 7) and to some extent a form of decisions mandating specific activities (article 6).

35. With regard to access to justice, the communicants claim that they were denied access to a review procedure to challenge the substantive and procedural legality of the government decrees which, they argue, should be guaranteed under article 9, paragraph 2, of the Convention. The relevance of article 9, paragraph 2, would depend on the extent to which article 6 is applicable, and, as was stated above (paras. 28–32), the Committee considers that, while the decrees primarily concern article 7 decision-making, some of their elements fall within the scope of article 6, and that therefore provisions of article 9, paragraph 2, apply.

36. The communicants also point out that they were denied access to review procedures to challenge the land designation aspect of the decrees. In this respect the Committee notes that the subject matter of the decrees is regulated in detail by both Armenian environmental laws (such as the Law on Environmental Impact Assessment) and laws regulating urban planning. Moreover, these laws require that the public be consulted in the process of such decision-making. It is therefore the Committee's opinion that the communicants, in accordance with article 9, paragraph 3, should have had access to a review procedure to challenge the decisions, which deal with such subject matter and which they believed to contradict their national law relating to the environment.

37. The lawsuit challenging the legality of the decrees and petitioning for a writ to declare them null and void was dismissed by the district court for lack of jurisdiction. The decision of the court points out that the Civil Procedure Code prevents courts from declaring null and void for any reason decisions whose constitutionality is subject to review by the Constitutional court. It further notes that the Constitution of Armenia provides for a review of the constitutionality of government decisions by the Constitutional Court only. However, as the communicants point out, only three institutions have standing in the Constitutional Court (see para. 15 above). Two of these represent the executive that issues government decrees, and the third constitutes a large proportion of the national legislative body. In the Committee's opinion, such an approach does not ensure that members of the public have access to review procedures.

38. However, in the Committee's opinion, the problem is not so much with the issue of jurisdiction or standing. Rather, it is connected to the fact that planning decisions whose subject matter is regulated by environmental legislation, and decisions on specific activities which, in accordance with the Convention, should be subject to an administrative or judicial review, were taken through a procedure that provides no possibility for the public to participate and no remedies. The Committee acknowledges that national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to regulate matters subject to articles 6 and 7 of the Convention exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of the

Convention. In this case, the Committee has not been made aware of any compelling reason justifying the choice of this form of decision-making.

39. The Committee finds this approach to be out of compliance with the obligations to ensure that members of the public concerned have access to a review procedure and to provide adequate and effective remedies in accordance with article 9, paragraphs 2–4, of the Convention. At the same time, the Committee notes the information provided to it by the Party concerned with regard to proposed legislative changes described in paragraph 4 above. In the Committee's opinion, such changes will, if implemented, bring the situation into compliance with article 9 of the Convention.

III. CONCLUSIONS

40. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

41. The Committee finds that by failing to ensure that bodies performing public functions implement the provisions of article 4, paragraphs 1 and 2, of the Convention, Armenia was not in compliance with that article.

42. The Committee also finds that by failing to ensure effective public participation in decision-making on specific activities, the Government of Armenia did not comply fully with article 6, paragraph 1 (a); with annex I, paragraph 20, of the Convention; or, in connection with this, with article 6, paragraphs 2–5 and 7–9. It considers that the extent of non-compliance would be somewhat mitigated if public participation were to be provided for in further permitting processes for the specific activities in question, but it notes that the requirement under article 6, paragraph 4, to ensure that early public participation is provided for when all options are open would still have been breached. In this regard, the Committee notes, however, the information provided to it by the Government of Armenia regarding the new draft law on Environmental Impact Assessment and understands that the drafters of the new law will take this opportunity to ensure its approximation with the requirements of the Convention.

43. The Committee also finds that by failing to provide for public participation in decision-making processes for the designation of land use, the Government of Armenia was not in compliance with article 7 of the Convention.

44. The Committee further finds that by failing to ensure that members of the public concerned had access to a review procedure and to provide adequate and effective remedies, the Government of Armenia was not in compliance with article 9, paragraphs 2–4, of the Convention.

B. Recommendations

45. Noting that the Party concerned has agreed that the Committee take the measure referred to in paragraph 37 (b) of the annex to decision I/7, the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, recommends that Armenia:

(a) undertake practical and legislative measures to overcome the existing problems with access to environmental information, including, where appropriate, statistical monitoring of processing information requests;
(b) ensure practical application of public participation procedures at all levels of decision-making in accordance with article 7 of the Convention and relevant domestic legislation;
(c) develop detailed procedures for public participation in decision-making on activities referred to in article 6, paragraph 1, of the Convention, *inter alia* by incorporating them into the new Law on Environmental Impact Assessment, and to ensure their practical application, including by providing training to officials of all the relevant public authorities at various levels of administration;
(d) ensure that appropriate forms of decisions are used in decision-making on matters subject to articles 6 and 7, so as to ensure that the public can effectively exercise their rights under the Convention;
(e) undertake appropriate practical measures to ensure effective access to justice, including the availability of adequate and effective remedies to challenge the legality of decisions on matters regulated by articles 6 and 7 of the Convention;
(f) take the consideration and evaluation of the Committee into account in the ongoing revision of legislation referred to in paragraphs 4, 39 and 42 above as well as in further consideration of the specific matter raised by the communicants; and
(g) take the findings and conclusions of the Committee into account in further consideration of the specific matter raised by the communicants.

46. The Committee invites the Party concerned to provide information to the Committee, no less than six months before the third meeting of the Parties, on the measures taken and the results achieved in implementation of the above recommendations.

47. The Committee requests the secretariat, and invites relevant international and regional organizations and financial institutions, to provide advice and assistance to Armenia as necessary in the implementation of the measures referred to in paragraph 45.

48. The Committee resolves to review the matter no later than three months before the third meeting of the Parties and to decide what recommendations, if any, to make to the Meeting of the Parties, taking into account all relevant information received in the meantime.

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Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

Twelfth meeting
Geneva, 14–16 June 2006

REPORT OF THE MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice
(Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))

Adopted by the Compliance Committee on 16 June 2006

INTRODUCTION

1. On 3 January 2005, the Belgian non-governmental organization Bond Beter Leefmilieu Vlaanderen VZW (BBL; hereinafter the communicant) submitted a communication to the Committee alleging non-compliance by Belgium with its obligations under article 2, paragraph 5, article 3, paragraph 1, and article 9, paragraphs 1 to 4, of the Aarhus Convention.

2. The communication concerns access to justice for environmental organizations in Belgium. The communicant claims that Belgian legislation and case law do not comply with the "third pillar" of the Convention, namely with the provisions requiring access to justice in environmental matters. More specifically, the concept of "interest" as a criterion for standing before the Belgian judicature is too narrowly interpreted – for example, by the Council of State in cases concerning construction permits and planning decisions. This constitutes a barrier to wide access to justice for environmental organizations. Hence, the communicant argues, Belgian law is not in compliance with article 9 of the Aarhus Convention.

3. The communication was forwarded to the Party concerned on 10 March 2005, following a preliminary determination as to its admissibility.

4. The reply from the Party concerned, received on 9 August 2005, disputed the claim of non-compliance, and held that the Belgian regime on access to justice in environmental matters complies with the relevant provisions of the Convention. The Party concerned thus asked the Committee to dismiss as unfounded the allegations made in the communication. However, while disagreeing with the Communicant on the merits, the Party concerned did not maintain that the communication failed to satisfy the formal requirements for admissibility for review by the Committee.

5. The Committee at its seventh meeting (ECE/MP.PP/C.1/2005/2, para. 14) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the arguments put forward by the Party concerned in its response and having further consulted with both parties at its ninth meeting, the Committee hereby confirms the admissibility of the communication, deeming the points raised by the Party to be of substance rather than related to the admissibility.

6. The Committee discussed the communication at its ninth meeting (12–14 October 2005), with the participation of representatives of both the Party concerned and the communicant, both of whom provided additional information.

7. During the discussion at the ninth meeting, the Communicant elaborated on its claims and pointed out that it was not asking for a review of all the court cases referred to in its communication. Rather, it argued that the case concerned the general issue of standing for environmental organizations, as reflected in the cases referred to. The Party concerned pointed out that it also understood the communication as addressing the legal issue as a whole rather than focusing on individual cases. Since by far most of the court decisions referred to in the communication concern town planning permits and area plans (e.g. with respect to land-fill, residential constructions and nature conservation), the Committee limits its findings and evaluation to these issues. As indicated by the cases invoked by the Communicant, the remedies most frequently sought when challenging town planning permits and area plans are the annulment or suspension of the decision in question.

8. In order to further clarify the case, the Committee asked the Party concerned by a letter of 25 October 2005 to provide answers to certain questions concerning the legal situation in Belgium. The Party provided an answer to these questions by its letter of 21 November 2005. In a letter dated 9 December 2005, the Committee asked the Party to provide further information

about the legal effect of the "plan de secteur" (area plan) and the "permis d'urbanisme" (town planning permit) in Walloon law. The Party provided answers to these questions in a letter dated 15 January 2006.

9. The Committee deliberated on the communication at its eleventh session and completed its preparation of draft findings and recommendations, which were then forwarded to the Party concerned and the communicant for comments pursuant to paragraph 34 of the annex to decision I/7.

10. In accordance with paragraph 34 and with reference to paragraph 36 (b) of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicant on 27 April 2006. Both were invited to provide comments, if any, by 26 May 2006. The Committee took note of a letter from the Belgian Minister of the Environment dated 24 May 2006. The letter described a number of measures being taken to strengthen access to justice. A multi-stakeholder roundtable had been held in the federal parliament and plans were under way for further training for the judiciary, consultations between the relevant Ministers at federal and regional level and the establishment of a national team of officers to work on access to justice with a view to giving appropriate follow-up to the Committee's findings and recommendations. Improvements in the law were also under consideration. Comments were received from the communicant on 29 May 2006. The Committee, having reviewed the comments, took them into account in finalizing its findings and recommendations.

I. SUMMARY OF FACTS[1]

11. The matter concerns access to justice for environmental organizations, as evidenced by legislation and court practice up to the point of the entry into force of the Convention for Belgium. Due to the federal structure of Belgium, the implementation of the Convention involves federal law as well as the laws of the three regions (Flanders, Wallonia and Brussels Capital Region). Environmental and planning laws are part of the regions' competence, and so is the administrative structure for managing these laws. Hence, the regions decide on administrative appeals against various forms of environmental and construction permits. All three regions provide for administrative appeal procedures against "environmental permits" for natural and legal persons who can show an interest in the case. However, there is no corresponding administrative appeal procedure for construction permits, available to third parties, including environmental organizations, in any of the regions. Thus, these decisions can only be appealed by third parties to the Belgian judicature, provided that the criteria for standing are fulfilled.

12. Legislation concerning standing, access to courts and judicial review as well as the structure of the court system is federal. The criteria for standing are set out in different laws, in particular the Judicial Code, the Act of 12 January 1993 Establishing a Right of Action in the

[1] This chapter includes only the main facts considered relevant to the question of compliance, as presented to and considered by the Committee.

Field of Environmental Protection ("Act of 1993"), the Criminal Procedural Code, the coordinated laws on the Council of State, and the Special Law on the Court of Arbitration.

13. Most important for the present case is the extent to which environmental organizations have access to the Council of State in order to challenge various administrative decisions. When trying a case, the Council of State restricts itself to either set aside the disputed act partially or in its entirety, or to confirm it. In addition to annulment, article 17 of the coordinated laws on the Council of State ("lois sur le Conseil d'Etat coordonnées") makes it possible, under certain conditions, to ask for suspension of an act on a preliminary basis. Before making such a request, however, an environmental organization needs to show "either a violation or an interest" in order to have access to the Council of State at all.

14. The Council of State has taken a less strict position than the Supreme Court in deciding on how to interpret the criterion of "interest". The jurisprudence of the Council of State is set out e.g. in the two most recent cases referred to by the Communicant. As pointed out, both cases were initiated before, but finally decided after the date the Convention entered into force for Belgium. In the first case, Judgement 133.834 of 13 July 2004, environmental organizations asked the Council of State to annul a decision by the Walloon Government concerning an area plan ("plan de secteur") providing for a landfill. In the second case, Judgement 135.408 of 24 September 2004, environmental organizations asked the Council of State to annul a town planning permit ("permis d'urbanisme") granted by the Mayor and Deputy Mayors ("bourgmestre et échevins") of the municipality of Grez-Doiceau for certain residential constructions. In both cases, the requests by the environmental organizations were turned down for lack of standing.

15. It follows from these and other cases that environmental organizations can act before the Council of State if they satisfy the conditions that apply to all natural and legal persons, i.e. to be able to show a direct, personal and legitimate interest as well as a "required quality". This required quality is proven by an organization when it acts in accordance with its statutory goals and these goals do not coincide with the protection of a general interest or a personal interest of its members. Two criteria must be fulfilled in order to appreciate the general character of the organization's statutory goal, a social and a geographical criterion. The case is not admissible if the objective of the organization is so broadly defined that it is not distinct from a general interest. As to the geographical criterion, an act cannot be challenged by an organization if the act refers to a well-defined territory and the activities of the organization are not territorially limited or cover a large geographical area, unless the organization also has a specifically defined social objective. Moreover, an organization whose objective expands to a large territory may only challenge an administrative act if the act affects the entire or a great part of the territory envisaged by the organization's statutes.

16. In addition to the national laws, Belgium, as a member State of the European Union (EU), is bound by European Community law and the approach taken by the European Court of Justice with respect to the status of international agreements concluded by the European Community. The European Court of Justice has held in two cases (Case C-213/03, Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la region vs. Electricité de France, of 15 July 2004; and Case C-239/03, Commission of the European Communities vs. French Republic, of 7 October 2004) that under certain circumstances a provision in an international agreement

concluded by the European Community may be directly applicable in the member State. Thus, the provision of an international agreement can become part of the domestic law of the EU member State. It is quite likely that some provisions of the Aarhus Convention, to which the European Community is a Party, have such properties as to be directly applicable in the EU member States. In such a case the provision of the Aarhus Convention must be applied by national courts and administrative authorities in the EU member States.

17. The Communicant and the Party concerned have made references to several judgements by the Council of State to prove their case. The Communicant lists cases where environmental organizations have been denied access to the Council of State, and Belgium in its reply refers to cases where the Council of State admitted standing for environmental organizations.

18. The Communicant alleges that despite the less strict attitude taken by the Council of State compared with the Supreme Court, even the interpretation by the former is too narrow to comply with article 9 of the Convention. In particular, environmental organizations are denied access to the Council of State when the claim is not brought by a local organization. Because of this various claims by organizations have been declared inadmissible. Also the different jurisprudence of the Supreme Court and Council of State (and the Court of Arbitration) as such complicates predictability. For this reason, the Communicant alleges that Belgium is also not in compliance with the requirement of article 3, paragraph 1, of the Convention, that each Party take the necessary measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.

19. In its reply, the Party concerned argues that the Communicant gives an imbalanced image of Belgian law by its selective citation. According to the Party concerned, the Council of State has often accepted the personal interest or damage of local environmental organizations, and annulled and suspended many decisions concerning hunting and bird protection. The Party concerned also considers the allegation of the Communicant, that the different approaches of the courts are in themselves inadequate to provide access to justice for environmental organizations, to be simplistic. The reason why the courts consider the notion of "interest" differently is because the different environmental laws concern different kinds of interests.

II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

20. Belgium ratified the Convention on 21 January 2003. The Convention entered into force for Belgium on 21 April 2003.

21. The Communicant has referred to eleven cases decided by various courts in order show that Belgium fails to comply with the Convention. Some of the cases are only briefly referred to whereas others are annexed in their entirety. When examining the communication on the merits, the Committee notes that none of the cases referred to by the Communicant to prove that Belgium currently fails to comply with the Convention, was initiated after its entry into force for Belgium. Two cases were finally dismissed by the court after the entry into force of the Convention for Belgium, but even these cases had been initiated before a public authority before the entry into force of the Convention.

22. In both decisions made after the entry into force for Belgium the Council of State actually refers to the Convention. In one of the cases (Judgement 133.834 of 13 July 2004), it explicitly considers that the Convention had not yet entered into force at the date of the requests for the annulment. For this reason, the Committee cannot exclude the possibility that had the Convention entered into force for Belgium, it would also have been considered by the Council of State so as to alter its previous jurisprudence. In the view of the Committee, these cases therefore cannot be used to show that Belgian law, i.e. its court practice, remains the same as before the entry into force and that Belgium is still not complying with the Convention (cf. article 28 of the Vienna Convention on the Law of Treaties).

23. Nevertheless, the view of the Communicant is based on well-established court practice and a new court practice has not yet been revealed. It is therefore pertinent to consider and evaluate the established practice of the Council of State in the light of the principles on access to justice in the Convention. In this way, the findings of the Committee reveal its views on Belgian law, if the court practice is not altered. For the given reasons, however, even if the Committee will find that the court practice reflected in the given cases is not consistent with the Convention, this will not lead to the conclusion that Belgium is in a state of non-compliance with the Convention.

24. Nine of the eleven cases referred to are decisions by the Council of State, and almost all of them concern planning decisions. The two cases decided by the Council of State in 2004 concern, respectively, decisions on area plans by the Walloon Government in order to allow a landfill installation, and town planning permits given by the Mayor and Deputy Mayors of the municipality of Grez-Doiceau for residential constructions. The Committee therefore limits its findings and evaluation to whether Belgian law, up to the point of entry into force of the Convention, would have provided access to justice for challenging decisions concerning town planning permits and area plans in accordance with the Convention. The remedies most frequently sought when challenging such decisions are the annulment or suspension of the decision in question

25. The Walloon Government as well as the Mayor and Deputy Mayors of the municipality of Grez-Doiceau constitute public authorities, in accordance with article 2, paragraph 2, of the Convention.

26. The Convention obliges the Parties to ensure access to justice for three generic categories of acts and omissions by public authorities. Leaving aside decisions concerning access to information, the distinction is made between, on the one hand, acts and omissions related to permits for specific activities by a public authority for which public participation is required under article 6 (article 9, paragraph 2) and, on the other hand, all other acts and omissions by private persons and public authorities which contravene national law relating to the environment (article 9, paragraph 3). It is apparent that the rationales of paragraph 2 and paragraph 3 of article 9 of the Convention are not identical.

27. Article 9, paragraph 2, applies to decisions with respect to permits for specific activities where public participation is required under article 6. For these cases, the Convention obliges the Parties to ensure standing for environmental organizations. Environmental organizations, meeting the requirements referred to in article 2, paragraph 5, are deemed to have a sufficient interest to be granted access to a review procedure before a court and/or another independent and

impartial body established by law. Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention.

28. Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public "where they meet the criteria, if any, laid down in its national law" have access to administrative or judicial procedures to challenge the acts and omissions concerned. Contrary to paragraph 2 of article 9, however, paragraph 3 does not refer to "members of the public concerned", but to "members of the public".

29. When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity.

30. Relevant in this case is also article 9, paragraph 4, according to which the procedures for challenging acts and omissions that contravene national law relating to the environment shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

31. Based on the information received from the Party concerned and the Communicant, the Committee understands that decisions concerning area plans ("plan de secteur") do not have such legal functions or effects as to qualify as decisions on whether to permit a specific activity. Therefore, article 9, paragraph 3, is the correct provision to review Belgian law on access to justice with respect to area plans, as provided for in Walloon legislation.

32. The situation is more complicated with respect to the legal functions and effects of town planning permits ("permis d'urbanisme"), as defined by Walloon law. Based on the information provided by the Party and the Communicant, it appears to the Committee that in Walloon law some town planning permits may amount to permit decisions for specific activities where public participation is required (e.g. when an environmental impact assessment is required; cf. annex I, paragraph 20 of the Convention), whereas other do not. Hence, it is not possible for the Committee to generally conclude whether Belgian law on access to justice for these cases should be assessed in light of article 9, paragraph 2 or 3. Therefore, the Committee will assess the case under both provisions.

33. In the view of the Committee, the criteria that have been applied by the Council of State with respect to the right of environmental organizations to challenge Walloon town planning permits would not comply with article 9, paragraph 2. As stated, in these cases environmental organizations are deemed to have a sufficient interest to be granted access to a review procedure before a court or an independent and impartial body established by law. Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention. As shown by the cases submitted by the

Communicant with respect to town planning permits this is not reflected in the jurisprudence of the Council of State. Thus, if the jurisprudence is maintained, Belgium would fail to comply with the article 9, paragraph 2, of the Convention.

34. To the extent that a town planning permit should not be considered a permit for a specific activity as provided for in article 6 of the Convention, the decision is still an act by a public authority. As such it may contravene provisions of national law relating to the environment. Thus, Belgium is obliged to ensure that in these cases members of the public have access to administrative or judicial procedures to challenge the acts concerned, as set out in article 9, paragraph 3. This provision is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. When assessing the Belgian criteria for access to justice for environmental organizations in the light of article 9, paragraph 3, the provision should be read in conjunction with articles 1 to 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."

35. While referring to "the criteria, if any, laid down in national law", the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the 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 other the 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.

36. Accordingly, 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. One way for the Parties to avoid a popular action ("actio popularis") in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, "to take fully into account the objective of the Convention to guarantee access to justice."

37. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, namely to what extent national law effectively has such blocking consequences for environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. As mentioned, Belgian (Walloon) law does not provide for administrative appeals or remedies for third parties to challenge town planning permits or decisions on area planning. The question therefore is whether sufficient access is

granted to the Council of State. This evaluation is not limited to the wordings in legislation, but also includes jurisprudence of the Council of State itself.

38. Up to the point of entry into force of the Convention for Belgium, the general criteria for standing of environmental organizations before the Council of State have not differed from those of natural persons. According to this practice, to be able to challenge a town planning permit or a plan before the Council of State, an environmental organization must thus claim a direct, personal and legitimate interest. It must also prove that, when acting in accordance with its statutory goals, the goals do not coincide with the protection of a general interest or a personal interest of its members. Hence, federations of environmental organizations have generally not been able to meet this criterion, since their interest is not seen as distinct from the interests of its members. Moreover, according to this practice, two criteria must be fulfilled in order to appreciate the general character of the organization's statutory goal, a social and a geographical criterion. The case is not admissible if the objective of the organization is so broadly defined that it is not distinct from a general interest. As to the geographical criterion, an act cannot be challenged by an organization if the act refers to a well-defined territory and the activities of organization are not territorially limited or cover a large geographical area, unless the organization also has a specifically defined social objective. Furthermore, an organization whose objective expands to a large territory may only challenge an administrative act if the act affects the entire or a great part of the territory envisaged by the organization's statutes.

39. The Convention does not explicitly refer to federations of environmental organizations. If, in the jurisdiction of a Party, standing is not granted to such federations, it is possible that, to the extent that member organizations of the federation are able to effectively challenge the act or omission in question, this may suffice for complying with article 9, paragraph 3. If, on the other hand, due to the criteria of a direct and subjective interest for the person, no member of the public may be in a position to challenge such acts or omissions, this is too strict to provide for access to justice in accordance with the Convention. This is also the case if, for the same reasons, no environmental organization is able to meet the criteria set by the Council of State.

40. The Convention does not prevent a Party from applying general criteria of the sort found in Belgian legislation. However, even though the wordings of the relevant Belgian laws do not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as reflected in the cases submitted by the Communicant, implies a too restrictive access to justice for environmental organizations. In its response, the Party concerned contends that the Communicant "presents an unbalanced image by its 'strategic use' of jurisprudence," and that "the difficulties that the BBL experiences by the Communicant to bring an action in court are not representative for environmental NGOs in general". In the view of the Committee, however, the cases referred to show that the criteria applied by the Council of State so far seem to effectively bar most, if not all, environmental organizations from challenging town planning permits and area plans that they consider to contravene national law relating to the environment, as under article 9, paragraph 3. Accordingly, in these cases, too, the jurisprudence of the Council of State appears too strict. Thus, if maintained by the Council of State, Belgium would fail to provide for access to justice as set out in article 9, paragraph 3, of the Convention. By failing to provide for effective remedies with respect to town planning permits and decisions on area plans, Belgium would then also fail to comply with article 9, paragraph 4.

41. In this context, the Committee notes that the Party concerned, in its reply, makes two points that concern a State's internal law and constitutional structure in relation to its obligation under international law to observe and comply with a treaty. A similar argument was made in its written additional points in response to the questions asked by the Committee. First, the Party concerned holds that the federal structure of the Belgian State sometimes complicates the implementation of the Convention. Second, it argues that the separation of powers between the legislative, executive and judicial branches of government, as a fundamental part of the Belgian State, should be taken into account. The Committee therefore wishes to stress that its review of the Parties' compliance with the Convention is an exercise governed by international law. As a matter of general international law of treaties, codified by article 27 of the 1969 Vienna Convention on the Law of Treaties, a State may not invoke its internal law as justification for failure to perform a treaty. This includes internal divisions of powers between the federal government and the regions as well as between the legislative, executive and judicial branches of government. Accordingly, the internal division of powers is no excuse for not complying with international law.

42. An independent judiciary must operate within the boundaries of law, but in international law the judicial branch is also perceived as a part of the state. In this regard, within the given powers, all branches of government should make an effort to bring about compliance with an international agreement. Should legislation be the primary means for bringing about compliance, the legislature would have to consider amending or adopting new laws to that extent. In parallel, however, the judiciary might have to carefully analyse its standards in the context of a Party's international obligation, and apply them accordingly.

43. The Committee also recalls that according to article 3, paragraph 1, the Parties shall take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. This too reveals that the independence of the judiciary, which is indeed presumed and supported by the Convention, cannot be taken as an excuse by a Party for not taking the necessary measures. In the same vein, although the direct applicability of international agreements in some jurisdictions may imply the alteration of established court practice, this does not relieve a Party from the duty to take the necessary legislative and other measures, as provided for in article 3, paragraph 1.

44. Noting the observations made in the communication regarding the existence of different criteria for standing with respect to the procedures for seeking annulment and suspension, respectively, of decisions before the Council of State, the Committee is of the opinion, without, however, having made any in-depth analysis, that the provisions of article 9, paragraphs 2 and 3, of the Convention do not require that there be a single set of criteria for standing for these two types of procedure.

III. CONCLUSIONS

45. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

46. Since all the court decisions submitted by the Communicant refer to cases initiated before the entry into force of the Convention for Belgium, they cannot be used to show that the practice has not been altered by the very entry into force of the Convention. Therefore, the Committee is not convinced that Belgium fails to comply with the Convention. However, as evidenced by the consideration and evaluation of the Committee, if the jurisprudence of the Council of State is not altered, Belgium will fail to comply with article 9, paragraphs 2 to 4, of the Convention by effectively blocking most, if not all, environmental organizations from access to justice with respect to town planning permits and area plans, as provided for in the Walloon region.

47. The Committee appreciates the statement in the reply from Belgium to the effect that it continues to make efforts and is open to improvements on its implementation of the Convention.

B. Recommendations

48. While the Committee is not convinced that the Party concerned fails to comply with the Convention, it considers that a new direction of the jurisprudence of the Council of State should be established; and notes that no legislative measures have yet been taken to alter the jurisprudence of the Council of State. It also notes that the Party concerned agrees that the Committee take the measure referred to in paragraph 37 (b) of the annex to decision I/7.

49. Therefore, the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, recommends the Party concerned to:

(a) Undertake practical and legislative measures to overcome the previous shortcomings reflected in the jurisprudence of the Council of State in providing environmental organizations with access to justice in cases concerning town planning permits as well as in cases concerning area plans; and

(b) Promote awareness of the Convention, and in particular the provisions concerning access to justice, among the Belgian judiciary.

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ECONOMIC COMMISSION FOR EUROPE

MEETING OF THE PARTIES TO THE
CONVENTION ON ACCESS TO INFORMATION,
PUBLIC PARTICIPATION IN DECISION-MAKING AND
ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

Compliance Committee

Sixteenth meeting
Geneva, 13–15 June 2007

REPORT OF THE COMPLIANCE COMMITTEE ON ITS SIXTEENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS WITH REGARD TO COMPLIANCE BY ALBANIA

Findings and recommendations adopted by the Compliance Committee

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INTRODUCTION

1. The Compliance Committee adopted the findings and recommendations contained in this document at its sixteenth meeting (13–15 June 2007) and in accordance with its mandate set out in the annex to decision I/7 of the Meeting of the Parties to the Convention.

2. The review of compliance by Albania with its obligations under the Convention was initiated by the Committee in response to a communication (ACCC/C/2005/12) from the Alliance for the Protection of the Vlora Gulf (Albania) concerning public access to information and participation in decision-making on the construction of an industrial park and a thermal electric power station in Vlora, Albania.

I. BACKGROUND

A. General issues

3. On 27 April 2005, the Albanian non-governmental organization (NGO) Alliance for the Protection of the Vlora Gulf (also translated as Civil Alliance for the Protection of the Vlora Bay) submitted a communication to the Committee alleging violation by Albania of its obligations under article 3, paragraph 2; article 6, paragraph 2; and article 7 of the Convention.

4. The communication alleged that the Party concerned had failed to notify the public properly and in a timely manner and to consult the public concerned in the decision-making on planning of an industrial park comprising, inter alia, oil and gas pipelines, installations for the storage of petroleum, three thermal power plants and a refinery near the lagoon of Narta, on a site of 560 ha inside the protected National Park. The communicant also alleged that the Party failed to make appropriate provision for public participation in accordance with article 7 of the Convention. The full text of the communication is available at: http://www.unece.org/env/pp/pubcom.htm.

5. The communication was forwarded to the Party concerned on 29 June 2005, following a preliminary determination by the Committee that it was admissible. At the same time, the Committee requested the communicant to present some clarifications and additional information, in particular on any use made of domestic remedies.

6. The Party concerned responded on 25 November 2005, disputing the claim of non-compliance. It stated, inter alia, that:

(a) The Government had not made a decision on the development of the proposed industrial park as a whole;

(b) A decision-making process for the establishment of a thermal electric power station (TES) was under way, but no decision on an environmental permit had been taken;

(c) The public had been provided with timely and adequate access to information about construction of the thermal electric power station;

(d) The Government had never received any request for information on the projects from the communicant;

(e) The public had had the possibility to participate in the decision-making process for the TES, as three public meetings had been organized at different stages of the process (i.e. feasibility study, scoping and environmental impact assessment), with participation of local citizens and NGOs;

(f) Since the Government had not made any final decisions yet on the projects, there was nothing to be challenged through the courts or other appeal bodies in Albania by the communicant.

7. The Committee discussed the communication at its tenth meeting (5–7 December 2005), with the participation of a representative of the communicant (Mr. Ardian Klosi) who provided additional information. The Party concerned had also been invited to send a representative, but had declined to do so. The communicant was asked to provide additional information and to answer several questions in written form within four weeks. The Committee also asked the secretariat to seek certain additional information from the Government, which was done by letter of 16 December 2005.

8. The communicant answered the questions by letter of 7 January 2006, providing additional information and several documents in Albanian with summaries in English. In its letter, the communicant alleged that there had been no public participation in decisions concerning the proposed industrial energy park. It maintained that there had been only pro forma public participation in the TES project, because most of those who had participated were governmental employees and functionaries from one political party. The communicant also alleged that the State-owned Albanian Electrical Energy Corporation (Korporata Elektroenergjetike Shqiptare, or KESH) had only announced the public discussion on the construction of the TES and the documents had only been made available in February 2004, after the environmental impact assessment (EIA) process had already been finished. The communicant further alleged that there had been no public information or public participation with respect to the decision-making processes concerning the proposed Albanian-Macedonia-Bulgaria Oil (AMBO) pipeline (see para. 44 below).

9. The communicant sent a further letter to the Committee on 1 February 2006 containing additional information about alleged plans of the Albanian Government to issue a final license to the Italian-Romanian company La Petrofilera, which would allow it to start operating a large coastal terminal for the storage of oil and oil by-products in the Bay of Vlora without any public participation having taken place.

10. Having received no response from the Party concerned to its request of 16 December 2005 for additional information by the time of its eleventh meeting (29–31 March 2006), the Committee sent a second request on 12 April 2006, asking for additional information and some clarifications.

11. On 12 June 2006, the Party concerned provided the Committee with the text of three decisions of the Council of Territorial Adjustment of the Republic of Albania, all dated 19 February 2003. Decision No. 8 approved the use of the territory for the development of an

industrial and energy park; Decision No. 9 approved the construction site for a coastal terminal for the storage of oil and oil by-products and associated port infrastructure in Vlora; and Decision No. 20 approved the construction site of the TES in Vlora. The Party concerned also sent the Committee a chronology of the participation of the public in the decision-making process for the TES, stating that the procedures had been in accordance with national and international law.

12. As the Party concerned had not fully answered the Committee's questions, on 5 September 2006, the secretariat wrote on behalf of the Chairperson requesting it to provide additional information before the thirteenth meeting of the Committee (4–6 October 2006). In its response, sent to the secretariat on 21 October 2006, the Party concerned answered some of the outstanding questions. However, it failed to answer a number of other questions, including on public notification and participation procedures in the decision-making process for the industrial energy park; also, it failed to discuss the time frame for the appeal to the court and to provide a copy of the decision of the Albanian Parliament on funding of the TES.

13. On 20 November 2006, the secretariat sent a further letter to the Party concerned on behalf of the Chairperson reiterating the request for the missing information and posing a few additional questions. It was also agreed to return to the discussion phase at the fourteenth meeting of the Committee, and consequently both the Party concerned and the communicant were notified accordingly and invited to participate.

14. On 1 December 2006, the Party concerned answered in some detail a question about the possibilities for access to administrative and judicial review, providing new information about Albania's Ombudsman and the role of the courts in the Constitution and laws of Albania. However, it did not answer a question on whether there was a possibility of appeal before a final decision had been taken. It also failed to answer a crucial question about the notification of the public and public participation in decision-making on the industrial park. Finally, it did not send four documents requested by the Committee.

15. At its fourteenth meeting (13–15 December 2006), the Committee discussed the case with representatives of both the Party concerned and the communicant, both of whom answered questions, clarified issues, and presented new information. The Party concerned provided information about current status of the TES, namely that no applications for environmental, construction or operating permits had been lodged. Concerening the industrial energy park, the only decision made was about its location. Although some questions remained unanswered, the Committee decided to move to the preparation of draft findings and recommendations.

B. Involvement of international financial institutions

16. At its eleventh meeting, the Committee had decided to seek information from the World Bank and the European Bank for Reconstruction and Development (EBRD), as they were two of the main financing institutions for the TES. It noted that the project was subject to their procedures, including procedures related to information and participation issues. The secretariat sent letters to both institutions on 27 July 2006 inviting them to provide any relevant information, including on whether the World Bank's Inspection Panel was or had been addressing the issue.

17. The World Bank office in Tirana responded in a letter dated 2 August 2006 stating that it was not and had never been involved in the development of the industrial park project, but that it had consistently advised the Government of Albania that the development of any facility planned for such a park should be subject to an appropriate environmental assessment. Regarding the TES in Vlora, the World Bank, EBRD and the European Investment Bank (EIB) had agreed to finance the project and consultants funded by the United States Trade and Development Agency (USTDA) had selected the location based on a detailed siting study, taking into consideration environmental issues. According to the above letter, the siting study had been followed by preparation of a full environmental assessment, during which several scoping sessions and public consultations had been organized, and public input had been taken into account. The World Bank stated that the meetings had been well attended by representatives of governmental agencies, universities, NGOs and the general public, and had been publicized by Albanian television. According to the World Bank, "The entire process was carried out in accordance with Albanian laws and in compliance with applicable European Union and World Bank guidelines".

18. The communicant sent a letter to the Committee on 30 September 2006 commenting on the response by the World Bank. The letter stated that even if the World Bank was not directly involved in the industrial park, it was aware of the other components that were envisaged for the industrial park as well as the intention to expand the TES itself from a capacity of 100 megawatts (MW) up to a capacity of 300 MW. Despite this, public presentations of the project had only addressed the impact and emissions from a 100 MW power station, thus failing to take into account the future cumulative environmental impact of these projects.

19. In commenting on the draft of these findings and recommendations, the World Bank pointed out that potential requirements for future expansion of the TES to 300 MW had been mentioned, studied and reflected in the EIA for Vlora Combined Cycle Generation Facility.

20. The communicant furthermore stated that there was no evidence that the intellectuals and NGOs of Vlora had participated in the meeting on 31 October 2002. Besides, this meeting had taken place after the approval of the siting study and feasibility study. The communicant argued that at that stage there had been a lack of publication of information. It cited the director of the National Agency for Energy, Mr. Besim Islami, who, in answer to a question from a member of the public at the public meeting on 3 September 2003, admitted that "There were not any views taken on this phase from the local government, as this was not requested from the company for the reason of confidence and prudence. In these days and in the last month we have been passing into these explanatory and indispensable procedural meetings".

21. In the course of commenting on the draft of these findings and recommendations in May 2007, the World Bank informed the Committee that its Inspection Panel had received a Request for Inspection on the subject of the project.

22. EBRD, in its response of 25 October 2006 to the letter from the secretariat, confirmed that it was providing financing for the construction of the TES and stated that it was not involved in the industrial park. The EBRD Board of Directors had approved the financing for the TES following its review of the project documentation, including reports on compliance with EBRD policies and procedures on public consultation. The project was subject to EIA and public consultations that had been carried out in accordance with Albanian EIA legislation and the

World Bank's environmental guidelines, which were comparable to the EBRD EIA requirements.

23. In the course of commenting on the draft of these findings and recommendations in May 2007, the EBRD informed the Committee that on 19 April 2007 a formal complaint by the communicant with regard to this project was registered with the EBRD Independent Inspection mechanism and was being reviewed for eligibility.

C. Admissibility

24. The Committee at its eighth meeting (May 2005) had determined on a preliminary basis that the communication was admissible, subject to review following any comments received from both parties. At its fourteenth meeting (December 2006), the Committee confirmed that the communication was admissible.

D. Use of domestic remedies

25. At its eighth meeting, the Committee also discussed the extent to which use had been made of domestic remedies and requested further information from the communicant on this point. After receiving additional information and answers from the communicant, the Committee, at its tenth meeting in December 2005, again discussed the question of domestic remedies in the presence of the communicant. The communicant asserted that its attempt to conduct a referendum on the industrial park was the use of a domestic remedy. The communicant had collected 14,000 signatures (10% of the electorate in Vlora), which was the amount necessary for a referendum according to the Albanian Constitution. However, on 25 November 2005, the Election Committee had refused the request for a referendum. The communicant had then appealed this decision to the Constitutional Court despite having doubts about the prospects of a successful outcome. The Court determined the appeal inadmissible in December 2006.

26. In explaining why it had not pursued more traditional channels of administrative or judicial review, the communicant stated in its letter of 7 January 2006 that the "judiciary system in Albania is very slow and sluggish, in many aspects corrupt" and that "there was not a single case up to this day that would have been decided in favour of an environmental complaint or charge".

27. The Party concerned, in its initial response of 25 November 2005, took the position that there were no domestic remedies currently available in the present case: "Since there is no decision taken on the projects, there is nothing to be challenged by courts or other appeal bodies". However, in its letter of 21 October 2006, the Party concerned stated that "the Albanian legislation does provide for possibilities to appeal for cases when there is noticed failure to provide information or inadequate notification. According to Albanian law, the case can be sent to court for violation of procedures…". The Party did not indicate at what stage this possibility existed – before or after the decision is made.

28. In its response of 1 December 2006, the Party concerned, in addition to providing a detailed explanation of the possibilities for access to administrative review and to the courts in accordance with the Constitution and legislation of Albania, presented information about access to the Ombudsman. At the fourteenth meeting of the Committee, the representative of the Party concerned stated that access to justice was possible both before and after a decision is made. In

response, the communicant explained that it had not tried to use the Ombudsman or seek administrative review because it considered that to challenge the decision of the Cabinet of Ministers signed by the Chairman of the Council, who also happened to be the Prime Minister, was "out of the question".

E. Preparation and adoption of the findings and recommendations

29. In accordance with paragraph 34 and with reference to paragraph 36 (b) of the annex to decision I/7, the Committee prepared draft findings and recommendations at its fifteenth meeting. These were forwarded for comment to the Party concerned and the communicant as well as to the relevant international financial institutions (IFIs) on 29 March 2007 with an invitation to provide comments, if any, by 15 May 2005. Comments were received from the communicant on 3 May 2007 and additionally on 15 May 2007 and 12 June 2007. The Party concerned provided its comments on 18 May 2007, together with a copy of an environmental consent for the TES. Additionally, comments were received from the EBRD on 11 May 2007 and from the World Bank on 15 May 2007. The Committee, having reviewed the comments, took them into account in finalizing these findings and recommendations.

II. SUMMARY OF THE FACTS, EVIDENCE AND ISSUES[1]

30. The communication concerns a proposal to establish an industrial and energy park north of the port of Vlora on the Adriatic coast. The facts relating to the proposed energy park and some of its envisaged components, notably the TES, the oil storage facility and the proposed oil and gas pipeline, are summarized in the following paragraphs, taking into account that different components relate to different provisions of the Convention.

1. Industrial and energy park

31. On 19 February 2003, the Council of Territorial Adjustment of the Republic of Albania approved, through Decision No. 8, the site of an industrial and energy park immediately to the north of the city of Vlora. Through this Decision, signed and stamped by Mr. Fatos Nano, Chairman of the Council, who was the Prime Minister at the time, the Council "Decided: The approval of the territory for the development of 'The Industrial and Energy Park – Vlore'". Decision No. 8 furthermore deemed that the Ministry of Industry and Energy "should coordinate work" with various Ministries and other bodies "to include within this perimeter [of the industrial and energy park] the projects of the above mentioned institutions, according to the designation 'Industrial and Energy Park'". It stated also that various Ministries "must carry out this decision" and that "This decision comes to force immediately."

32. The Party concerned informed the Committee that the decision had been subject to an EIA procedure; however, the EIA was not detailed, because it was considered that the separate components of the proposed park would each carry their own more demanding EIA requirements.

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

33. The Committee has not been provided with any evidence of public participation, including notification or public announcement, in the process leading up to Decision No. 8.

34. In October 2005, following a change of government, the Prime Minister established an ad hoc commission to consider the economic and environmental aspects of Vlora industrial and energy park project. Three meetings were held with stakeholders, two in Tirana (22 and 29 October 2005) and one in Vlora (11 November 2005). The communicant has not contested that these meetings took place and that they enabled the concerned stakeholders to participate, and it has confirmed that its representatives did indeed participate in them. Its objections relate rather to the perception that there was a lack of willingness to from the proponents of the project, including the Government, to "listen and to take into consideration the opinion and the will of the people", thereby reducing the decision-making process to "a mere rubber stamp".

35. The communicant states that it submitted several requests for information regarding the plans for the industrial park to the Ministry of Energy and to the Ministry of the Environment, but that it has never received any answer from them. However, the communicant did not present any evidence to substantiate that statement (e.g. copies of letters, proof of receipt). The Party concerned maintains that no such requests from the communicant have been "registered" by the Ministry of the Environment. The communicant did present a copy of a letter from Ekolevizja (the most well known network of environmental organizations in Albania) to the Ministry of Environment dated 3 March 2005 asking for information about the proposed TES and oil storage facility in Vlora, to which it had received no response. The communicant did not present proof of receipt of the request.

36. In June 2007, shortly before the adoption of these findings and recommendations, the Party concerned informed the Committee that on 22 May 2007, the Council of Territorial Adjustment of Albania had adopted a decision that modified destination of the park to exclusively industrial, effectively precluding construction on its territory, inter alia, of the oil terminal.

2. Thermal electric power station

37. On 19 February 2003, the Council of Territorial Adjustment approved Decision No. 20 on the construction site of the TES in Vlora. Through this Decision, signed and stamped by Mr. Fatos Nano, Chairman of the Council, who was the Prime Minister at the time, the Council "Decided: to approve the construction site with a surface of 14 hectares for the facility of the new Port of Vlora, within the industrial Energy Park… according to the attached layout". It stated also that the Council of the District of Vlora and the Ministry of Energy and industry should carry out this decision" and "This decision comes to force immediately."

38. The Party concerned informed the Committee that in order to address the problem with electricity supply in Albania, the Ministry for Industry and Energy and KESH began to study the technical and financial viability of installing new base load thermal generation facilities in Albania. KESH asked for funding from EBRD, the World Bank and EIB.

39. The USTDA awarded a grant to the Government of Albania to assist in the development of the new thermal generation facility. The Albanian Ministry of Industry and Energy hired international consultants Montgomery Watson Harza (MWH) to select the best site and

technology, to conduct a feasibility study, and to conduct an environmental impact assessment (EIA) of the proposed facility.

40. Site selection was undertaken during the period April–September 2002. A draft siting report was completed on 6 June 2002, recommending Vlora as the best site and distillate oil-fired, base load, combined cycle generation allowing for conversion to natural gas as the best generation technology. On 21 June 2002, the Ministry of Energy and KESH approved the recommendation. MWH then conducted a detailed feasibility study to evaluate the technical requirements and the financial, environmental, and social viability of the proposed generation facility with an installed capacity range of 90 to 130 MW at the selected site. On 21 October 2002, the feasibility study was completed and "introduced in Vlora".

41. On 31 October 2002, the Ministry of Energy and Industry convened a public meeting in Vlora to introduce the project and begin the public consultation process (see para. 43 (a)).[2] On 21 December 2002, the Council of Territorial Adjustment (Vlora District) approved the choice of the site for the TES. On 19 February 2003, the Council of Territorial Adjustment of the Republic of Albania confirmed the site of the TES through Decision No. 20.

42. On 2 April 2003, a public meeting was held in Vlora to discuss the terms of reference for the EIA study (scoping). On 23 July 2003, copies of the draft EIA study were delivered in Vlora for public consultation purposes. On 3 September 2003, a further public meeting was held to discuss the draft EIA study.

43. As regards the participation of the public in the three public meetings referred to in the previous paragraphs, varying degrees of information are available to the Committee:

(a) The introductory meeting on 31 October 2002 which addressed the proposed construction of the TES in Vlora was attended by various representatives of national and local authorities as well as, according to the Party concerned, intellectuals and NGOs of Vlora. The communicant disputes the claim that intellectuals and NGOs of Vlora participated. The Committee repeatedly requested[3] the Party concerned to provide specific information concerning the process of notification for the meeting (for residents, NGOs and other stakeholders) and a list of participants. In the course of the nearly two-year period following the forwarding of the communication to the Party concerned, and despite specific requests by the Committee, right up to the process of commenting on these findings and recommendation in draft form, the Party concerned failed to provide any such information. On 18 May 2007, the Party concerned belatedly provided a report and list of participants of the meeting which took place in October 2002. The Party concerned maintains that the list of participants of the meeting demonstrates that 17 out of 39 participants represented civil society organizations or individual members of the public. No information with regard to the notification procedure has been provided.

[2] According to its official minutes and report, the meeting took place on 28 October 2002. However, newspaper articles published on 1 November 2002 as well as Party's own comments on the draft of the Committee's findings and recommendations refer to 31 October 2002 as the date on which the meeting took place.
[3] Notably by letters of 16 December 2005 and 12 April 2006 and during the fourteenth meeting of the Committee.

(b) The meeting on 2 April 2003 to review the scope of the EIA was attended by more than 100 people, 40 of whom signed an attendance sheet a copy of which was made available to the Committee. The communicant commented that "there was not a single NGO represented or any important environmental activist in this meeting" and that public opinion was not taken into account in the decision. It stated that those considered to represent the public presence at this meeting and at the third meeting were mostly members of the local government and the Socialist Party who were promoting the construction of the industrial and energy park. The Party concerned maintained that local university, business community, a leader of the opposition party, and two NGOs attended the meeting. However, it did not provide the Committee with any details of who was invited to participate, or more generally of the steps taken to notify the public concerned.

(c) The meeting on 3 September 2003 to review the draft EIA was attended by some 35 people, a list of whom was included in the EIA study (Appendix E). Of these, five appear to have been technical experts, 15 represented various public authorities, five represented various local enterprises, the affiliation of six was not indicated, and four appear to have been associations, including three environmental organizations. Again, information requested from the Party concerned regarding the process of notification of the public concerned has not been forthcoming.

(d) The Party concerned states that notifications of these meetings "were made available one month prior (according to the information given by the consulting company)".[4] No further information on the manner or content of the notifications has been forthcoming. When commenting on the draft findings, the Party indicated that changes of staff in the relevant local authority led to loss of any such information.

(e) The final EIA document, published on 6 October 2003, five weeks after the third public meeting, states that all three meetings "were covered by Albanian television stations and broadcast through a segment on the nightly news".

(f) A document entitled "Summary of Environmental Impacts Associated with the Vlore Thermal Power Station", prepared for the purposes of meeting the requirements of the EBRD public disclosure and consultation procedure, states that "The public was well engaged in a dialogue concerning the project early on in the EIA process. Public announcements were thorough, transparent and well distributed". It maintains that "direct invitations to attend public meetings were sent to institutions and individuals" and that the process was coordinated closely with (among others) "citizens of Vlore, Vlore University students and faculty, local and national television stations, more than 20 NGOs and others associated with social and environmental issues." However, the document does not go into detail as to who was notified or invited to which meeting, and while it does provide some more information concerning the meetings (to some extent reflected in subparas. (a) to (c) above) information concerning the first meeting is particularly sparse.

[4] Letter of 25 November 2005.

44. The EIA study was finalized on 6 October 2003. On 18 October 2003, KESH issued a press release launching a public discussion on the evaluation of the EIA. It invited all interested parties to participate in an open consultation process and provided information on where the relevant documents could be obtained.

45. On 10 February 2004, KESH issued a further press release along similar lines though providing more specific details on where and by what date comments should be submitted and indicating that the suggestions from the public would be included in an annex to the EIA. Specifically, the EIA materials would be available for a 120-day period from 9 February 2004 to 7 June 2004 for public review and comment, in a number of public locations, including in Vlora, in accordance with the EBRD public consultation and disclosure procedure. Announcements containing this information were also placed in various newspapers.

46. In its comments on the draft of these findings and recommendations, the EBRD pointed out that within the 120-day consultation process in 2004, it had received no comments from the communicant, neither was it aware of the public concern of the level indicated by the communicant.

47. The public meetings held in late 2005 (see para. 34), while intended to consider the economic and environmental aspects of the industrial and energy park project, appear to have focused on the TES and should therefore be taken into consideration in reviewing the overall decision-making process for the TES.

48. At its fourteenth meeting (December 2006), the Committee had been informed by the representative of the Party concerned that no application for an environmental permit, construction permit or operating permit for the TES had yet been lodged and that the only decision that had been taken concerned the location of the TES. In May 2007, in the context of commenting on the draft findings, the Party concerned informed the Committee that environmental consent for the TEC has been issued in February 2007. A copy of this environmental consent, as well as a copy of the environmental license issued by the Ministry of Environment, Forestry and Water Administration of Albania on 3 March 2007, have been provided to the Committee by the EBRD, together with its comments.

3. Oil storage terminal and port infrastructure

49. On 19 February 2003, the Council of Territorial Adjustment of the Republic of Albania approved the construction site for a coastal terminal for storage of oil and by-products and associated port infrastructure through Decision No. 9. On 8 May 2003, the Council of Ministers adopted a decision approving a concession procedure to the benefit of the Italian-Romanian company La Petrolifera. On 13 May 2004, the concession was approved by Parliament. On 11 February 2005, the Council of Ministers adopted a decision registering the land in the name of Petrolifera. Any such facility having a capacity of 200,000 tons or more would fall within the scope of annex I of the Convention. The communicant provided information orally at the fourteenth session, which at the time was not contested by the Party concerned, to the effect that the envisaged capacity was of the order of 500,000 tons. In May 2007, following a further attempt by the Committee to clearly establish the capacity of the storage terminal, the Party concerned in the course of commenting on the draft findings and recommendations established the maximum capacity of the terminal at 170,000 tons, i.e. below the threshold set in annex I of

the Convention, and informed the Committee that an environmental permit for the terminal and port infrastructure was issued in April 2007. It is the understanding of the Committee that the mentioning of 500,000 tons in the EIA study for the oil storage terminal referred to the potential market demands for annual consumption of oil.

4. Oil and gas pipelines

50. On 5 December 2003, the Council of Territorial Adjustment of the Republic of Albania approved the route of the proposed AMBO pipeline. On 26 April 2004, the Council of Territorial Adjustment (Vlora District) approved the route of the pipeline. No evidence of public participation prior to either of these decisions has been presented.

5. Access to information

51. When commenting on the draft findings and recommendations in May 2007, the communicant informed the Committee that following the conclusion of a TES construction contract between KESH and Maire Engineering (Italy), it requested KESH to provide it with a copy of the contract. It also requested the Ministries of Environment and Energy to provide a copy of the loan agreement between the Government of Albania and the IFIs. It had received no responses.

6. National legislative framework

52. The EIA legislation of Albania has provisions on public debate over projects and the associated EIA reports, with participation of various agencies and stakeholders including "interested people [and] environmental not-for-profit organizations". The debate should be organized and directed by the responsible local authority, which should within five days of receipt of a consultation request from the Minister of Environment: (a) notify the public and environmental not-for-profit organizations and put at their disposal the EIA report for a period of one month; and (b) within one month, organize an open debate with all those interested, notifying participants 10 days in advance (art. 20).

53. A separate article, article 26, is dedicated to public participation. Whereas article 20 appears to apply to the stage when the EIA report has been prepared, article 26 provides that the interested public and environmental not-for-profit organizations may participate in all phases of the environmental impact assessment decision-making process. The Minister of Environment is required to determine with a separate normative act the duties of environmental organs in order to guarantee the participation of the public and of environmental not-for-profit organizations in this process.

54. The legislation does not have a provision on appeal to a court or another independent judicial body. Instead, in case of irregularities in the EIA process, the public may request that the Minister of the Environment carry out a partial or full review of the process of environmental impact assessment and the Minister is required to reply within 20 days from receipt of request. This is distinct from the appeal possibilities referred to by the Party concerned in its letter of 1 December 2006 (see para. 28), according to which the Code of Administrative Procedures gives the right to initiate or participate in administrative processes and procedures for administrative

review as well as for appeals whereby any person may make a motion to nullify, cancel or change of administrative decisions.

55. According to the EIA legislation, strategic environmental assessment is required, inter alia, for strategies and action plans on energy, industry, transport, territory adjustment, national and regional plans, industrial areas, coastal areas, tourism areas and protected areas (art. 5). Procedures, deadlines and parties' obligations in all phases of strategic environmental assessment process shall be the same as for projects requiring the more in-depth process of EIA.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

56. Albania deposited its instrument of ratification of the Convention on 27 June 2001. The Convention entered into force for Albania on 25 September 2001.

57. The Convention, as a treaty ratified by Albania, is part of the Albanian legal system and is directly applicable, including by the courts. The Party concerned has stated that some aspects of the Convention have been transposed into national law.

A. Admissibility and use of domestic remedies

58. As mentioned under paragraph 20 above, the Committee found the communication to be admissible. Nonetheless, the Committee does have some concerns about the limited extent to which the communicant made use of domestic remedies. The communicant did not try to apply to a court or another independent or impartial body established by law, either about the alleged refusal of the information requests (as entitled under art. 9, para. 1), or about the alleged failure of the public authorities to notify the public concerned about the proposed activities in an adequate, timely and effective manner and to take into account its concerns (under the article 9, para. 2).

59. The communicant attempted to justify this at one point by asserting that Albanian legislation did not provide domestic judicial or similar remedies of the kind envisaged under article 9; at another stage, by reference to its lack of confidence in the ability of the Albanian courts to safeguard its interests in an effective way. Furthermore, it considered its efforts to raise signatures and thereby precipitate a referendum to be a form of domestic remedy, albeit not in a conventional sense.[5]

60. Decision I/7 of the First Meeting of the Parties of the Aarhus Convention says that the Committee should "*take into account* any *available* domestic remedy" (emphasis added). As previously noted by the Committee (MP.PP/C.1/2003/2, para. 37), this is not a strict requirement to exhaust domestic remedies. The Party concerned said in November 2005 that there was no domestic judicial remedy that could be used before the decision was taken, as there was nothing that a court could consider. One year later, the Party concerned presented general information to the effect that according to the Constitution and laws of Albania, there was access to

[5] The reasons why the Election Committee, and subsequently the Constitutional Court, rejected this initiative, despite the requisite number of signatures having supposedly been obtained, remain unclear to the Committee.

administrative review, the Ombudsman and the courts. The first statement of the Party concerned could be seen to imply that the three decisions the text of which it submitted to the Committee in June 2006 (see para. 9 above) were not subject to appeal, which was also the position of the communicant (see para. 23); by contrast, its second statement indicated that they could have been appealed. In any event, there appears to be a certain lack of clarity with regard to possibilities to appeal certain decisions.

61. The Committee regrets the failure of both the Party concerned and the communicant to provide, in a timely manner, more detailed and comprehensive information on the possibilities for seeking domestic remedies. Furthermore, it does not accept the communicant's assertion that it has tried all possible domestic remedies. Nonetheless, in the face of somewhat incomplete and contradictory information concerning the availability of remedies, also from the side of the Party concerned, the Committee cannot reject the allegations of the communicant that domestic remedies do not provide an effective and sufficient means of redress.

B. Legal basis

62. As is clear from section I, the case concerns a number of different issues and proposed activities: the energy and industrial park, the TES, the oil storage facility, and the oil and gas pipelines, among others. Each of these issues and proposed activities has its own decision-making processes, and to a certain extent they relate to different provisions of the Convention.

63. During the discussion on the case which took place at the Committee's fourteenth meeting, the communicant indicated that the various decisions of the Albanian authorities referred to in the communication were parts of an overall construction and development plan, about the existence of which the public had not been informed. No evidence or further information to substantiate this allegation has been made available to the Committee. Consequently, the Committee has not addressed this issue in its findings and conclusions. However, it notes that where such overall plans exist, they might be subject to provisions of the Convention and that, in any event, meaningful public participation, generally speaking, implies that the public should be informed that the decisions subject to public participation form parts of an underlying overall plan where this is the case.

64. The Committee decided to concentrate primarily on the issue of public participation with regard to the two decisions made by the Council of Territorial Adjustment of the Republic of Albania on 19 February 2003, namely Decision No. 8 (approving the site of the proposed industrial and energy park) and Decision No. 20 (approving the construction site of the proposed TES). This approach is in line with the Committee's understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, para. 13), that Decision I/7 does not require the Committee to address all facts and/or allegations raised in a communication. This procedural decision by the Committee to focus on these issues does not prevent it from addressing other aspects of the case.

65. The decisions have in common that they are crucial for the entire decision-making in relation to these sites, constructions and activities. The Committee will first have to consider whether the relevant decisions amount to decisions on specific activities under article 6 of the Convention, or decisions on plans under article 7. In one of its earlier decisions, the Committee, pointed out that "When determining how to categorize a decision under the Convention, its label

in the domestic law of a Party is not decisive. Rather, […it] is determined by the legal functions and effects of a decision…" (ECE/MP.PP/C.1/2006/4/Add.2, para. 29). Also, as previously observed by the Committee (ECE/MP.PP/C.1/2006/2/Add.1, para. 28), the Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions.

66. Decision No 20 concerns activities of types that are explicitly listed in annex I of the Convention. Paragraph 1 of annex I refers to "Thermal power stations and other combustion installations with a heat input of 50 MW or more". As regards Decision No. 8, industrial and energy parks are not listed in annex I as such, even though many of the activities that might typically take place within such parks are listed. If an EIA involving public participation for such a park were required under national legislation, it would be covered by paragraph 20 of annex I.

67. Decision No. 20 simply designates the site where the specific activity will take place and a number of further decisions to issue permits of various kinds (e.g. construction, environmental and operating permits) would be needed before the activities could proceed. Nevertheless, on balance, it is more characteristic of decisions under article 6 than article 7, in that they concern the carrying out of a specific annex I activity in a particular place by or on behalf of a specific applicant.

68. Decision No. 8 on the industrial and energy park, on the other hand, has more the character of a zoning activity, i.e. a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not).[6] This would link it more closely with article 7.

69. The proposed industrial and energy park includes several separate construction projects, each of which would require various kinds of permits. From the information received from the Party concerned and the communicant, it is not clear to what extent the industrial park itself, as distinct from its components, would require further permitting processes, which would in turn allow opportunities for public participation. This too might be a factor distinguishing Decision No. 8 from Decision Nos. 9 and 20, because it is clear that the latter decisions will be followed by further permitting decisions for the respective projects.

70. Taking into account the fact that different interpretations are possible with respect to these issues, the Committee chooses to focus on those aspects of the case where the obligations of the Party concerned are most clear-cut. In this respect, it notes that the public participation requirements for decision-making on an activity covered by article 7 are a subset of the public participation requirements for decision-making on an activity covered by article 6. Regardless of whether the decisions are considered to fall under article 6 or article 7, the requirements of paragraphs 3, 4 and 8 of article 6 apply. Since each of the decisions is required to meet the public

[6] In reaching this conclusion, the Committee notes the definition of "plans" in the European Commission Guide for Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment: "Plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas." Definition of "program" is "the plan covering a set of projects in a given area… comprising a number of separate construction projects…." See http://www.unece.org/env/sea_ec_guide/sect3.htm#Ref/7

participation requirements that are common to article 6 and article 7, the Committee has decided to examine the way in which those requirements have or have not been met.

71. The Committee is aware that at least one of the two decisions that it has chosen to focus on would need to be followed by further decisions on whether to grant environmental, construction and operating permits (and possibly other types of permits) before the activities in question could legitimately commence. However, public participation must take place at an early stage of the environmental decision-making process under the Convention. Therefore, it is important to consider whether public participation has been provided for at a sufficiently early stage of the environmental decision-making processes in these cases.

C. Substantive issues

1. Industrial and energy park

72. The Party concerned has informed the Committee that there was "no complex decision taken on the development of industrial park as a whole". It has emphasized that Decision No. 8 of the Council of Territorial Adjustment of the Republic of Albania "On the Approval of the Industrial and Energy Park – Vlore", which approved the development of "The Industrial and Energy Park – Vlore", was just a location (siting) decision. However, this does not detract from its importance, both in paving the way for more specific decisions on future projects and in preventing other potentially conflicting uses of the land. Several ministries were instructed to carry out this decision. The decision came into force immediately. It is clear to the Committee that this was a decision by a public authority that a particular piece of land should be used for particular purpose, even if further decisions would be needed before any of the planned activities could go ahead.

73. No evidence of any notification of the public concerned, or indeed of any opportunities for public participation being provided during the process leading up to this decision, has been presented to the Committee by the Party concerned, despite repeated requests. The documents provided by the Party concerned do not demonstrate that the competent authorities have identified the public that may participate, as requested under article 7 of the Convention, and that they have undertaken the necessary measures to involve the members of the public in the decision-making. To the contrary, the evidence provided suggests that the opponents were not properly notified about the possibilities to participate. The Committee is therefore convinced that the decision was made without effective notification of the public concerned, which ruled out any possibility for the public to prepare and participate effectively during the decision-making process.

74. Given the nature of the decision as outlined in the previous paragraph, even if public participation opportunities were to be provided subsequently with respect to decisions on specific activities within the industrial and energy park, the requirement that the public be given the opportunity to participate at an early stage when all options are open was not met in this case. Because of the lack of adequate opportunities for public participation, there was no real possibility for the outcome of public participation to be taken into account in the decision. Thus the Party concerned failed to implement the requirements set out in paragraphs 3, 4 and 8 of article 6, and consequently was in breach of article 7.

75. The recent modifications in the scope of this decision (see para. 36) may indeed influence its potential impact on the environment, but they do not as such alleviate failures to use proper public consultation provisions on the stage when the site of the park was being determined.

2. Thermal electric power station

76. Contrary to the decision-making process leading up to the designation of the site of the industrial and energy park, the decision-making process relating to the proposed TES involved some elements of public participation, e.g. public notifications, public meetings, availability of EIA documentation and so on. However, as regards Decision No. 20, dated 19 February 2003, which establishes the site of the TES, the only element of public participation in this phase of the process appears to have been the public meeting that took place in Vlora on 28 or 31 October 2002. The issues of who was notified of the meeting and invited to participate in it, the content of the notification, and who actually participated, are therefore important. As mentioned above (para. 37 (a)), the Party concerned asserted that among those who participated in the meeting were "intellectuals and NGOs of Vlora". This assertion has been strongly disputed by the communicant. Unfortunately, despite repeated requests by the Committee, the Party concerned had failed to provide specific information on these points up until May 2007 (see para. 43 (a)). Indeed, even the actual date on which the meeting took place could not be clearly established (see para. 41).

77. Having received the report, minutes and the list of participants of the October 2002 meeting, the Committee, prompted by a correspondence received from the communicant, examined them in comparison with the minutes and the list of participants of the meeting 30 September 2003 (see para. 43 (c)). In this regard the Committee notes that out of 16 questions put forward by the participants of the first meeting and 18 questions raised at the second meeting, 12 are exactly the same. Of these, nine questions received practically verbatim identical replies. Introductions to the meetings and some of the general interventions made by the public officials are also identical. Furthermore, the Committee notes that the lists of participants of the two meetings differ only in the four additional public officials who attended the first meeting. The results of this comparative analysis raise serious concerns regarding the extent to which the report of the meeting can be relied upon as an accurate record of the proceedings as well as regarding the genuine nature of the questions and concerns raised, recorded and subsequently taken into account in the decision-making process.

78. The unclear circumstances surrounding the meeting in October 2002, and the failure of the Party concerned to provide anything to substantiate the claim that the meeting was duly announced and open for public participation, as well as concerns about the quality of the meeting records, lead the Committee to conclude that the Party concerned failed to comply with the requirements for public participation set out in paragraphs 3, 4 and 8 of article 6 of the Convention.

79. A question with regard to the stage of a decision-making process at which public consultations should take place was raised in the commenting on the draft of these findings and recommendations. In this regard, the Committee wishes to make clear that once a decision to permit a proposed activity in a certain location has already been taken without public involvement, providing for such involvement in the other decision-making stages that will follow can under no circumstances be considered as meeting the requirement under article 6, paragraph

4, to provide "early public participation when all options are open". This is the case even if a full environmental impact assessment is going to be carried out. Providing for public participation only at that stage would effectively reduce the public's input to only commenting on how the environmental impact of the installation could be mitigated, but precluding the public from having any input on the decision on whether the installation should be there in the first place, as that decision would have already been taken. The Committee has already expressed this view in some of its earlier findings and recommendations (see ECE/MP.PP/C.1/2005/2/Add.4, para.11 and ECE/MP.PP/C.1/2006/2/Add.1, para.29).

80. The two meetings that took place on 2 April 2003 and 3 September 2003 obviously occurred after the adoption of Decision No. 20, and therefore cannot be considered as events contributing to the involvement of the public in that decision. Thus, they do not mitigate the failure of the Party concerned to comply with the Convention in the process leading to Decision No. 20 of 19 February 2003.

81. Even so, the Committee wishes to make a short comment on these meetings as well, since they also give rise to concern. No information has been provided by the Party concerned to demonstrate that the meetings in April and September 2003 were publicly announced, so as to allow members of the public opposing the project to actively take part in the decision-making. Nor has the Party concerned been able to give any reasonable explanation as to why the rather strong local opposition to the project, indicated by the 14,000 people calling for a referendum, was not heard or represented properly at any of these meetings. This gives raise to concerns that the invitation process also at this stage was selective and insufficient. The only public notification, in the form of newspaper advertisements, that was presented to the Committee related to meetings that took place later in 2004. Thus the Committee notes that, despite some subsequent efforts to improve the means for public participation, there were several shortcomings also in the decision-making process after February 2003.

82. Furthermore, the Committee notes the information provided by the Party concerned in the context of commenting on the draft findings and recommendations that an environmental consent has been issued for the TES in February 2007. Considered together with the fact that as late as 15 December 2006 no application for a permit had been lodged (see para. 48), the issuing of the consent raises a number of serious concerns. These concerns relate to the way in which the provisions of article 6 of the Convention were applied to this decision, in particular in light of the fact that neither the environmental consent issued on 16 February 2007 nor environmental license issued on 3 March 2007 address the issue of public comments or reasons and considerations on which it is based. The Committee notes that the reasons for these concerns appear to resemble those related to decisions Nos. 8 and 20.

3. Oil storage terminal and port infrastructure

83. With regard to Decision No. 9, approving the construction site for a proposed coastal terminal for storage of oil and by-products and associated port infrastructure, the Committee did not receive information sufficient for it to evaluate the quality of the public participation process in the relevant decision-making. However, the Committee was informed that the capacity of the proposed storage terminal is below the threshold of 200,000 tons stipulated in paragraph 18 of annex I, to the Convention. Thus the requirements for public participation in article 6 do not apply to this decision unless provided for in the national law of the Party concerned, in

accordance with either article 6, paragraph 1(b), of the Convention or paragraph 20 of annex I, to the Convention. The Committee is aware that an EIA procedure was in place in Albania at the time of the decision, which could potentially trigger paragraph 20 of annex I, although it has not been able to obtain sufficient information about the situation. However, given this and the fact that the issues raised with regard to Decision No. 9 appear to considerably resemble those in Decisions Nos. 8 and 20, as well as the interest in not further delaying the presentation of its findings with respect to those two decisions, the Committee decides not to further consider this Decision No. 9 at this stage.

4. Oil and gas pipelines

84. The Committee notes that pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km are listed in paragraph 14 of annex I of the Convention, and are therefore subject to the full set of public participation requirements under article 6. The AMBO pipeline and other pipeline proposals have not been a particular focus of the Committee's attention, and the Committee has not received sufficient information from the Party concerned or the communicant to be in a position to conclude whether or not there was a failure of compliance with the Convention.

5. Requests for information, article 4

85. With regard to the allegations of the communicant that several requests for information were refused or ignored (para. 35), the Committee is concerned that at least some information requests to the Government may not be registered or dealt with properly. In the absence of more concrete evidence, however, including proof that the requests were received by the public authorities in question, the Committee is not in a position to find that there was a failure to comply with article 4 of the Convention.

86. The Committee takes note of the communicant's allegations concerning the failure of the authorities to respond to its requests for information made in 2007 (see para. 51). The Committee, using its discretionary power to focus on what it believes is most important in any given case, does not find it necessary to investigate this matter in any great detail. It does however note that if confirmed, such refusal to provide response to a request for information would be in breach of provisions of article 4, paragraph 1, of the Convention.

6. Clarity of the framework, article 3, paragraph 1

87. The Committee is concerned about the lack of a clear, transparent and consistent framework to implement the provisions of this Convention in Albanian legislation. In particular, there is no clear procedure of early notification of the public (by public announcement or individual invitations, before a decision is made), identification of the public concerned, quality of participation, or taking the outcome of public meetings into account. Besides the fact that the Committee had difficulties obtaining information from both parties, who did not answer all its questions in a timely and comprehensive manner, and that it still has some questions unanswered, the Committee considers that the Party concerned should take the necessary legislative, regulatory and other measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions of the Convention.

D. Process of developing findings and recommendations

88. As a general remark on the processing of the communication, the Committee is concerned by the fact that it has taken more than two years to prepare findings and recommendations in this case. This is at least partly attributable to the initial lack of engagement in the process of the Party concerned (as evidenced not least by the fact that it did not accept the invitation to participate the discussion at the eleventh meeting of the Committee), and to the difficulties in obtaining timely, accurate and comprehensive answers from both the Party concerned and the communicant. Indeed, right up to the time of commenting on these findings and recommendations in draft form, i.e. May–June 2007, and despite specific and sometimes repeated requests by the Committee, the Party concerned failed to provide information crucial for correct interpretation of relevant events. The Committee therefore does not exclude a possibility that there is other information relevant to the case that has as yet not been made available to it at this stage.

89. The Committee notes however that the process of compliance review is forward-looking and that its aim is to begin facilitating implementation and compliance at the national level once a need for such is established. It therefore prefers to put forward those conclusions and recommendations which it can make at this stage.

Involvement of international financial institutions

90. Noting that the ultimate responsibility for implementation of and compliance with the provisions of the Convention lies in the hands of individual Parties, the Committee:

(a) Notes with appreciation the constructive contribution of the relevant IFIs, and in particular the World Bank and EBRD, to its process of review of compliance in connection with this communication, which was very useful in establishing many of the facts related to the process under review;

(b) Is mindful of the fact that the involvement of these institutions in the TES project has probably stimulated a gradual increase in the application of the public participation and consultation procedures to the decision-making process by the national authorities;

(c) Also notes with appreciation the interest expressed by both the World Bank and EBRD to support a structured approach to the implementation of the Convention in Albania.

IV. CONCLUSIONS

91. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

92. With respect to the proposed industrial and energy park (paras. 72–75), the Committee finds that the decision by the Council of Territorial Adjustment of the Republic of Albania to allocate territory for the Industrial and Energy Park of Vlora (Decision No. 8 of 19 February 2003) falls within the scope of article 7 and is therefore subject to the requirements of article 6, paragraphs 3, 4 and 8. The Party concerned has failed to implement those requirements in the relevant decision-making process and thus was not in compliance with article 7.

93. With respect to the proposed thermal electric power station (paras. 76–82), the Committee finds that the decision by the Council of Territorial Adjustment on the siting of the TES near Vlora (Decision No. 20 of 19 February 2003) is subject to the requirements of article 6, paragraphs 3, 4 and 8. Although some efforts were made to provide for public participation, these largely took place after the crucial decision on siting and were subject to some qualitative deficiencies, leading the Committee to find that the Party concerned failed to comply fully with the requirements in question.

94. By failing to establish a clear, transparent and consistent framework to implement the provisions of the Convention in Albanian legislation, the Party concerned was not in compliance with article 3, paragraph 1, of the Convention (para. 87).

B. Recommendations

95. Noting that the Party concerned has agreed that the Committee take the measure referred to in paragraph 37 (b) of the annex to decision I/7, the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, has adopted the recommendations set out in the following paragraphs.

96. The Committee recommends that the Party concerned take the necessary legislative, regulatory, administrative and other measures to ensure that:

(a) A clear, transparent and consistent framework to implement the provisions of the Convention in Albanian legislation is established, including a clearer and more effective scheme of responsibility within the governmental administration;

(b) Practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment are in place not only during preparation of individual projects, including through development of detailed procedures and practical measures to implement article 25 of the EIA Law of Albania;

(c) The public which may participate is identified;

(d) Notification of the public is made at an early stage for projects and plans, when options are open, not when decisions are already made;

(e) Notification of the entire public which may participate, including NGOs opposed to the project, is provided, and notifications are announced by appropriate means and in an effective manner so as to ensure that the various categories of the public which may participate are reached, and records kept of such notifications;

(f) The locations where the draft EIA can be inspected by the public before public meetings are publicized at a sufficiently early stage, giving members of the public time and opportunities to present their comments;

(g) Public opinions are heard and taken into account by the public authority making the relevant decisions in order to ensure meaningful public participation;

97. Having regard to paragraph 37 (d), in conjunction with paragraph 36 (b), of the annex to decision I/7, the Committee recommends the Party concerned to take particular care to ensure early and adequate opportunities for public participation in any subsequent phases in the permitting process for the industrial and energy park and the associated projects.

98. The Committee also recommends that the measures proposed in paragraphs 95–97 be taken or elaborated, as appropriate, in consultation with relevant NGOs.

99. The Committee invites the Party concerned to draw up an action plan for implementing the above recommendations and to submit this to the Committee by 15 September 2007.

100. The Committee invites the Party concerned to provide information to the Committee by 15 January 2008 on the measures taken and the results achieved in implementation of the above recommendations.

101. The Committee requests the secretariat, and invites relevant international and regional organizations and financial institutions, to provide advice and assistance to the Party concerned as necessary in the implementation of the measures referred to in paragraphs 95–99.

102. The Committee resolves to review the matter no later than three months before the third meeting of the Parties and to decide what recommendations, if any, to make to the Meeting of the Parties, taking into account all relevant information received in the meantime.

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ECONOMIC COMMISSION FOR EUROPE

Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

Geneva, 29–31 March 2006

REPORT ON THE ELEVENTH MEETING

1. The eleventh meeting of the Compliance Committee took place in Geneva on 29–31 March 2006. All the members were present. Representatives of the Governments of Hungary and Romania and the non-governmental organizations (NGOs) Clean Air Action Group (Hungary), Earthjustice, Environmental Law Alliance Worldwide (United States), International Human Rights Law Clinic and the University of Oregon School of Law (United States), as well as one independent expert, participated as observers during certain parts of the meeting.

2. The meeting was opened by the Chairperson, Mr. Veit Koester.

I. ADOPTION OF THE AGENDA AND ELECTION OF OFFICERS

3. The Committee adopted its agenda as set out in document ECE/MP.PP/C.1/2006/1.

* Reissued for technical reasons.

II. RELEVANT DEVELOPMENTS SINCE THE PREVIOUS MEETING OF THE COMMITTEE

4. Mr. Koester informed the Committee about the UNEP High-Level Meeting on Compliance with and Enforcement of Multilateral Environmental Agreements which had taken place on 21–22 January 2006 in Sri Lanka. Information on the meeting was available at www.iisd.ca/ymb/unepmea.

5. Mr. Koester also informed the Committee about the meeting of the Compliance Committee established under the Cartagena Protocol on Biosafety which had taken place in February 2006. The report of that meeting had been presented to the Conference of the Parties to the Convention on Biodiversity serving as the Meeting of the Parties to the Protocol which had taken place in Curibita, Brazil, on 13–17 March 2006.

6. Mr. Jonas Ebbesson informed the Committee about a forthcoming International Conference on Environmental Law and Justice which would take place in Stockholm on 4–9 September 2006 and would include a session on Environmental Justice and Legal Processes. Further information on the Conference was available from http://www.juridicum.su.se/EnvJusticeConf/.

7. The representative of Earthjustice reported to the Committee on the final session of the Commission on Human Rights, which had ended the previous week, and about progress towards establishing a Human Rights Council in its place.

III. OTHER MATTERS ARISING FROM THE PREVIOUS MEETING

8. There were no matters arising from the previous meeting.

IV. SUBMISSIONS BY PARTIES CONCERNING OTHER PARTIES

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

V. SUBMISSIONS BY PARTIES CONCERNING THEIR OWN COMPLIANCE

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

VI. REFERRALS BY THE SECRETARIAT

11. No referrals had been made by the secretariat.

VII. COMMUNICATIONS FROM MEMBERS OF THE PUBLIC

12. The Committee revised its draft findings and recommendations on communication ACCC/C/2004/06 (Kazakhstan), taking into account comments provided by the Party concerned and the communicant as required under paragraph 34 of the annex to decision I/7. The Committee noted that in its comments on the draft findings and recommendations, the Party concerned had expressed the view that the facts, findings and recommendations would have more impact if supported by further details. The Committee agreed to invite the Party concerned to identify which specific details it considered useful to include, and to reply to the Committee by 15 May 2006. While the Committee would not change the substance of its findings and recommendations, it would consider making further clarifications in the text with a view to adopting it at its next meeting. The secretariat was requested to contact the Party concerned in order to convey the outcome of the Committee's discussion and at the same time give the Party concerned an opportunity to inform the Committee if it was not in agreement with the Committee's proposal to make recommendations.

13. The Committee finalized and adopted its findings and recommendations on communication ACCC/C/2004/08 (Armenia), taking into account comments provided by the Party concerned and the communicant as required under paragraph 34 of the annex to decision I/7. The findings and recommendations of the Committee are contained in the addendum to this report (ECE/MP.PP/C.1/2006/2/Add.1). The Committee requested the secretariat to make these publicly available and to ensure that they were distributed to the Party concerned and the communicant as soon as feasible.

14. The Committee completed its work on draft findings and recommendations on communication ACCC/C/2005/11 (Belgium) in a closed session. These would be sent to the Party concerned for consideration and to seek its agreement with regard to the making of recommendations. They would also be sent to the communicants for comments (decision I/7, annex, paras. 34 and 36 (b)). The Committee would take into account any comments when finalizing the draft findings and recommendations at its twelfth meeting.

15. As agreed at its tenth meeting, the Committee resumed the discussion on communication ACCC/C/2005/12 (Albania). The communicant had provided further information in response to the request made by the secretariat on the Committee's behalf. A similar request had been forwarded to the Party concerned, but it had failed to provide further information. Having considered the information available to it, the Committee confirmed its earlier determination of the admissibility of the communication and proceeded to deliberate on its subject matter. The Committee found that, while the information available to it was sufficient to reach conclusions on some issues raised in the communication, it still fell short of providing a good basis for a comprehensive review. The Committee therefore decided to seek further information both from the Party concerned and from the communicant and agreed on a set of issues it wanted to clarify. At the same time, it would convey its preliminary conclusions regarding non-compliance with respect to issues mentioned in the communication for which sufficient information was available. The Committee requested the secretariat to communicate its considerations to the Party concerned and the communicant, and to invite them to provide the required information.

16. Mr. Sandor Fülöp informed the Committee about his scheduled visit to Albania in early June 2006. The Committee agreed that while in Albania, Mr. Fülöp would be in a good position to gather information related to a review of the communication in accordance with paragraph 25 (b) of the annex to decision I/7. It therefore requested the secretariat to communicate with the Party concerned seeking its consent to such information gathering by Mr. Fülöp on behalf of the Committee, in accordance with paragraph 25 (b) of the annex to decision I/7. The Committee indicated that it would be desirable for Mr. Fülöp to be supported in this task by the secretariat.

17. The Committee took note of the fact that the decision-making processes referred to in the communication were also subject to procedures of the World Bank and the European Bank for Reconstruction and Development (EBRD). Given the need to avoid duplication of effort and enhance synergies, it agreed to inform these institutions that it was considering a communication on the matter and to inquire about their involvement in the proposed projects and about whether their respective inspection panels were addressing the issue. The correspondence to the two institutions would be copied to the Government of Albania and the institutions would be copied on the correspondence to the Government.

18. As had been agreed at its tenth meeting, the Committee entered into discussions on communication ACCC/C/2005/13 (Hungary) submitted by Clean Air Action Group and concerning compliance by Hungary with certain provisions of articles 6, paragraphs 4 and 7, and article 9, paragraphs 2 and 3, of the Convention. The communication alleged that the Hungarian Act XII/2005 on the amendment of Act CXXVIII/2003 on Public Interest and Development of the Expressway Network in the Republic of Hungary went further in reducing opportunities for public participation than the original Act challenged earlier in communication ACCC/C/2004/04. The allegation related in particular to the opportunities for public participation and access to justice with regard to decisions on the designation of expressway tracks and decision-making on special extraction sites (areas within which road construction material such as clay, sand and gravel may be extracted).

19. In general, discussions on the communication proceeded in accordance with the form decided on by the Committee at its fifth meeting (MP.PP/C.1/2004/6, para. 40). They included interventions by the representative of the Government of Hungary, the communicant and observers.

20. The Committee confirmed that the communication was admissible. After the discussion of the communication, the Committee deliberated the matter in closed session (decision I/7, annex, para. 33). Because Mr. Fülöp had declared a possible conflict of interest with regard to the communication, he did not participate in the deliberations.

21. The Committee did not find that the changes made to the Hungarian legislation since the Committee had reached its findings with respect to ACCC/C/2004/04 had altered the possibilities for the public to exercise its rights under the Convention in such a way that Hungary was no longer in compliance with the Convention. However, the consequences of the changes in the legislation for compliance with the Convention might depend on their practical application. The Committee therefore agreed to recommend that the Government of Hungary keep the matter under review.

22. The Committee presented its conclusions in an open session with the Party concerned and the communicant present. The Chairperson proposed that, in the interest of making the most effective use of the Committee's time and given the similarities with its findings with respect to communication ACCC/C/2004/04, the further procedure with regard to the review of the communication be limited to the reflection of this finding in the report of the meeting. The representative of the Government of Hungary agreed with this approach. Taking into account the fact that the special extraction sites were subject to an environmental impact assessment procedure, as is stated in paragraph 17 of the response provided by the Government of Hungary, the representative of the communicant also agreed that there was no need for the Committee to develop a formal paper with evaluations and findings. He added, however, that this fact would be more apparent if it were clearly reflected in the Act on Public Interest and Development of the Expressway Network.

23. With regard to communication ACCC/C/2005/14 (Poland), the Committee noted that no further information had been received from the communicant. Noting the requirement in paragraph 19 of the annex to decision I/7 that communications be supported by corroborating information, the Committee determined that the communication was inadmissible.

24. The Committee noted the response provided by the Government of Romania regarding communication ACCC/C/2005/15. It agreed to enter into discussion on the substance of the communication at its twelfth meeting, which would take place on 14–16 June 2006. It requested the secretariat to notify the Party concerned and the communicant of this and of their right to participate (decision I/7, annex, para. 32). The communicant should be asked to indicate by 15 May 2006 why it considered the Convention had been violated, taking into account the information provided by the Government of Romania.

25. One new communication had been received since the previous meeting. Communication ACCC/C/2005/16 had been submitted by Association Kazokiskes Community (Lithuania), represented by its lawyers, regarding compliance by Lithuania with the provisions of article 6 and article 9, paragraph 2, of the Convention. The communication alleged that the Lithuanian authorities had failed to comply with certain provisions of article 6 of the Convention in decision-making regarding the establishment of a landfill in Kazokiskes. The communicants further alleged that they had had no opportunity to challenge the decision on establishment of the landfill, particularly since they had not received the relevant decisions.

26. The Committee discussed the communication, addressing the following points:

- Whether the information contained in the data sheet was accurate or needed modifying;
- Whether, on preliminary examination, the communication appeared to meet the criteria for admissibility; and
- Which points should be raised with the Party concerned or with the communicant.

27. The Committee determined on a preliminary basis that the communication was admissible, but it did not, at this stage, draw any conclusions regarding the compliance issues raised in them. The Committee also agreed on a set of issues to be raised with the communicant.

VIII. OTHER INFORMATION RECEIVED BY THE COMMITTEE RELEVANT TO POSSIBLE CASES OF NON-COMPLIANCE

28. The Committee had received no additional information relevant to possible cases of non-compliance.

IX. FOLLOW-UP ON SPECIFIC CASES OF NON-COMPLIANCE

29. The Committee reviewed the implementation strategy submitted by the Government of Kazakhstan pursuant to decision II/5a of the Meeting of the Parties. It agreed on a preliminary set of comments on the Strategy, which would be further elaborated through electronic consultation within the Committee and communicated to the Party concerned.

30. The Committee noted with regret that the Government of Ukraine had not provided the strategy for implementing the Convention requested by the Meeting of the Parties through decisions II/5b (para. 3). The Meeting had requested the Government of Ukraine to submit such a strategy by the end of 2005. The Committee noted the complete failure of the Government of Ukraine to engage with the process and agreed that if the strategy was not submitted by the time of its next meeting, it would consider including in its report to the Meeting of the Parties a recommendation on possible further measures with regard to Ukraine. It mandated the Chairperson to communicate the outcome of the Committee's discussions to the Party.

31. The Committee noted the response received from the Government of Turkmenistan to the letter from the Chairperson of the Committee with regard to the implementation of decision II/5c and matters raised by the Party in earlier correspondence (ECE/MP.PP/C.1/2005/6, para. 32). The Committee agreed to invite a delegation from the Government of Turkmenistan to attend its next meeting (on 14–16 June 2006 in Geneva) to discuss measures and activities for implementation of the recommendations contained in decision II/5c of the Meeting of the Parties. The Committee mandated the Chairperson to communicate this invitation to the Party.

X. REVIEW OF COMPLIANCE WITH REPORTING REQUIREMENTS AND PROCEDURES FOR ADDRESSING COMPLIANCE ISSUES ARISING FROM THE IMPLEMENTATION REPORTS

32. Mr. Fülöp presented two informal papers analysing how Parties were implementing article 9 of the Convention. He had chosen to focus on this area given the general conclusion emerging from the implementation reports that the access to justice pillar of the Convention posed the greatest implementation challenges.

33. The Committee agreed that the analysis could be used, *inter alia,* to highlight certain general compliance issues with regard to specific provisions of the Convention in its next report to the Meeting of the Parties or in another input document for the meeting of that body. With this in mind, the Committee agreed to discuss the paper at one of its next meetings and requested Mr. Fülöp to make specific proposals about how to present these issues to the Meeting of the Parties.

XI. PROGRAMME OF WORK AND CALENDAR OF MEETINGS

34. The Committee confirmed that it would hold its twelfth meeting in Geneva on 14–16 June 2006. The provisional dates of the Committee's thirteenth and fourteenth meetings remain as outlined in paragraph 41 of the report of the ninth meeting (ECE/MP.PP/C.1/2005/6). The Committee provisionally agreed to hold its fifteenth meeting on 21–23 March 2007.

XII. ANY OTHER BUSINESS

35. The secretariat informed the Committee that the first draft of a decision on review of compliance under the Convention's Protocol on Pollutant Release and Transfer Registers (PRTRs) had been prepared by the facilitator of the Contact Group on the Compliance Mechanism and Rules of Procedure under the Working Group on PRTRs. The draft would be discussed at the next meeting of the Working Group (on 17–19 May 2006 in Geneva). The Committee agreed to provide comments to the Working Group on its firsthand experience with the Convention's compliance mechanism, which might prove of interest to the Working Group if it were to opt to develop a mechanism broadly similar to that developed under the Convention. The text of the comments would be prepared after the Committee's meeting through the Committee's electronic decision-making process and submitted to the Working Group through the secretariat.

36. The Committee took note of Ms. Kruzikova's notice of her intention to stand down from the Committee due to her recent appointment as Director of the Department of Legislation in the Czech Ministry of Environment.

37. The procedure for replacing a Committee member who resigns mid-term is governed by paragraph 10 of the annex to decision I/7, which mandates the Bureau to appoint a new member for the remainder of the outgoing member's term, subject to the approval of the Committee.

38. The secretariat informed the Committee that, at the Bureau's request, an invitation to nominate candidates for Ms. Kruzikova's replacement had been circulated to the Parties, Signatories and NGOs falling within the scope of article 10, paragraph 5, of the Convention and promoting environmental protection. The Bureau was expected to select a candidate to replace Ms. Kruzikova at its next meeting, on 4 April 2006.

39. The Committee agreed to consider the Bureau's selected candidate using its electronic decision-making procedure, so that the substitution could be made before its twelfth meeting.

40. The Committee expressed its gratitude to Ms. Kruzikova for her excellent service and her important contribution to its work.

XIII. ADOPTION OF THE REPORT AND CLOSURE OF THE MEETING

41. The Committee adopted the draft report prepared by the Chairperson and the secretariat. The Chairperson then closed the meeting.

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MEETING OF THE PARTIES TO THE CONVENTION ON
ACCESS TO INFORMATION, PUBLIC PARTICIPATION
IN DECISION-MAKING AND ACCESS TO JUSTICE
IN ENVIRONMENTAL MATTERS

Third meeting
Riga, 11–13 June 2008
Item 6 (b) of the provisional agenda
Procedures and mechanisms facilitating
the implementation of the Convention:
Compliance mechanism

REPORT BY THE COMPLIANCE COMMITTEE[1]

Addendum

COMPLIANCE BY ROMANIA WITH ITS OBLIGATIONS UNDER THE CONVENTION

This document was prepared by the Compliance Committee in accordance with its mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties. It contains findings with regard to communication ACCC/C/2005/15 by the non-governmental organization Alburnus Maior (Romania) concerning public access to information and participation in decision-making on a proposed gold mine in Rosia Montana, Romania, as adopted by the Compliance Committee in March 2008.

[1] This document was submitted on the above date to allow due time for consultations with the parties concerned following the nineteenth meeting of the Compliance Committee (5–7 March 2008).

I. BACKGROUND

1. On 5 July 2005, the Romanian non-governmental organization (NGO) Alburnus Maior submitted a communication to the Compliance Committee alleging violation by Romania of its obligations under article 6, paragraphs 3, 4, 7 and 8, of the Convention.

2. The communication alleged that the Party concerned had failed to comply with the provisions of article 6 of the Convention regarding decision-making on the environmental impact assessment (EIA) for the Rosia Montana open-cast gold mine proposal, in particular at the scoping stage of the procedure. The full text of the communication is available at: http://www.unece.org/env/pp/pubcom.htm.

3. The communication was forwarded to the Party concerned on 27 October 2005 following a preliminary determination by the Committee that it was admissible. In forwarding the communication, the Committee also raised a number of questions with regard to Romanian EIA legislation and the relevant institutional and practical arrangements in place.

4. At the same time, the Committee agreed that in deciding how to proceed with the case, it would take account of any further information provided by the communicant with regard to the availability and adequacy of domestic remedies, and any use made thereof.

5. The Party concerned responded on 22 March 2006, disputing the claim of non-compliance as well as providing information in response to the questions posed by the Committee when forwarding the communication. Further information was received from the Party concerned on 12 June 2006 and, in response to a request from the Committee dated 25 March 2007, on 25 May 2007.

6. Further information was also received from the communicant on 15 May 2006, 6 July 2006, 7 December 2006 and 27 February 2007.

7. The Committee discussed the communication at its twelfth meeting (14–16 June 2006), with the participation of representatives of the communicant and the Party concerned. Having considered the information presented by the parties concerned, the Committee agreed not to proceed with the development of findings and recommendations on the communication until the environmental agreement procedure in question had been completed.

8. At its fifteenth meeting (21–23 March 2007), the Committee considered additional information that had been provided by the communicant on 27 February 2007 which referred to certain alleged deficiencies in the public consultation process. The Committee expressed some concerns with regard to the alleged shortcomings in the public participation procedure and in particular noted the allegations of the communicant concerning restrictions on access to EIA documentation. These restrictions were of a general nature affecting all EIA documentation, not just the documentation associated with the Rosia Montana project.

9. The Committee invited the Party concerned by means of a letter from the secretariat dated 29 March 2007 to comment on the issues raised by the communicant, including the allegations with regard to access to EIA documentation.

10. On 24 April 2007, the Committee received a copy of an open letter written by the communicant to the Minister of Environment of Romania challenging a legislative proposal from the Ministry to amend a Ministerial order on the EIA, which included a possibility for the developer to request confidentiality of any part of EIA documentation on the grounds of commercial confidentiality and intellectual property rights.

11. The Party concerned provided its response on 25 May 2007 addressing the main allegations contained in the supplementary information provided by the communicant.

12. Taking note of the information provided by the Party concerned, the Committee, at its sixteenth meeting, expressed concern at the way in which the issue of public disclosure of EIA studies was handled under the current system in Romania. It communicated this to the Party concerned in a letter from the secretariat dated 5 July 2007.

13. Furthermore, in view of the uncertainty surrounding the timetable for the completion of any licensing procedure for the Rosia Montana plant, the Committee decided at its seventeenth meeting (26–28 September 2007) to address separately the issues concerning the confidentiality of EIA studies, which were of a general nature, with a view to preparing findings and, if appropriate, recommendations with regard to this particular issue at its eighteenth meeting. It informed the Party concerned of this intention by a letter dated 1 October 2007, and invited it to provide any comments by 9 November 2007.

14. The Committee agreed to return to the aspects of the communication concerning compliance with the provisions of the Convention in the decision-making on the Rosia Montana gold mine project at a later stage, in accordance with its earlier decision (ECE/MP.PP/C.1/2006/4, para. 19).

Admissibility

15. The Committee at its ninth meeting (12–14 October 2005) determined on a preliminary basis that the communication was admissible. At its twelfth meeting (14–16 June 2006), the Committee confirmed that the communication was admissible.

Preparation and adoption of the findings and recommendations

16. In accordance with paragraph 34 of the annex to decision I/7, the Committee prepared draft findings and recommendations at its eighteenth meeting. These were forwarded for comment to the Party concerned and to the communicant on 19 December 2007 with an invitation to provide comments, if any, by 25 January 2008. Comments were received from the communicant on 23 January 2008. The Party concerned provided its comments on 25 January 2008. The Committee, having reviewed the comments, took them into account in finalizing these findings and recommendations.

II. SUMMARY OF THE FACTS, EVIDENCE AND ISSUES[2]

17. The communication submitted on 5 July 2005 concerned the alleged failure of the Party concerned to adequately involve the public in the early stages of the decision-making procedure with regard to the Rosia Montana gold mine, in particular the scoping stage of the procedure.

18. The communicant subsequently provided information with regard to the alleged failure by the Party concerned to ensure access to information contained in the EIA documentation.

19. In its written response, as well as during the discussions on the communication at the twelfth meeting of the Committee, the Party concerned pointed out, inter alia, that the environmental agreement procedure on the mine was still ongoing and that the public consultations would take place once the EIA report had been released. It also referred to public announcements and a planned public consultation process under the decision-making procedure.

20. On 27 February 2007, the communicant provided the Committee with supplementary information regarding alleged flaws in the public consultation procedures that had taken place in the second half of 2006. Among other things, the communicant brought to the attention of the Committee a letter by the Environmental Protection Agency of Alba-Iulia, dated 29 January 2007, which stated that upon the instructions of the National Environmental Protection Agency, only the conclusions of EIA reports were to be made public, but not the entire reports, unless the author of the report authorized their publication.

21. In its response provided on 25 May 2007, the Party concerned informed the Committee that the Romanian Copyright Office had informed the National Environmental Protection Agency that environmental impact studies were scientific studies protected by copyright law and therefore could be used, and in particular made publicly available, only with the express agreement of the author. The environmental protection agencies could make publicly available only the results of these studies. Complete studies could only be released with the agreement of their authors who could request the payment of copyright fees. The Party concerned also pointed out that neither the provisions of article 6, paragraph 6, of the Aarhus Convention[3] nor the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) define EIA documentation but rather refer to the minimum content of the documentation that should be made available.

22. The Party concerned further pointed out that various studies carried out in the course of EIA apply specific methodologies of assessment and modelling techniques which are reflected in EIA studies. The Party concluded that such studies are therefore protected by copyright law. It noted that in order to balance interests protected by the copyright and the need of the relevant authorities and the public to be aware of the potential environmental effects of a certain activity, only the outcome of the EIA study, and not the compete study, is provided to the relevant public authorities and the public.

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

[3] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

23. In its comments on the draft findings and recommendations provided to the Committee on 25 January 2008, the Party concerned referred to a new letter sent by the National Environmental Protection Agency to its regional and local offices on 22 June 2007 informing them that the EIA report, the environmental report and the environmental balance report represented public documentation which should be made publicly available, except for data for which confidentiality had been requested by the project proponent and granted by the Ministry of Environment and Sustainable Development.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

24. Romania deposited its instrument of ratification of the Aarhus Convention on 11 July 2000. The Convention entered into force for Romania on 30 October 2001, i.e. the collective date of entry into force.

25. The Convention, as a treaty ratified by Romania, is part of the Romanian legal system and is directly applicable, including by the courts.

26. The communication as such addressed both issues concerned with public participation procedures and issues of access to information under article 6, paragraph 6, and article 4 of the Convention. The Committee, as noted in paragraph 15 above, took into account the uncertainty surrounding the timetable for the completion of the decision-making procedure in question, and in the light of its understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, para. 13), that decision I/7 does not require it to address all facts and/or allegations raised in a communication, decided only to consider the issue of the public accessibility of EIA studies in these findings.

27. Article 5, paragraph 1, of the Convention requires public authorities to possess and update information relevant to their functions, and requires Parties to establish mandatory systems ensuring an adequate flow of information about proposed and existing activities which may significantly affect the environment. It is the understanding of the Committee that as a minimum this should include EIA studies in their entirety, including specific methodologies of assessment and modelling techniques used in their preparation.

28. EIA studies are prepared for the purposes of the public file in administrative procedure. Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law.

29. The Committee wishes to stress that in jurisdictions where copyright laws may be applied to EIA studies that are prepared for the purposes of the public file in the administrative procedure and available to authorities when making decisions, it by no means justifies a general exclusion of such studies from public disclosure. This is in particular so in situations where such studies form part of "information relevant to the decision-making" which, according to article 6, paragraph 6, of the Convention, should be made available to the public at the time of the public participation procedure.

30. The Committee stated in its findings and recommendations with regard to communication ACCC/C/2004/3 and submission ACCC/S/2004/1 that article 6, paragraph 6, aimed at providing

the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore more effective. It is certainly not limited to a requirement to publish an environmental impact statement. Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule. A general exemption of EIA studies from disclosure is therefore not in compliance with article 4, paragraph 1, in conjunction with article 4, paragraph 4, and article 6, paragraph 6, in conjunction with article 4, paragraph 4, of the Convention.

31. The Committee also notes that general exemption of EIA studies from disclosure on the grounds of intellectual property rights was the subject of review in at least one other communication (ECE/MP.PP/C.1/2005/2/Add.3, paras. 16, 31 and 32). It therefore wishes to express its concern with regard to this practice. Equally, the Committee expresses its concern with regard to the legislative proposal referred to in paragraph 10.

IV. CONCLUSIONS

32. Having considered the above, the Committee adopts the findings set out in the following paragraphs.

33. The Committee finds that by having introduced a general rule exempting full EIA studies from public disclosure, Romania was not in compliance with article 4, paragraph 1, in conjunction with article 4, paragraph 4, and article 6, paragraph 6, in conjunction with article 4, paragraph 4, of the Convention. However, the Committee notes the information from the Party concerned to the effect that this situation has been remedied by the introduction of the new instructions with regard to availability of the EIA documentation, referred to in paragraph 23 above. Taking this into account, the Committee considers that the Party concerned is no longer in a state of non-compliance with article 4, paragraph 1, of the Convention in connection with the instructions on applicability of intellectual property exemptions to EIA documentation. It does so on the understanding that the possibility for exempting data from disclosure referred to in the letter issued by the Party in June 2007 is applied in a restrictive way and is limited to the list of exemptions referred to in article 4, paragraph 4, of the Convention, that reasons for application of such exemptions are clear and transparent and that the list of documents referred to in the letter covers the full EIA study and any other documents referred to in article 6, paragraph 6, of the Convention.

34. The Committee appreciates that the instructions of the National Environmental Protection Agency referred to in paragraph 23 have been reversed since it first raised the matter with the Party concerned in the course of review of this communication. The Committee, however,

deeply regrets that it was only informed of this fact in January 2008, despite having addressed the very same issue in its letters to the Party concerned on two occasions since the new instructions were issued (paras. 12 and 13).

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Third meeting
Riga, 11-13 June 2008
Item 6 (b) of the provisional agenda
Procedures and mechanisms facilitating the implementation of the Convention:
Compliance mechanism

REPORT BY THE COMPLIANCE COMMITTEE*

Addendum

COMPLIANCE BY LITHUANIA WITH ITS OBLIGATIONS UNDER THE CONVENTION

This document was prepared by the Compliance Committee in accordance with its mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties. It contains findings and recommendations with regard to communication ACCC/C/2006/16 by Association Kazokiskes Community (Lithuania) concerning decision-making on the establishment of a landfill in Kazokiskes, as adopted by the Compliance Committee on 7 March 2008.

*This document was submitted on the above date to allow due time for consultations with the parties concerned following the nineteenth meeting of the Compliance Committee (5-7 March 2008).

Introduction

1. On 13 March 2006, Association Kazokiskes Community (Lithuania), represented by Mr. Ulrich Salburg and Ms. Ramune Duleviciene, hereinafter “the communicant”, submitted a communication to the Compliance Committee alleging non-compliance by the Republic of Lithuania with its obligations under article 6 and article 9, paragraph 2, of the Convention.

2. The communication concerns a landfill in the village of Kazokiskes in the municipality of Elektrenai Vilnius. The communicant alleges that the Lithuanian authorities failed to comply with provisions of article 6 of the Convention with respect to decision-making on the establishment of the landfill. The communicant further alleges that it had no opportunity to challenge the decision on the establishment of the landfill, in particular due to the fact that it had not received the relevant decisions.

3. The communication was supplemented with a number of supporting documents, including English translations.

4. In the communication, the communicant also informed the Committee about the involvement of the European Community (EC) in the project and about its intention to submit a separate communication claiming non-compliance by the EC through failure to ensure consistency of its relevant legislation with the Convention and through decision-making regarding co-financing the landfill. Such a communication was indeed submitted on 12 June 2006 (ACCC/C/2006/17).

5. The Committee at its eleventh meeting (31 March 2006), determined on a preliminary basis that communication ACCC/C/2006/16 was admissible.

6. The Committee requested the communicant by letter dated 13 April 2006 to provide more detailed information with regard to Association Kazokiskes Community and in particular its statutory objectives. It also requested more information with regard to appeal procedures initiated by the communicant, including whether these had been initiated on behalf of the Association or on behalf of its individual members.

7. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 13 April 2006.

8. The communicant submitted the requested information on 29 May 2006, without however indicating whether the appeal procedures were initiated on behalf of the Association or on behalf of its individual members.

9. A response was received from the Party concerned on 2 October 2006, disputing the claims made in the communication and providing an overview of the applicable national legal framework. The Party concerned also:

(a) Provided information about court decisions by the Administrative Court of Vilnius County granting standing to the communicant and initiating court proceedings regarding the relevant decisions on the landfill;

(b) Cited the opinions of some nationwide environmental non-governmental organizations (NGOs) (including Bank-Watch) which were in favour of placing a regional landfill in Kazokiskes.

10. On 6 and 29 May 2007, the communicant provided further information in response to questions from the Committee concerning the implications for the communication of certain procedures in the Administrative Court of Vilnius County. The information provided included partial translation of the relevant court decision. The final decisions had not been in favour of the claimant, and the communicant maintained that its allegations concerning non-compliance with article 9, paragraph 2, of the Convention remained relevant. A separate translation of the court decision was provided by the Party concerned.

11. At its sixteenth meeting (13–15 June 2007), the Committee discussed the communication with the participation of representatives of both the Party concerned and the communicant, both of whom answered questions, clarified issues and presented new information. The communicant also provided a statement in written form, whereby its allegations were clarified and extended to cover non-compliance with article 7 of the Convention. The Party concerned provided information about the decision-making processes in force in Lithuania, including copies of the Lithuanian Environmental Impact Assessment (EIA) Manual.

12. The Committee confirmed that the communication was admissible. However, it considered that while many issues had been clarified during the discussions at its sixteenth meeting, several outstanding issues remained, inter alia, related to the relevant provisions of Lithuanian legislation, which required further clarification.

13. The Committee asked the representatives of the Party concerned to provide to it by 15 July 2007 the required information, including translations of the relevant legislative provisions, information about the procedure, including dates, applied to the decision-making on the regional waste management plan, and information on the validity of the EIA decision of the Kazokiskes landfill in relation to the requirements for the application for the Integrated Pollution Prevention and Control (IPPC) permit.

14. The Party concerned provided the information requested on the regional waste management plan and the IPPC permit in correspondence received on 17 July 2007 , followed on 10 September 2007 by the translations of the relevant pieces of legislation, including regulations on public participation in the territorial planning (Planning regulation) and on public participation in the EIA process (Order on public participation in EIA), and Amendment of EIA law.

15. On 21 September 2007, the communicant submitted to the Committee a response to the additional information provided by the Party concerned as well as documents supporting its allegations concerning the date of the approval of the waste management plan.

Preparation and adoption of the findings and recommendations

16. In accordance with paragraph 34 of the annex to decision I/7, the Committee prepared draft findings and recommendations at its eighteenth meeting. These were forwarded for comment to the Party concerned and to the communicant on 12 February 2008 with an invitation to provide comments, if any, by 25 February 2008. Comments were received from the communicant on 26 February 2008. The Party concerned provided its comments on 27 February 2008. The Committee, having reviewed the comments, took them into account in finalizing these findings and recommendations.

I. SUMMARY OF THE FACTS, EVIDENCE AND ISSUES

A. NATIONAL LEGAL FRAMEWORK

17. The communication concerns a proposed landfill with a projected total capacity of 6.8 million tons of waste over a period of 20 years, which is meant to serve as a regional landfill serving the waste management needs of the Vilnius region. The landfill is located in the immediate proximity of the residential area where the communicants live (with some of the installations within 500 m of residential houses) in the village of Kazokiskes in the municipality of Elektrenai near Vilnius.

18. The location, which is an old gravel and sand quarry, is already being used as a municipal landfill. Since 1999, the site has been subject to various planning decisions with the aim of establishing a modern landfill there serving regional purposes.

19. The national legal framework for approving a landfill consists of several consecutive procedures, including:

(a) A waste management plan;
(b) A detailed plan;
(c) An EIA decision;
(d) Approval of the technical project and construction permit;
(e) An IPPC permit.

Waste management plan

20. Establishment of a landfill is supposed to derive from the relevant waste management plan – in the case of the landfill in Kazokiskes, the Vilnius County Waste Management Plan.

21. The drafting and approval of the waste management plan was undertaken in accordance with provisions of the national legislative acts that were in effect at the time, i.e. the Waste Management Law of the Republic of Lithuania and the requirements of the Waste Management Regulations approved by the Order No. 217 of the Minister of Environment of 14 July 1999. According to the provisions of these legislative acts, regional waste management plans were to be approved by the county council. In addition, they were required to be endorsed by all eight municipal councils within the county.

22. The aforementioned municipalities took decisions regarding the endorsement of the Vilnius County Management Plan during the period from April to June 2002. The Vilnius County Waste Management Plan was approved by the Vilnius County Council on 31 May 2002.

Detailed plan

23. In Lithuania, the detailed plan assumes the role of the principal planning permission authorizing a project to be located in a particular site and setting out its basic parameters.

24. The detailed plan for the landfill in Kazokiskes was approved on 5 April 2002 by the Elektrenai Municipality Council.

25. The communicant alleges:

(a) Insufficient notification about possibility to participate;

(b) Insufficient notification about the approval of the plan and possibility to challenge it;

(c) Misleading content of the notification;

(d) Insufficient and "superficial" technical data being the basis for the plan approval (see para. 45 below).

26. The Party concerned maintains that:

(a) The notification was sufficient and fully in compliance with the applicable rules:

(i) There was a notice in the local newspaper;

(ii) Additionally, 14 property owners living within the "sanitary zone" were informed by registered letters;

(b) The information forming the basis for the approval of the plan was sufficient for this (early) stage of the procedure, where only the general characteristics of the project and its location were being approved;

(c) The public did not demonstrate great interest (only five persons participated in the hearing).

Environmental Impact Assessment decision

27. The EIA decision was taken on 12 June 2002 by the Ministry of Environment.

28. The communicants allege inadequate notification and inadequate content of the EIA report.

29. The Party concerned maintains:

(a) The public was notified and consulted in relation to both the EIA programme (scoping phase) and the EIA report itself;

(b) The notification was sufficient and fully in compliance with the applicable rules;

(c) The report included all requested information;

(d) The public did not raise objections.

Technical project and construction permit

30. The technical project and construction permit were approved on 13 May 2005 by the regional authorities.

31. The communicant alleges that the public did not have any chance to participate in either procedure.

32. The Party concerned maintains that although the special rules under environmental legislation do not apply here, the public concerned did have possibilities to participate under the general rules of administrative procedure.

33. In the course of the review of the communication by the Committee, both parties concerned held the view that these decision-making procedures, taken in the context of Lithuanian legislation, would not constitute procedures regulated by article 6 of the Convention.

Integrated Pollution Prevention and Control permit

34. The IPPC permit is required for a regional landfill once it is constructed and Lithuanian law envisages that the public will have all possibilities to participate and challenge the decision.

35. The communicant alleges that after the actual construction of the landfill the above possibilities are not effective.

B. SUBSTANTIVE ISSUES

Informing the public (notification) under article 6, paragraph 2

36. The communicant alleges that information was not provided "early in an environmental-decision-making procedure":

(a) In the detailed plan – the public was informed only eight days before the plan was "completed", whereas the legal requirement is to provide 20 working days for the public to have access to the detailed plan before it is approved (see Lithuanian national implementation report of 2005, response to question 19);

(b) In the EIA decision - the public did not have a chance to participate in the scoping (designing the EIA programme) as envisaged in Lithuanian law.

37. The communicant alleges that the information provided in the notification was not "adequate" ("appropriate"), and in particular did not properly describe the "proposed activity" or the "nature of possible decisions":

(a) In the detailed plan – the public was not informed that the project concerned a major new landfill to be established in their locality and from the information provided could have assumed that the project related to the restoration of the existing small local landfill;

(b) In the EIA decision – the public was informed that the EIA report concerned "development possibilities of waste management in the Vilnius region" and not a major landfill in their neighbourhood.

38. The communicant alleges that manner in which the information was provided was not "effective": information about the possibilities to participate in the detailed plan and the EIA was announced in *Elektrenu Zinios*, which is a weekly official journal and not a popular daily local newspaper.

39. The Party concerned maintains in relation to the detailed plan that:

(a) The notification concerning the detailed plan was sufficient and fully in compliance with the applicable rules, because:

(i) There was a notice in the local newspaper,

(ii) Additionally, 14 property owners living within the "sanitary zone" had been informed by registered letters;

(b) The notification was sufficient for this (early) stage of the procedure where only the general characteristics of the project and its location were being approved.

40. The Party concerned maintains in relation to the EIA decision that:

(a) The public was notified and consulted in relation to both the EIA programme (scoping phase) and the EIA report itself;

(b) The notification was sufficient and fully in compliance with the applicable Lithuanian rules.

Reasonable time frames under article 6, paragraph 3

41. The communicant alleges that the 10 working days envisaged in the Lithuanian EIA law for getting acquainted with the documentation (including the EIA report) and preparing to participate is not reasonable.

42. The Party concerned maintains that the period of 10 working days is commonly approved by Lithuanian legislation and that until now no one has questioned such a period as being unreasonable.

Early public participation when all options are open – article 6, paragraph 4

43. The communicant alleges that:

(a) The possibility to participate was offered to the public only after certain options had already been decided upon (landfill or waste incinerator) and when only two possible locations were being discussed;

(b) Participation in the IPPC permitting process happens only after the construction is finalized, which in fact - for economic reasons – makes no alternative option available anymore.

44. The Party concerned maintains that:

(a) The decisions on the choice of landfill (as opposed to incineration or other options) and its two possible locations were taken at the stage of the Waste Management Plan;

(b) The IPPC law provides that the project may not start to operate if it fails to meet the Best Available Technique (BAT) requirement.

Applicants to be encouraged to enter into discussions with the public – article 6, paragraph 5

45. The communicant alleges that the applicant made no attempt to discuss the issue with the public and was not encouraged to do so by the authorities.

Information to be made available under article 6, paragraph 6

46. The communicant alleges that:
(a) Insufficient data on technical design were submitted;
(b) No alternatives as to the method of waste management were considered;
(c) no detailed data on impact on human health were submitted.

47. The Party concerned maintains that:
(a) The data on technical design were sufficient for the purpose of EIA. More detailed data will be provided at the stage of the IPPC permit where the public will have a chance to assess the technology in the light of the BAT requirement;
(b) Two alternative locations were considered and Kazokiskes was selected as the less environmentally harmful option;
(c) Sufficiently detailed data on impact were provided in the EIA report.

Information about the decision – article 6, paragraph 9

48. The communicant alleges that:
(a) The decision on the EIA itself was never published but only the information about the decision was published fifteen days after its approval;
(b) The information about the decision was published in a supplement of *State News*, which is an official publication not read by the public, instead of being published in a national or local newspaper;
(c) A sufficient statement of reasons was not provided, in particular why the landfill was to be built.

49. The Party concerned maintains that:
(a) The information about the decision was published according to applicable Lithuanian procedures;
(b) The reasons were provided as required by applicable Lithuanian procedures, including the outcome of public participation showing public support for the landfill.

Public participation in the preparation of the waste management plans - article 7

50. The communicant alleges that:

(a) Public participation opportunities were not provided during the preparation of the Vilnius County Waste Management Plan;

(b) The Plan was finally approved on 31 May 2002, which was after the Convention took effect for Lithuania and therefore its approval without opportunities for public participation constitutes a breach of the Convention.[†]

51. The Party concerned:

(a) Appears to consider the issue as subject to article 7 of the Convention;

(b) Acknowledges that the legislation in force during preparation of the Plan did not require public participation;

(c) Maintains, however, that "the key drafting procedures were carried out prior to [when the] Aarhus Convention took effect, thus the Aarhus Convention requirements should not apply to the aforementioned Plan".

Access to justice

52. The communicant maintains that, due to inadequate notification about the taking of the decisions on the detailed plan and EIA, it did not have a chance to challenge the decisions within the period of time prescribed by Lithuanian law (one month). It brought this matter before the courts.

53. The courts refused to accept the claim due to lack of convincing evidence for being unable to submit a claim within the period prescribed. On appeal the court was ready to reinstate the time limit provided the communicant being able to prove the exact time when it finally obtained the information about the decisions, so that the court could ascertain whether the one month period was met. However, the communicant was not able to establish the exact time and was not able to pursue the matter.

II. CONSIDERATION AND EVALUATION BY THE COMPLIANCE COMMITTEE

A. Legal basis and scope of considerations by the Compliance Committee

54. The Republic of Lithuania deposited its instrument of ratification of the Convention on 28 January 2002. The Convention entered into force for Lithuania on 28 April 2002.

55. The landfill in question belongs to activities covered by annex I, paragraph 5, of the Convention. The full range of public participation procedures under article 6 of the Convention

[†] The communicant referred to the Plan in connection with article 7 of the Convention in its statement made in the course of the discussion on the communication at the Committee's sixteenth meeting (13–15 June 2007), while referring to it in connection with article 6 of the Convention in its written submission of 21 September 2007.

applies to decisions whether to permit such activities. Furthermore, the Vilnius County Waste Management Plan belongs to plans "relating to the environment" to which article 7 of the Convention applies.

56. Noting that some of the activities described in the communication took place prior to the Convention's entry into force for Lithuania, the Committee is focusing on the activities that took place after 28 April 2002. However, as pointed out by the Committee, in determining whether or not to consider certain domestic procedures initiated before the entry into force of the Convention for the Party concerned, it considers whether significant events of those processes had taken place since the entry into force (cf. ECE/MP.PP/C.1/2005/2/Add.2, para. 4). In this regard the Committee noted that the significant events of the EIA procedure relating to implementation of article 6, in the Committee's understanding, came after the entry into force of the Convention for Lithuania, with notification of the public concerned taking place in May 2002 and the decision itself being made on 12 June 2002.

57. The communication refers to a number of consecutive decision-making procedures. In such cases, it is possible that more than one decision amounts to a permit decision under article 6 or a decision to adopt a plan under article 7 of the Convention. This must be determined on a contextual basis, taking into account the legal effects of each decision. Moreover, as stated by the Committee in previous findings, when it determines how to categorize the relevant decisions under the Convention, their labels in the domestic law of the Party concerned are not decisive (cf. the findings concerning Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para. 29). In the present case, while the Vilnius County Waste Management Plan clearly constitutes a plan covered by article 7 of the Convention, and has been considered thus by the communicant as well as the Party concerned, the nature of the other decisions relating to the landfill is less clear.

58. As stated above, detailed plans in Lithuanian law have the function of the principal planning permission authorizing a project to be located in a particular site and setting the basic parameters of the project. This suggests that, despite the label in Lithuanian law and the fact that detailed plans are treated as plans under article 7 of the Convention in the Lithuanian national implementation report of 2005, the detailed plan for the Kazokiskes landfill generates such legal effects as to constitute a permit decision under article 6 rather than a decision to adopt a plan under article 7 of the Convention. Considering the function and legal effects of the EIA decision and the IPPC decision, these decisions too constitute permitting decisions under article 6 of the Convention. However, bearing in mind that the decision concerning the detailed plan was taken on 5 April, that is, prior to the Convention entry into force for Lithuania, the Committee has evaluated only the EIA and IPPC decisions for the Kazokiskes landfill in the light of article 6 of the Convention.

59. The communicant and the Party concerned both consider that the approval of the technical project and construction permit should not be treated as decisions subject to article 6. The Committee has decided not to address this issue in the present case. This approach is in line with the Committee's understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, para. 13), that decision I/7 does not require the Committee to address all facts and/or allegations raised in a communication. On the other hand, in these findings the Committee is addressing also some general features of the Lithuanian legal framework, despite the indication by the communicant in its letter of 21 September 2007, that the communication

was not aiming at the compliance of the Lithuanian legal framework in general, but only concerned its deficient application in the case of the landfill in question.

60. The Committee notes that the decision-making procedure concerning the landfill in question was appreciated by some nationwide Lithuanian environmental NGOs and cited as being a good example of carrying out public participation procedures.

61. The Committee further notes that following ratification of the Convention by Lithuania, the legal framework for territorial planning has changed in order to provide a clearer framework for public rights to participate and to initiate review procedures.

B. Admissibility and use of domestic remedies

62. As mentioned under paragraph 12 above, the Committee finds the communication to be admissible, notwithstanding the fact that the chain of the decision-making procedures aiming to permit the landfill was not completed at that time, and in particular the fact that the IPPC permit was still to be granted, with the possibility remaining to challenge it in court.

63. The communicant has attempted to make use of the domestic remedies available at the early stage. The Committee finds some merit in the argument of the communicant that deficiencies in applying public participation procedures effectively deprived it of its rights under article 9, paragraph 2, of the Convention, i.e. the possibility to challenge the decisions taken at the early stage of decision-making.

64. Moreover, as pointed out in paragraph 59, the communication involves also issues related to the compliance of the entire legal framework with the requirements of the Convention, an issue which can be addressed regardless of the outcome of the decision-making on the landfill.

C. Substantive issues

Informing the public (notification) under article 6, paragraph 2

65. Lithuanian legislation does not provide for a clear requirement, that the public be informed in a timely, adequate and effective manner.

66. It is not clear from the information provided to the Committee whether the public was properly notified about the possibility to participate in the “designing the EIA programme” (i.e. the scoping stage) as envisaged in the Lithuanian law. At the same time, it has been clearly shown that what the public concerned was informed about were possibilities to participate in a decision-making process concerning “development possibilities of waste management in the Vilnius region” rather than a process concerning a major landfill to be established in their neighbourhood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.

67. The requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities

and their possibilities to participate. Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being "effective" established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies.

68. The Committee thus concludes that by not properly notifying the public about the nature of possible decisions, and by failing to inform the public in an effective manner, Lithuania has failed to comply with article 6, paragraph 2 of the Convention.

Reasonable time frames under article 6, paragraph 3

69. The requirement to provide "reasonable time frames" implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project.

70. The time frame of only 10 working days, set out in the Lithuanian EIA Law, for getting acquainted with the documentation, including EIA report, and for preparing to participate in the decision-making process concerning a major landfill, does not meet the requirement of reasonable time frames in article 6, paragraph 3. This finding is not negated by the fact that the fixed period of 10 working days is commonly approved by Lithuanian legislation and that until now, according to the Party concerned, no one has questioned such period as being unreasonable.

Early public participation when all options are open – article 6, paragraph 4

71. 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 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.

72. Lithuanian law envisages public participation in decision-making on plans and programmes. With this in mind and considering the structure of the consecutive decision-making and the legal effect of the different decisions in Lithuania, the fact that certain decisions took place when certain options were already decided upon (e.g. landfill or waste incinerator) and

when only two possible locations were discussed does not seem to exceed the above limits of discretion.

73. While the information available to the Committee is not sufficient to conclude whether indeed in this particular case the public had a chance to participate in the scoping (i.e. designing the EIA programme), the Committee welcomes the approach of the Lithuanian law which envisages public participation at the stage of scoping. This appears to provide for early public participation in EIA decision-making.

74. Bearing in mind the general considerations in paragraphs 73 to 75, a system whereby the IPPC permitting process starts after the construction is finalized, as is the case in Lithuania, need not of itself be in conflict with the requirements of Convention, though in certain circumstances it might be. Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure. A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the "events on the ground" have effectively eliminated alternative options. If the only opportunity for the public to provide input to decision-making on technological choices, which is subject to the public participation requirements of article 6, is at a stage when there is no realistic possibility for certain technological choices to be accepted, then this would not be compatible with the Convention.

75. In the present case, the Committee is not convinced that those questions concerning technological choices which had effectively been ruled out by the de facto existence of the landfill installation (such as the major choice between landfill and incineration) did not fall within the scope of the earlier decisions in which there were opportunities for the public to participate. The deficiencies in the public participation opportunities identified elsewhere in these findings are not directly related to the fact that the IPPC phase starts after the construction has been completed. It may not be a politically realistic option for the authorities to permanently block the operation of the installation by indefinitely refusing to grant any operating permit might, as pointed out by the communicant. Yet it does not appear to be unrealistic that the authorities might reject a particular technological choice and thereby force the developer to submit a new application proposing a different technology.

76. A general conclusion from these considerations is that there is a need for clear and transparent sequencing of permitting decisions, so that it is clear to the public what is being decided and which options are under consideration at each stage.

Applicants to be encouraged to enter into discussions with the public – article 6, paragraph 5

77. The communicant's allegations with respect to the lack of engagement on the part of the developer (para. 44) do not seem to be justified bearing in mind that according to Lithuanian law the developer is in fact responsible for organizing public participation, including for making available the relevant information and for collecting the comments.

78. However, the above reliance on the developer in providing for public participation in fact

raises doubts as to whether such an arrangement is fully in line with the Convention. Indeed, it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6). Accordingly, reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention.

Information to be made available under article 6, paragraph 6

79. With regard to the communicants' allegations with respect to lack of certain information relevant to the decision-making (para. 45), the Committee does not consider itself in a position to analyse the accuracy of the data which form the basis for the decisions in question. The Convention, while requiring the main alternatives studied by the applicant to be made accessible, does not prescribe what alternatives should be studied. Thus, the role of the Committee is to find out if the data that were available for the authorities taking the decision were accessible to the public and not to check whether the data available were accurate.

Submission of comments - article 6, paragraph 7

80. Whereas the Convention requires in article 6, paragraph 7, that "public participation procedures shall allow the public to submit … any comments, information, analyses or opinions", Lithuanian legislation limits the right to submit comments to the *public concerned,* and these comments are required to be "motivated proposals", i.e. containing reasoned argumentation. In this respect, Lithuanian law fails to guarantee the full scope of the rights envisaged by the Convention.

Information about the decision – article 6, paragraph 9

81. With regard to the allegation as to the failure to publicize the final decision (para. 47), the Committee wishes to underline that the Convention does not require the decision itself to be published. It only requires that the public be informed about the decision and has the right to have access to the decision together with the reasons and considerations on which it is based. The public shall be informed "promptly" and "in accordance with the appropriate procedures". The Convention does not specify here, as opposed to article 6, paragraph 2, any further requirements regarding informing the public about taking the decision thus leaving to the Parties some discretion in designing "the appropriate procedures" in their national legal frameworks. Similarly, the Convention does not set any precise requirements as to documenting "the reasons and considerations on which the decision is based "except for the requirement to provide evidence of taking due account of "the outcome of public participation" as required under article 6, paragraph 8.

82. Whether informing the public 15 days after the adoption of the decision can be considered to be prompt depends on the specific circumstances (e.g. the kind of the decision, the type and size of the activity in question) and the relevant provisions of the domestic legal system (e.g. the relevant appeal procedures and their timing). Without sufficient knowledge about the Lithuanian legal system and its "appropriate procedures", the Committee does not at this stage consider itself in a position to decide on whether or not notification about the decision in this particular

case was prompt. The Committee takes note however that the public was informed about the decision, as it is not disputed by the communicant, in a manner that was in compliance with the applicable Lithuanian procedures.

83. It is not the task of the Committee to assess whether the reasons and considerations on which the EIA decision concerning the landfill was based were accurate and in compliance with the applicable provisions of the Lithuanian law. The Committee takes note, however, that the statement of reasons for the above decision did refer, as it is not disputed by the communicant, to the outcome of public participation.

84. Bearing the above in mind the Committee is not able to conclude whether article 6, paragraph 9, of the Convention was implemented correctly. The Committee wishes to note however that whatever time period for informing the public about the decision is granted by domestic legislation, it should be "reasonable" and in particular bearing in mind the relevant time frames for initiating review procedures under article 9, paragraph 2. Moreover, the manner in which the public is informed and the requirements for documenting the reasons and considerations on which the decision is based should be designed bearing in mind the relevant time frames and other requirements for initiating review procedures under article 9, paragraph 2, of the Convention.

Public participation in preparation of the waste management plans - article 7

85. Since the bulk of activities related to preparation of the waste management plans took place well before the Convention entered into force in relation to Lithuania, the Committee did not address the subject matter of the corresponding allegations. Nevertheless the Committee is of the opinion that pending the ratification process, the Party should strive to apply the Convention. In this regard, the Committee notes that at the first meeting of the Parties (Lucca, Italy, October 2002) Lithuania, like other Signatories, approved the declaration calling on all the Signatories to put in place the full set of implementing legislation as well as procedures and mechanisms for implementing the specific provisions of the Convention and, in the interim, to seek to apply the provisions of the Convention to the maximum extent possible (ECE/MP.PP/2/Add.1, para. 9)

86. The Committee, however, without having examined the issue in depth, is under the impression that although the current legislation seems to be in line with article 7, it relates only to plans and programmes that are subject to strategic environmental assessment (SEA) and that there is no evidence of the public participation requirements covering other plans and programmes relating to the environment.

Access to justice

87. The Committee notes the communicant's claim that its right to initiate the review procedures in accordance with article 9, paragraph 2, was compromised by the manner and the timing of the notification of the decisions on the detailed plan and the EIA. However, the Committee also notes that the court was ready to reinstate the time limit for appeal from the time that the communicant first learned of the decisions and that the communicant did not pursue this possibility. The Committee therefore does not consider that there is enough evidence to reach the conclusion that there was a failure to implement article 9, paragraph 2, of the Convention.

III. CONCLUSIONS

88. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

89. The Committee finds that by failing to inform the public in an adequate, timely and effective manner about the possibility to participate in the decisions concerning the EIA decision (paras. 65–69), and by providing too short a time to inspect the documentation and to submit comments in relation to the above decisions regarding the landfill in question, Lithuania failed to comply with the requirements of article 6, paragraphs 2, and 3, of the Convention.

90. Moreover, the Committee finds the following general features of the Lithuanian legal framework as not being in compliance with article 6 of the Convention:

(a) Lack of clear requirement for a public to be informed in an adequate, timely and effective manner (article 6, para. 2);

(b) Setting a fixed 10 working-day period for inspecting the documentation and for submitting the comments (article 6, para. 3);

(c) Making developers (project proponents) rather than relevant public authorities responsible for organizing public participation, including for making available the relevant information and for collecting the comments (article 6, paragraph 2 (d) (iv) and (v), and article 6, para. 6);

(d) Requiring that comments submitted should be “motivated” and restricting those entitled to submit such comments to the “public concerned” (article 6, para. 7).

B. Recommendations

91. The Committee, pursuant to paragraph 35 of the annex to decision I/7 and taking into account the cause and degree of non-compliance, recommends to the Meeting of the Parties to:

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Government of Lithuania to take the necessary legislative, regulatory, administrative and other measures to ensure that:

(i) There is a clear requirement for the public to be informed of decision-making processes that are subject to article 6 in an adequate, timely and effective manner;

(ii) There are reasonable time frames for different phases of public participation taking into account the stage of decision-making as well as the nature, size and complexity of proposed activities;

(iii) There is a clear responsibility on the relevant public authorities to ensure such opportunities for public participation as are required under the Convention, including for making available the relevant information and for collecting the comments;

(iv) There is a clear possibility that any comments can be submitted by any member of the public, even if the comments are not “motivated”; There is a clear correlation between the time period(s) for informing the public about the decision and making available the text of the decision together with the reasons and considerations on which it is based with the time frame for initiating review procedures under article 9, paragraph 2, of the Convention;

(v) For each decision-making procedure covered by article 6 of the Convention a public authority from which relevant information can be obtained by the public and to which comments or questions can submitted is designated;

(vi) All plans and programmes relating to the environment are subject to appropriate public participation.

(b) Pursuant to paragraph 37 (c) of the annex to decision I/7, invite the Government of Lithuania to draw up an action plan for implementing the above recommendations with a view to submitting it to the Committee by 31 December 2008.

(c) Invite the Government of Lithuania to provide information to the Committee at the latest six months in advance of the fourth meeting of the Parties on the measures taken and the results achieved in implementation of the above recommendations.

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MEETING OF THE PARTIES TO THE CONVENTION ON
ACCESS TO INFORMATION, PUBLIC PARTICIPATION
IN DECISION-MAKING AND ACCESS TO JUSTICE
IN ENVIRONMENTAL MATTERS

Third meeting
Riga, 11–13 June 2008
Item 6 (b) of the provisional agenda
Procedures and mechanisms facilitating the implementation of the Convention:
Compliance mechanism

REPORT BY THE COMPLIANCE COMMITTEE[1]

Addendum

COMPLIANCE BY THE EUROPEAN COMMUNITY WITH ITS OBLIGATIONS UNDER THE CONVENTION

This document was prepared by the Compliance Committee in accordance with its mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties. It contains findings with regard to communication ACCC/C/2005/17 submitted by the non-governmental organization Association Kazokiskes Community (Lithuania) alleging non-compliance by the European Community with its obligations under article 6, paragraphs 2 and 4, and article 9, paragraph 2, of the Convention, as adopted by the Compliance Committee in April 2008.

[1]This document was submitted on the above date to allow due time for consultations with the Party concerned and the communicant following the nineteenth meeting of the Compliance Committee (5–7 March 2008).

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I. BACKGROUND

1. On 12 June 2006, Association Kazokiskes Community (Lithuania), represented by Mr. Ulrich Salburg and Ms. Ramune Duleviciene (hereinafter "the communicant") submitted a communication to the Compliance Committee alleging non-compliance by the European Community with its obligations under article 6, paragraphs 2 and 4, and article 9, paragraph 2, of the Convention.

2. The communication concerns compliance with the requirement of article 6 of the Convention in connection with Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC Directive) and the decision of the European Commission to co-finance a landfill in Kazokiskes (Lithuania). The communicant alleges that the European Community institutions failed to comply with provisions of article 6 of the Convention regarding decision-making concerning co-financing of establishment of the landfill. The communicant further alleges general failure on the part of the European Community to correctly implement provisions of the Convention into the Community law, in particular through the provisions of the IPPC Directive.

3. The communication was supplemented with a number of supporting documents.

4. The communication is related to communication ACCC/C/2006/16, submitted earlier by the same communicant and alleging non-compliance by Lithuania with the Convention in relation to decision-making on the landfill.

5. The Committee, at its twelfth meeting (14–16 June 2006), determined on a preliminary basis that the communication was admissible.

6. Pursuant to paragraph 22 of the annex to decision I/7, the Committee forwarded the communication to the Party concerned on 11 August 2006. The Committee also raised a number

of questions in relation to the communication with both the Party concerned and the communicant.

7. The communicant submitted the requested information on 10 October 2006, addressing in detail all the issues raised.

8. The Party concerned replied by a letter dated 10 January 2007 from the European Commission, acting on behalf of European Community, indicating that due to organizational and staff changes it would require more time to provide a substantive response.

9. The substantive response was provided by the Party concerned by letter of 2 May 2007.

10. The Party concerned requested that interpretation be provided for the meeting at which the communication would be discussed. This took a certain amount of time to arrange and caused the discussion on the communication to be scheduled only at the Committee's seventeenth meeting (26–28 September 2007).

11. At its seventeenth meeting, the Committee discussed the communication with the participation of representatives of both the Party concerned and the communicant, who answered questions, clarified issues and presented new information. The communicant's statement (also provided in writing) also included details with regard to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (EIA Directive). The Party concerned provided, inter alia, information about the relevant Community legislation.

12. The Committee confirmed that the communication was admissible. However, it considered that while many issues had been clarified during the discussions at its seventeenth meeting, there were several issues, inter alia related to the relevant provisions of Community legislation in relation to the Convention, which required further clarification. The Committee therefore requested the Party concerned to provide such clarifications following the meeting. Such additional information was provided by the Party concerned on 21 November 2007.

13. On 28 February 2008, the secretariat circulated draft findings and recommendations prepared by the Committee to the Party concerned and the communicant, inviting them to comment. The communicant responded by a letter dated 2 April 2008 and the Party concerned by a letter dated 7 April 2008. In its comments, the Party concerned indicated that it did not agree with the content of the draft recommendations proposed by the Committee, and against that background and based on its view that the legislation, practices and procedures of the Community in relation to the Convention were adequate, did not agree that recommendations should be formulated by the Committee. In finalizing the text, the Committee made some changes in order to take into account the comments of the Party concerned and the communicant. In the light of its finding that there was no non-compliance, coupled with the opposition of the Party concerned to the inclusion of any recommendations in that circumstance, the Committee has not made any recommendations.

II. SUMMARY OF THE FACTS, EVIDENCE AND ISSUES

A. Community legal framework

14. The communication concerns the financing of a proposed landfill in the village of Kazokiskes in the municipality of Elektrenai Vilnius, with a projected total capacity of 6.8 million tons of waste over a period of 20 years.

15. Such a project belongs to the categories of projects listed in Annex I to the EIA Directive and to the categories of installations listed in Annex I to the IPPC Directive.

16. Both Directives were amended by Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (Public Participation Directive) with a view to implementing the public participation and access to justice requirements of the Convention.

B. Substantive issues

Application of article 6 of the Convention in relation to financing decisions

17. The communicant maintains that although a decision of the European Commission to co-finance a project does not itself, in its view, represent a decision on "whether to permit" an activity to which the provisions of article 6 of the Convention would apply, the European Commission, when making such a decision, was nevertheless under an obligation to ensure that the relevant provisions of the Convention were followed during the national decision-making related to the relevant project, and should have refused to finance a project where such provisions were not strictly followed.

18. Furthermore, the communicant alleges that while the decision about financing was taken well before the European Community ratified the Convention, the financing continued after it had become a Party and therefore the obligations with regard to the Convention were relevant.

19. The Party concerned maintains that in its view the Convention's requirements are fully implemented in the respective Community legislation and according to the information available to it, the relevant provisions of this legislation are being appropriately applied in relation to the project in question.

Application of article 6 of the Convention in relation to multiple permits

20. The communicant maintains that the requirements of article 6 of the Convention should be applied in relation to all decisions on whether to permit proposed activities listed in annex I of the Convention. In its view, if a national legal framework requires a number of decisions/permits covering different topics "which are relevant in respect of environmental pollution and danger to the public concerned", public participation is required in relation to each and every such decision/permit and in each case all of the requirements of article 6 should be applied.

21. The communicant further maintains that in situations where there is a sequence of permitting decisions, limiting the range of options may be allowed only provided that public participation was carried out at an earlier stage of the decision-making where certain options were debated, and provided that all the relevant activities which fall within the scope of annex I of the Convention are subject to public participation at both respective stages.

22. In this context, the communicant indicates that although European Community law envisages public participation in relation to two different stages of decision-making, i.e. EIA and IPPC permits, not all activities listed in annex I of the Convention are subject to both procedures, since neither Annex I of the EIA Directive nor Annex I of the IPPC Directive are identical with annex I to the Convention.

23. The Party concerned maintains that although indeed neither Annex I of the EIA Directive nor Annex I of the IPPC Directive are identical with annex I of the Convention, in combination they cover it comprehensively. Furthermore, the Party concerned indicates that Annex II of the EIA Directive includes all remaining activities from annex I of the Convention. The Party also maintains that the Convention as an agreement concluded by the Council is binding on the Community's institutions and Member States and takes precedence over the legal acts adopted under the EC Treaty[2] (secondary legislation), which also means that the Community law texts should be interpreted in accordance with such an agreement. The Party concerned recognizes that the EIA Directive itself leaves it to the discretion of Member States to decide whether in case of activities listed in Annex II of the EIA Directive the assessment is needed and therefore whether public participation is also needed. However, it maintains that the Convention, as part of Community law, has direct application in such cases, putting Member States under an obligation to carry out the assessment with the requirement for public participation also in relation to such activities listed in Annex II of the EIA Directive which are covered by annex I of the Convention.

24. The communicant maintains that for the provisions of the IPPC Directive to fully comply with the requirements of article 6 of the Convention, they should be interpreted to cover all options. In this regard, it maintains in particular that the IPPC Directive should not allow an IPPC permit to be required only after the actual construction of an installation, since in such a case, the public participation procedure preceding the issuing of the permit does not amount to "early public participation, when all options are open and effective public participation can take place".

Informing the public (notification) under article 6, paragraph 2, of the Convention

25. The communicant maintains that the provisions of the IPPC Directive that link public participation with the IPPC permit in practice render meaningless the requirement to inform the public "early in an environmental decision-making procedure" and in a "timely and effective manner". This is so, it argues, because such permits are granted only before the commencement of operation of the facility in question but not necessarily before its construction, which therefore allows for the interpretation that public participation is not required before the construction of a

[2] The treaty establishing the European Community.

new IPPC installation.

26. Furthermore, the communicant maintains that the EIA Directive also does not clearly require public participation to be carried out before construction commences, which again deprives of any sense the requirement of informing the public "early in an environmental decision-making procedure" and in "timely and effective manner".

27. The Party concerned maintains that all the procedural provisions of both the EIA and IPPC Directives fully reflect all the relevant provisions of the Convention, and in particular assure that the public is informed "early in an environmental decision-making procedure" and in a "timely and effective manner" within the framework and scope of the respective procedures.

28. Furthermore, the Party concerned maintains that although neither the EIA Directive nor the IPPC Directive expressly mentions the wording "adequate, timely and effective manner", the applicable rules fully implement this requirement. Moreover, the Convention itself forms part of Community law and should be applied directly.

Early public participation when all options are open – article 6, paragraph 4, of the Convention

29. The communicant maintains that any public participation that is envisaged after the construction of an installation can by no means be considered as "early public participation, when all options are open and effective public participation can take place". In its view, after the construction is completed, most options are not open anymore and therefore there is no possibility for effective participation. Thus the lack of provisions that clearly require public participation to be carried out before the commencement of construction in both the EIA and IPPC Directives is not in compliance with article 6, paragraph 4, of the Convention.

30. The Party concerned maintains that the relevant procedures ensure early and effective participation when all options are open, although the range of options differs according to the scope of both procedures which address slightly different aspects.

Access to justice

31. The communicant maintains that providing access to justice in relation to public participation procedures that take place after the construction starts is meaningless.

32. Furthermore, the communicant alleges that the Public Participation Directive, when amending the EIA and IPPC Directives, failed to introduce provisions that oblige the Member States to provide the public concerned with effective remedies, including injunctive relief.

33. The Party concerned maintains that the relevant provisions are in line with the respective provisions of article 9 of the Convention, bearing in mind the scope of competence of the European Community.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

A. Legal basis and scope of considerations by the Committee

34. The European Community concluded the Convention with the Council Decision of 17 February 2005 and deposited its instrument of ratification of the Convention on the same day. The Convention entered into force for the European Community on 18 May 2005.

35. The Committee notes the Party's statement that the Convention as an agreement concluded by the Council is binding on the Community's institutions and Member States and takes precedence over the legal acts adopted under the EC Treaty (secondary legislation), which also means that the Community law texts should be interpreted in accordance with such an agreement.

36. The Committee decides to focus its attention on the substantive issues identified in section I B above (paras. 17–33). In addition to alleging non-compliance with respect to the European Commission's co-financing of the landfill, the communicant alleges a general failure on the part of the European Community to correctly implement articles 6 and 9 of the Convention. In its examination, the Committee therefore also considers some issues of a general character with respect to the implementation of the Convention into Community law. However, this general examination is limited to the type of activity here in question, i.e. landfills. This approach is in line with the Committee's understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, para. 13), that decision I/7 does not require the Committee to address all facts and/or allegations raised in a communication. This procedural decision by the Committee to focus on these issues does not prevent it from addressing other aspects of the case.

B. Admissibility and use of domestic remedies

37. The Committee confirmed admissibility of the communication at its seventeenth meeting (see para. 12 above).

38. The Committee notes that the communicant exhausted the available domestic remedies by filing a complaint to the European Commission, and that under the Community law there are no other remedies available in such cases.

C. Substantive issues

Application of article 6 of the Convention in relation to financing decisions

39. Regarding the allegation of the communicant that article 6 of the Convention is applicable to the decision to fund the project in question, the Committee, on account of the fact that such a decision was taken well before the European Community ratified the Convention, and having regard to the fact that the general matter of decisions on funding is under consideration in connection with another communication (ACCC/C/2007/21), decides not to consider the allegation.

40. In this context, the Committee welcomes the efforts of the European Commission to monitor compliance with the provisions of Community law aiming to implement the Convention while taking decisions whether to provide funding for a project and making implementation of such provisions a condition for applying for funding.

Application of article 6 of the Convention in relation to multiple permits

41. The first issue to be examined with regard to article 6 of the Convention refers to multiple permitting decisions for landfills. The Committee does not consider that article 6 necessarily requires that the full range of public participation requirements set out in paragraphs 2 to 10 of the article be applied for each and every decision on whether to permit an activity of a type covered by paragraph 1. First, the very title of the Convention (ending with the words “in environmental matters”) implies that even though it is not spelled out in article 6, the permitting decisions should at the very least be environment-related. Second, even within the environment-related permitting decisions that might be required before a given activity may proceed, there may be large variations in their significance and/or environmental relevance. Some such decisions might be of minor or peripheral importance, or be of limited environmental relevance, therefore not meriting a full-scale public participation procedure.

42. On the other hand, nor does the Committee consider that where several permitting decisions are required in order for an activity covered by article 6, paragraph 1, to proceed, it is necessarily sufficient for the purposes of meeting the requirements of article 6 to apply the public participation procedure set out it to just one of those permitting decisions. Where one permitting decision embraces all significant environmental implications of the activity in question, it might be sufficient. However, where significant environmental aspects are dispersed between different permitting decisions, it would clearly not be sufficient to provide for full-fledged public participation only in one of those decisions. Whether a system of several permitting decisions, where public participation is provided with respect to only some of those decisions, amounts to non-compliance with the Convention will have to be decided on a contextual basis, taking the legal effects of each decision into account. It is of crucial importance in this regard to examine to what extent such a decision indeed “permits” the activity in question.

43. The Committee is well aware that Parties to the Convention in their national legal frameworks provide a variety of approaches to regulatory control of activities listed in annex I of the Convention. Not all decisions required within national frameworks of regulatory control should necessarily be considered as “decisions on whether to permit proposed activities”. On the other hand, this does not mean that there is necessarily only one such a decision “to permit proposed activities”. In fact, many national frameworks require more than one such permitting decision. The Committee therefore considers that some kind of significance test, to be applied at the national level on a case-by-case basis, is the most appropriate way to understand the requirements of the Convention. The test should be: does the permitting decision, or range of permitting decisions, to which all the elements of the public participation procedure set out in article 6, paragraphs 2 to 10, apply embrace all the basic parameters and main environmental implications of the proposed activity in question? If, despite the existence of a public participation procedure or procedures with respect to one or more environment-related permitting decisions, there are other environment-related permitting decisions with regard to the activity in question for which no full-fledged public participation process is foreseen but which

are capable of significantly changing the above basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process, this could not be said to meet the requirements of the Convention.

44. Article 6 of the Convention obliges the Parties to meet the minimum requirements for public participation in decision-making related to all activities listed in annex I (and other activities determined by the Parties). While this applies to the Party concerned too, the structure of the European Community and its legislation differs from those of all other Parties to the Convention in the sense that while relevant Community legislation has been adopted to ensure public participation in various cases of environmental decision-making, it is the duty of its Member States to implement Community directives. This is the case also with the EIA Directive and the IPPC Directive, both of which apply to decision-making concerning landfills. Because of this distribution of power between the European Community and its Member States, the aforementioned significance test cannot be applied, and the assessment must take a slightly different approach.

45. The question to be considered is whether the EIA Directive and IPPC Directive allow the Member States to make the relevant decisions for landfills without a proper notification and opportunities for participation. Neither the EIA Directive nor the IPPC Directive seems to prevent multiple permit decisions in the Member States. The communicant has alleged that not all activities covered by annex I of the Convention are subject to both the EIA and IPPC procedures in European Community law. The Committee does not rule out the possibility that with respect to activities in annex I other than landfills, the Party concerned fails to comply with the Convention.

46. Bearing in mind the above characteristic features of the Community law and the fact that under EIA and IPPC directives public participation is mandatory in case of the two main permitting decisions applicable to landfills covered by annex I to the Convention, the Committee is of the opinion that as far as application of article 6 of the Convention in relation to multiple permits applicable to landfills is concerned, the Community legal framework in principle properly assures achievement of the respective goals of the Convention.

Informing the public (notification) under article 6, paragraph 2, of the Convention

47. The provisions concerning notification in both EIA and IPPC Directives provide for early and effective notification within the envisaged scope of both procedures which play slightly different roles in the decision-making under the Community law.

48. While neither the EIA Directive nor the IPPC Directive expressly sets out that the public must be informed in an “adequate, timely and effective manner”, they both include certain specific requirements aiming to ensure that the public is informed effectively and in a timely manner.

49. This may have some consequences for the implementation of the Convention, as most Member States seem to rely on Community law when drafting their national legislation aiming

to implement international obligations stemming from a treaty to which the Community is also a Party. Moreover, the provisions of the EIA Directive, including those relating to public participation, are being directly invoked in some legal acts concerning provision of Community funding, for example in Annex XXI to Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund. Thus in practice they may be applied directly by European Community institutions when monitoring compliance with the EIA Directive on the occasion of taking decisions concerning Community funding for certain activities.

50. As pointed out in paragraph 44, when examining compliance by the Party concerned, the Committee must take into account the structural difference between the European Community and other Parties, and the general division of powers between the Community and its Member States in implementing Community directives. The Committee notes that the IPPC Directive obliges the Member States to ensure early and effective public participation in permitting procedures concerning landfills. It also notes that the EIA Directive obliges the Member States to ensure that the public shall be informed early in environmental decision-making procedures concerning landfills. Thus, the relevant Community legislation does indeed provide for early information and participation. Moreover, although a similar formulation in the Directives as in the Convention could probably help to ensure adequate implementation of the Convention, bearing in mind the specificity of European Community directives, the fact that the terms “adequate, timely and effective manner” are not used in the Directives does not in itself amount to non-compliance with the Convention.

Early public participation when all options are open – article 6, paragraph 4, of the Convention

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, according to the particular needs of a given country and the subject matter of the decision-making, Parties have a certain 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 specifications 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.

52. Again, in its examination the Committee must consider the structural characteristics of the Party concerned, and the general division of powers between the European Community and its Member States in implementing Community directives. The communicant maintains that the EIA Directive and IPPC Directive fail to comply with the Convention because they fail to

provide for “early public participation, when all options are open and effective public participation can take place” on account of the fact that the participation may take place after the construction has commenced. The allegations concerning the two directives have to be considered separately.

53. First, it appears to the Committee that for all activities involving construction, the EIA Directive requires public participation to be carried out before the actual construction starts. This requirement can be interpreted from the definitions of “project” and “development consent” in article 1, paragraph 2, of the EIA Directive taken in conjunction with the obligation set out in article 2, paragraph 1, to require development consent.

54. Second, the Committee notes that the IPPC Directive obliges the Member States to ensure early and effective opportunities for public participation in procedures for issuing a permit for new installations covered by the IPPC Directive. A system whereby the IPPC permitting process starts after the construction is finalised need not of itself be in conflict with the requirements of Convention, though in certain circumstances it might be. Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure. A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the“events on the ground” have effectively eliminated alternative options. If a legal framework of a Party to the Convention is such that the only opportunity for the public to provide input to decision-making on technological choices which is subject to the public participation requirements of article 6 of the Convention is at a stage when there is no realistic possibility for certain technological choices to be accepted, then such a legal framework would not be compatible with the Convention.

55. It follows from the above that the provisions on public participation in both the EIA and the IPPC Directives, at least as far as decision-making for landfills is concerned, seem to be in line with the requirement of article 6, paragraph 4, of the Convention to provide “early public participation, when all options are open and effective public participation can take place”.

Access to justice

56. The communicant makes the point that it is meaningless to provide access to justice in relation to a public participation procedure that takes place after the construction starts. While the Committee does not accept that access to justice at this stage is necessarily meaningless, if there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question. However, the Committee is not convinced that the EIA Directive as amended by the Public Participation Directive allows a Member State to maintain a system where access to justice in relation to the EIA permit is only provided after the construction has started; nor is it convinced that a Member State having fully implemented the EIA, Public Participation and IPPC Directives would be able to have a system that only provides an opportunity for the public to challenge decisions concerning technological choices at a stage when there is no realistic possibility for considering alternative technologies.

57. The Committee notes that indeed both the EIA and the IPPC Directives lack provisions clearly requiring the public concerned to be provided with effective remedies, including injunctive relief. While such remedies are essential for effective access to justice, when considering the structural characteristics of the Party concerned, and the general division of powers between the European Community and its Member States, it is not clear to the Committee whether procedural issues relating to remedies are part of the European Community's competence. In the absence of further information on this issue, the Committee cannot conclude that the European Community fails to comply with article 9, paragraph 4, of the Convention. The Committee nevertheless stresses the importance of such remedies and the need for the European Community and the EU Member States to determine whether such remedies should be provided only by the laws of the Member States or in addition by Community legislation.

General issues of transposition

58. The Committee notes the point made by the Party concerned (para. 23) that under European Community law, an international agreement concluded by the Community is binding on the Community institutions and the Member States, and takes precedence over legal acts adopted by the Community. According to the Party concerned, this means that Community law texts should be interpreted in accordance with such an agreement. In this context, the Committee wishes to stress that the fact that an international agreement may be given a superior rank to directives and other secondary legislation in European Community law should not be taken as an excuse for not transposing the Convention through a clear, transparent and consistent framework into European Community law (cf. article 3, paragraph 1, of the Convention).

59. Notwithstanding the distinctive structure of the European Community, and the nature of the relationship between the Convention and the EC secondary legislation, as outlined in paragraph 35, the Committee notes with concern the following general features of the Community legal framework:

(a) Lack of express wording requiring the public to be informed in an "adequate, timely and effective manner" in the provisions regarding public participation in the EIA and IPPC Directives;

(b) Lack of a clear obligation to provide the public concerned with effective remedies, including injunctive relief, in the provisions regarding access to justice in the EIA and IPPC Directives.

While the Committee is not convinced that these features amount to a failure to comply with article 3, paragraph 1, it considers that they may adversely affect the implementation of article 6 of the Convention. Moreover, having essentially limited its examination to decision-making relating to landfills, the Committee does not make any conclusions with regard to other activities listed in annex I of the Convention. Nor does it make any conclusions concerning the precise correlation between the list of activities contained in annex I of the Convention and those contained in the respective annexes to the EIA and IPPC Directives.

IV. CONCLUSIONS

60. Having considered the above, the Compliance Committee adopts the finding set out in the following paragraph.

61. The Committee is not convinced that the matters examined by it in response to the communication establish any failure by the European Community to comply with the provisions of the Convention when transposing them through the EIA and IPPC Directives. The finding is based on the assumption that the IPPC Directive is interpreted in a way that allows an IPPC permit in relation to newly established installations to be granted after the construction is completed only if the public had an opportunity to participate at an earlier stage of the procedure when all options where open, in particular the options regarding those features that cannot realistically be altered after the construction is finalized.

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MEETING OF THE PARTIES TO THE CONVENTION ON
ACCESS TO INFORMATION, PUBLIC PARTICIPATION
IN DECISION-MAKING AND ACCESS TO JUSTICE
IN ENVIRONMENTAL MATTERS

Third meeting
Riga, 11-13 June 2008
Item 6 (b) of the provisional agenda
Procedures and mechanisms facilitating
the implementation of the Convention:
Compliance mechanism

REPORT BY THE COMPLIANCE COMMITTEE[1]

Addendum

COMPLIANCE BY DENMARK WITH ITS OBLIGATIONS UNDER THE CONVENTION

This document was prepared by the Compliance Committee in accordance with its mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties. It contains findings with regard to communication ACCC/C/2006/18 submitted by Mr. Søren Wium-Andersen (Denmark) concerning his lack of access to administrative or judicial procedures to challenge an act of culling of rooks in alleged violation of European Community law, as adopted by the Compliance Committee in March 2008.

[1]This document was submitted on the above date to allow due time for consultations with the parties concerned following the nineteenth meeting of the Compliance Committee (5-7 March 2008).

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I. BACKGROUND

1. On 3 December 2006, Mr. Søren Wium-Andersen (hereinafter the communicant), a resident of Denmark, submitted a communication to the Committee alleging non-compliance by Denmark with its obligations under article 9, paragraph 3, of the Convention.

2. The communication concerns access to justice for individuals in Denmark. The communicant claims that Danish law does not provide him with any means to challenge the alleged failure of Denmark to correctly implement the European Community Directive 79/409/EEC on the Conservation of Wild Birds (Birds Directive). In a letter to the secretariat, dated 20 December 2006, the communicant clarified that his communication concerns the lack of a right for him to have access to a review or appeal procedure concerning the implementation of the Birds Directive in Denmark.

3. The communication was forwarded to the Party concerned on 2 April 2007, following a preliminary determination as to its admissibility. The same day, the secretariat sent a letter with questions on behalf of the Committee to the communicant as well as to the Party concerned.

4. In its reply, dated 7 September 2007, the Party concerned disputed the claim of non-compliance. It stated that it understood the communication as focusing on the lack of access to procedures to challenge the alleged non-compliance of Danish law with the Birds Directive, and held that Denmark believed that it fully met the requirements of article 9, paragraph 3, of the Convention.

5. In a letter to the secretariat, dated 20 September 2007, the communicant clarified that his communication did not concern the general implementation of the Birds Directive, but rather the lack of administrative and judicial procedures through which he could challenge a concrete act of culling of rooks by the public authority of the municipality of Hillerød in May and June 2006. He concluded that therefore Denmark had not provided the means set out in article 9, paragraph 3, of the Convention.

6. The Committee at its fifteenth meeting (21-23 March 2007) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the arguments put forward by the Party concerned in its response and having further discussed the issue with both parties at its eighteenth meeting (28-30 November 2007), the Committee at the same meeting confirmed the admissibility of the communication, deeming the points raised by the Party to be of substance rather than related to admissibility.

7. The Committee discussed the communication at its eighteenth meeting, with the participation of representatives of both the Party concerned and the communicant, *inter alia* on the basis of the questions raised by the Committee in letters dated 1 October 2007 sent to both the Party concerned and the communicant.

8. In the discussion, the communicant pointed to the lack of possibilities to challenge the allegedly insufficient implementation by Denmark of the Birds Directive through the Danish penal law system. He also brought to the attention of the Committee the different statements regarding procedural remedies in environmental matters in the 2005 Danish Implementation Report to the Meeting of the Parties and in the Country report of Denmark in a 2007 study by Milieu Ltd under contract to the European Commission, entitled "Measures on access to justice in environmental matters (Article 9(3))" that had been submitted to the Committee by the Party concerned prior to the meeting. He mentioned that he had contacted the police authority as well as the public prosecutor, and that he had written a letter to the Nature Protection Board of Appeal (Naturankenævnet). He also explained that the reason why he had not contacted the Forest and Nature Agency (Skov- og naturstyrelsen), was that he did not believe such action would lead to any result. Asked why he had not used private law remedies, e.g. by suing for an injunction, the communicant replied that such procedures would be too costly.

9. For its part, the Party concerned stressed that the decision by the municipality of Hillerød to cull rooks was carried out not in its capacity of public authority, but as landowner. The Party concerned also described the applicable legislation, in particular the Hunting and Wildlife Act and the derived Statutory Order on Wildlife Damage, and the principles on standing before courts and administrative authorities in Danish law.

10. On 7 January 2008, the secretariat received an e-mail from the communicant containing a comment and an expert opinion, disputing the conclusions in the 2007 study by Milieu Ltd on access to justice in environmental matters in Denmark. In accordance with the Committee's procedures, this correspondence was forwarded to the Party concerned.

11. The Committee deliberated on the communication at its eighteenth session and completed its preparation of draft findings and recommendations through its electronic decision-making procedure in January 2008.

12. In accordance with paragraph 34 and with reference to paragraph 36 (b) of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicant on 1 February 2008. Both were invited to provide any comments by 11 February 2008. The Committee received two letters from the communicant, dated 15 and 18 February 2008, respectively. The comments by the communicant were taken

into account by the Committee by the Committee at its nineteenth meeting, to the effect that some minor changes were made in the draft findings. At the request of the Party concerned, the Committee extended the commenting deadline to 14 March 2008. The Party concerned provided its comments on that date. In its comments, the Party concerned referred to the draft recommendations made by the Committee alongside the draft findings and noted that it did not wish to accept them, since "the Committee does not find that Denmark does not comply with its obligations according to the Convention". Having regard to its finding set out in paragraph 41, Committee therefore had no possibility to maintain the recommendations.

II. SUMMARY OF FACTS, EVIDENCE AND ISSUES[2]

13. The matter concerns the lack of access for the communicant to administrative or judicial procedures to challenge the culling of rooks (corvus frugilegus) by the municipality of Hillerød, allegedly in violation of the Birds Directive.

14. According to the communicant, in spring 2006 the municipality of Hillerød implemented an extensive culling of rooks in several locations owned by the municipality. One of the rook colonies was situated on a water purification plant, one at a garbage station and others close to town dwellings. The municipality of Hillerød had the intention to cull 1,500 juvenile rooks to reduce the problem connected to vocal noise due to the breeding behaviour in the rook colonies. In cooperation with the State Forest District of the Danish Forest and Nature Agency, under the Danish Ministry of the Environment, and the Hillerød municipality, a number of persons related to the municipality were allowed to cull the juvenile rooks during the period of 1 May to 15 June 2006.

15. The communicant claims that the decision of the municipality, made by it in its capacity of a landowner, to cull the juvenile rooks violates the Birds Directive. Rooks are listed in annex II of the Birds Directive with the effect that they cannot be hunted in Denmark, unless four criteria set out in the directive are met. According to the communicant, none of these criteria were fulfilled before the culling.

16. In Danish law, the hunting of birds is regulated by the Hunting and Wildlife Management Act and the derived Statutory Order on Wildlife Damage. At the time of the decision of the Hillerød municipality, in its capacity as landowner, to cull the juvenile rooks, there was no prohibition against such acts in the said statutory order. Thus, at that time, provided certain conditions were met, landowners were allowed to cull such birds on their land without a license or any kind of prior authorisation. Yet, such culling was in violation of the Birds Directive, unless certain criteria were fulfilled.

17. According to Danish law, the Forest and Nature Agency is responsible for supervising activities covered by the Statutory Order on Wildlife Damage. As such it is bestowed with the power to act against acts that may contravene provisions relating to wildlife damage. If a private person or an environmental organisation report a violation against the statutory order to

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

the Agency, and the Agency finds the report well founded, it has to request the immediate termination of the challenged acts. A failure to comply with such a request is a criminal offence.

18. The communicant has stated that he wrote letters to the editors of local newspapers, but the municipality continued with the culling. He also reported the culling to the police authority, but his report was turned down. He appealed the decision of the police to the public prosecutor, but this appeal was turned down too. The communicant then reported the alleged non-compliance with the Birds Directive to the Nature Protection Board of Appeal, and was informed by the Board of Appeal that it did not have jurisdiction with regard to the implementation of European Community directives. In its reply, the Nature Protection Board of Appeal informed the communicant that his request had been forwarded to the Forest and Nature Agency for possible actions. Yet, the communicant never received a reply from the Forest and Nature Agency. During the discussion at the eighteenth meeting of the Committee, the Agency representative agreed that it would have been an act of good governance on behalf of the Agency to react to the letter of the communicant.

19. While the Forest and Nature Agency never contacted the communicant with regard to his letter, the Statutory Order on Wildlife Damage was indeed amended in 2006, with the effect that landowners are no longer allowed to cull rooks on their land or elsewhere without a license granted by the Forest and Nature Agency. However, the changes in the statutory order did not change the rules on administrative appeal. Thus, there is still no possibility to make an administrative appeal against the decision by the Forest and Nature Agency.

20. The communicant did not report the landowner's decision to cull the rooks to the Forest and Nature Agency, with a request that the Agency stop the culling, or to the Ombudsman. Nor did he start a judicial procedure against municipality. The local branch of the Danish Ornithological Society contacted the Hillerød municipality about the culling (and informed the local press), but there were no attempts by this society or any other member of the public, individuals or non-governmental organizations, to challenge the acts of culling through any administrative or judicial procedures.

21. As far as access to justice is concerned, Danish courts maintain the general criteria that, to have standing, the person concerned, whether a physical or legal person, must have a concrete, significant and individual interest in the case. Danish court practice on access to courts for non-governmental organizations in matters relating to nature protection is scarce and not that well established, and generally rather restrictive towards non-governmental organizations. Yet, some relevant jurisprudence has developed since the entry into force of the Convention for Denmark. In particular, the jurisprudence of the Western High Court (Vestre Landsret), as reflected in its decision of 2001 (*Danmarks Sportfiskerforbund and Lemvig og Omegns Sportfiskerforening vs. Miljø- & Energiministeriet, Skov- og Naturstyrelsen and Naturklagenævnet* [Danish Angler Society and Lemvig and Omegn's Angler Society vs. Ministry of the Environment and Energy, Forest and Nature Agency, and Nature Protection Board of Appeal], U.2001.1594V) indicates that at least some nation-wide as well as local non-governmental organizations concerned with the protection of wildlife can bring cases to court for an injunction. In this case, the organizations challenged decisions to allow the introduction of beavers into certain areas. While the case differs from that of challenging the culling of birds, it shows that such organizations can be considered to have a sufficiently concrete, significant and individual interest to go to court.

For individuals, however, invoking concerns for wildlife normally does not suffice to grant standing in Danish courts.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

A. General considerations

22. Denmark ratified the Convention on 29 September 2000. The Convention entered into force for Denmark on 30 October 2001.

23. The focus of the examination of the Committee is the claim by the communicant that he had no means available to challenge the alleged failure of Denmark to correctly implement the Birds Directive, and that because of this Denmark failed to comply with the Convention. In addition to writing letters to the editors of local newspapers, he reported the case to the police authority, appealed the decision by the police not to take action to the public prosecutor, and sent a letter to the Nature Protection Board of Appeal, asking it to investigate whether the Danish legislation on hunting and the derived Statutory order on Wildlife Damage complied with the Birds Directive. Yet, the Committee notes that neither did he nor any other member of the public request the competent supervisory authority, i.e. the Forest and Nature Agency, to take action against the culling.

24. It is not for the Committee to consider the culling of birds as such. However, the right of members of the public to challenge acts and omissions concerning wildlife is indeed covered by article 9, paragraph 3, of the Convention, to the extent that these amount to acts or omissions contravening provisions of national law relating to the environment.

25. The municipality of Hillerød constitutes a public authority, in accordance with article 2, paragraph 2, of the Convention, but the relevant decision to cull the juvenile rooks was made by the municipality not in its capacity of public authority, but as a landowner. Even so, article 9, paragraph 3, applies to the act by the Hillerød municipality to cull the juvenile rooks, regardless of whether it acted as public authority or landowner (and thus, in the same vein as a private person).

26. Although the opportunity to challenge acts and omissions set out in article 9, paragraph 3, pertains to a broad spectrum of acts and omissions, the challenge must refer to an act or omission that contravenes provisions in the national law relating to the environment. At the time of the culling of the rooks, while these acts may have been prohibited by the European Community Birds Directive, culling by landowners was allowed according to Danish legislation, including statutory orders.

27. The communicant argues that the act of culling the rooks contravenes European Community legislation rather than Danish legislation, whereas article 9, paragraph 3, refers to “provisions of its national law relating to the environment”. Therefore, the Committee must first consider whether in a case concerning compliance by Denmark, i.e. an EU member state, European Community legislation is covered by article 9, paragraph 3, of the Convention. The Committee notes that, in different ways, European Community legislation does constitute a part

of national law of the EU member states. It also notes that article 9, paragraph 3, applies to the European Community as a Party, and that the reference to "national law" therefore should be understood as the domestic law of the Party concerned. While the impact of European Community law in the national laws of the EU member states depends on the form and scope of the legislation in question, in some cases national courts and authorities are obliged to consider EC directives relating to the environment even when they have not been fully transposed by a member state. For these reasons, in the context of article 9, paragraph 3, applicable European Community law relating to the environment should also be considered to be part of the domestic, national law of a member state.

B. Criteria for ensuring access to administrative or judicial procedures

28. Access to justice in the sense of article 9, paragraph 3, requires more than a right to address an administrative agency about the issue of illegal culling of birds. This part of the Convention is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. Thus, Denmark is obliged to ensure that, in cases where administrative agencies fail to act in accordance with national law relating to nature conservation, members of the public have access to administrative or judicial procedures to challenge such acts and omissions.

29. As the Committee has pointed out in its findings and recommendations with regard to communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paras. 29-37), while article 9, paragraph 3, refers to "the criteria, if any, laid down in national law", the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which members of the public 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 other the 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 or other members of the public from challenging act or omissions that contravene national law relating to the environment. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, "to take fully into account the objective of the Convention to guarantee access to justice".

30. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent national law effectively has such blocking consequences for members of the public in general, including environmental organizations, 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 to 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."

31. The Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a substantial individual interest of the sort found in Danish law, provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to wildlife protection.

C. Available procedures to challenge decisions to cull protected birds

32. Although the communication centres on the communicant's attempts to initiate penal procedures against those responsible for the culling, the lack of such an opportunity for the communicant does not in itself necessarily amount to non-compliance with article 9, paragraph 3. That depends on the availability of other means for challenging such acts and omissions. Accordingly, for the assessment of compliance by the Party concerned, it is not sufficient to take into account only whether the communicant could make use of the Danish penal law system. It is not even sufficient to examine whether he himself had access to any administrative or judicial procedure to challenge the decision to cull the bird population. Rather, the Committee will have to consider to what extent some members of the public – individuals and/or organisations – can have access to administrative or judicial procedures where they can invoke the public environmental interests at stake when challenging the culling of birds allegedly in contravention of Danish law, including relevant European Community law.

33. At the time of the culling, the communicant was indeed able to address the alleged non-compliance of the activities in Hillerød with the Birds Directive to the Forest and Nature Agency. If the Agency would have found this claim to be well founded, it may have acted so as to stop the activity. Although the communicant's report on the incompatibility of Danish law and the Birds Directive did reach the Forest and Nature Agency, via the Nature Protection Board of Appeal, the report was essentially limited to a request to investigate the issue of compatibility. It did not include any claim for action against the municipality of Hillerød.

34. If the communicant had requested action by the Forest and Nature Agency at the time of the culling, it is still quite unlikely that the Agency would have decided in his favour, taking into account that the Agency was already fully aware of decisions of the municipality of Hillerød to cull the rooks. Moreover, had the Agency's decision not been in his favour, it is also unlikely that he would have had access to a judicial review procedure due to the Danish criteria for standing in court. Even so, the Committee notes that the communicant did not make his request to the Agency, taking into account also that he could have complained to the Minister of the Environment if the Agency had not decided in his favour. Nor did the communicant report the matter to the Ombudsman. As far as the Committee is aware, nor did any other member of the public.

35. While there is also an opportunity for individuals and non-governmental organisations to bring a private action directly to a court against an illegal activity, it is clear that in this case the communicant would not have fulfilled the criteria for standing. However, considering the limited, yet relevant, case law mentioned in paragraph 21, there appears to have been some possibility for some members of the public, namely certain non-governmental organizations, to challenge the culling. They could have reported the culling to the Forest and Nature Agency, alleging that the statutory order was not compatible with the Birds Directive and pointing at the general obligation of public authorities to ensure the fulfilment of Denmark's obligations arising

from European Community legislation. Had the Forest and Nature Agency turned down their request for actions against the culling, at least some such organisations, in particular local ones, might have had access to a judicial review of the Agency's decision.

36. The Committee is aware that Danish jurisprudence is not fully clear as to the effectiveness of this remedy, and that there is little case law to build upon. Yet, it cannot ignore the fact that neither the communicant nor any other member of the public tried to request action by the Forest and Nature Agency, and that no other actions were taken by the communicant or any other member of the public than those referred to in paragraph 23. The Committee is not convinced that, simply because there was no possibility for the communicant to trigger a penal procedure, Denmark failed to comply with the Convention in this particular case. Nor was there sufficient information provided to the Committee to conclude that no other member of the public would have been able to challenge the culling through other administrative or judicial procedures.

37. While the Committee concludes that it is not convinced that Denmark has failed to comply with the Convention, it notes the limited case law with regard to standing for non-governmental organisations in these situations. It therefore stresses that its findings are based on the presumption that the approach reflected in the decision by the Western High Court in 2001, referred to in paragraph 21, should indeed be applied mutatis mutandis as a minimum standard of access to justice for non-governmental organizations in cases relating to the protection of wildlife.

38. Although it is not decisive for the question of compliance in this case, the Committee notes that the Danish law on the culling of birds was actually changed shortly after the communicant's request reached the Forest and Nature Agency. It is not clear whether it was a direct result of the communicant's letter, but the new regime for the culling of birds requires a prior permit for any culling of the bird species in question. The licensing procedure has the effect that it is now illegal to cull these birds without a licence, and the Forest and Nature Agency is required to take action to immediately stop any unauthorised culling. If such a request by an environmental non-governmental organisation is turned down by the Agency, the relevant non-governmental organizations would have access to a judicial review procedure.

39. The Committee is aware that several kinds of decisions related to nature conservation can be appealed within the administrative system to the Nature Protection Board of Appeal. Often these decisions concern the protection of areas and habitats, and conflicts between the landowners' interests in using land against the public interest of preserving nature. However, some decisions relating to the direct protection of species of wild fauna, such as the new licensing regime on the culling of birds, cannot be appealed to the Nature Protection Board of Appeal, but only to a court. In the view of the Committee, although access to courts is an essential element, providing an administrative appeal to the Nature Protection Board of Appeal, in addition to the court procedure, would seem to be a more effective way of promoting the objective of the Convention than the current system.

IV. CONCLUSIONS

40. Having considered the above, the Committee adopts the findings set out in the following paragraphs.

41. The Committee is not convinced that the lack of opportunity for the communicant to initiate a criminal procedure in itself amounts to non-compliance by Denmark. On the basis of the information provided in the case, the Committee is not able to conclude that Danish law effectively bars all or almost all members of the public, in particular all or almost all non-governmental organizations devoted to wildlife and nature conservation, from challenging the culling of wild birds, as covered by article 9, paragraph 3.

42. While the Committee is not convinced that the Party concerned fails to comply with the Convention, it notes the limited case law with regard to standing for non-governmental organisations in these situations. As far as standing for such organisations is concerned, it therefore stresses the importance of applying the approach reflected in the decision by the Western High Court in 2001, referred to in paragraph 21, mutatis mutandis, as a minimum standard of access to justice in cases relating to the protection of wildlife.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-third meeting
Geneva, 31 March–3 April 2009

Report of the Compliance Committee on its Twenty-third meeting

Addendum

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

Adopted by the Compliance Committee on 3 April 2009

Summary

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

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I. Background

1. On 14 August 2007, the Albanian non-governmental organization (NGO) Civic Alliance for the Protection of the Bay of Vlora (Albania) submitted a communication to the Committee alleging a failure by the European Community to comply with its obligations under article 6 of the Convention.

2. The communication alleged that the European Community, through the European Investment Bank (EIB), was not in compliance with the Convention's article 6 by virtue of its decision to finance the construction of a thermo-power plant (TPP) in Vlora, Albania, without ensuring proper public participation in the process. The communicant claimed that the project had not been carried out in accordance with the public participation requirements of the national legislation or those of the Convention, to which both the European Community and Albania were Parties.

3. The communication is related to communication ACCC/C/2005/12, submitted earlier by the same communicant and alleging non-compliance by Albania with the Convention, inter alia, in relation to decision-making with respect to the TPP in Vlora considered by the Committee in the period 2005–2007 (ECE/MP.PP/C.1/2007/4/Add.1).

4. Noting that at the time of its submission the communication did not contain any supporting documentation, the Committee requested additional information and clarification from the communicant regarding the alleged violations of the Convention in a letter dated 1 October 2007. In response to this letter, the communicant submitted a memorandum specifying that in its opinion the European Community had not been in compliance with article 4, paragraph 1, article 5, paragraph 3, and article 6 of the Convention.

5. At its eighteenth meeting (28–30 November 2007), the Committee determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned.

6. Notification of the communication was forwarded to the Party concerned on 19 December 2007 along with a number of questions put forward by the Committee. The Committee inquired, in particular, whether information the communicant had requested from EIB was considered by the Party concerned to be environmental information and whether the consent of a borrower would be needed to release information related to loan agreements. The Committee also inquired about any available review procedures for denials of information requests. The communication itself was forwarded on 14 January 2008.

7. Also on 19 December 2007, the secretariat forwarded to the communicant a number of questions posed by the Committee, inter alia with regard to more detailed information on the information request and to the timing of the events and decisions referred to in the communication.

8. The Party concerned requested an extension for its response by e-mail on 20 May 2008. It responded on 5 August 2008, stating that it would contend that the Community was not to be considered as having acted in breach of the Convention. The communicant replied in a letter dated 20 August 2008.

9. The Committee discussed the communication at its twenty-first meeting (17–19 September 2008). The meeting was attended by representatives of both the Party concerned and the communicant, who answered questions, clarified issues and presented information.

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

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

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

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

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

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

15. The communication concerns the co-financing of the Vlora TPP project by EIB. The project is co-financed by the World Bank and the European Bank for Reconstruction and Development (EBRD). Both the World Bank and EBRD had also received complaints concerning the decision-making process leading to the loans by these institutions for the project. Independent review procedures have been or are being undertaken by the relevant bodies established by the World Bank and EBRD to examine whether they acted in conformity, inter alia, with their respective environmental policies and procedures. The Independent Recourse Mechanism established by EBRD published its "compliance review report relating to the Vlora Thermal Power Generation Project" on 17 April 2008. The compliance review expert came to the conclusion that "the aforesaid failure of the Bank to ensure full compliance with its obligations under Section II, paragraph 11, and Section III, paragraph 26, of the EBRD Environment Policy constitutes a material violation of the Environmental Policy warranting remedial changes to the Bank's practices and procedures so as to avoid a recurrence of such or similar violations in the future but not one warranting any remedial changes in the scope or implementation of the Project". The World Bank Inspection Panel recommended an investigation of the matters raised in a complaint submitted on behalf of the Civic Alliance for the Protection of the Bay of Vlora[2], but that investigation is understood to be ongoing at the time of finalizing these findings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Consideration and evaluation by the Committee

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

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

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

A. Access to environmental information

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

B. Environmental information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Filing an information request

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

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

D. Public participation in decisions on specific activities

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

IV. Conclusions

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

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

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-fourth meeting
Geneva, 30 June–3 July 2009

Report of the Compliance Committee on its Twenty-fourth meeting

Addendum

Findings with regard to communication ACCC/C/2007/22 concerning compliance by France

Adopted by the Compliance Committee on 3 July 2009

Summary

These findings were prepared by the Compliance Committee in accordance with its mandate as set out in paragraphs 13, 14 and 35 of the annex to decision I/7 of the Meeting of the Parties. They concern communication ACCC/C/2007/22 submitted by L'Association de Défense et de Protection du Littoral du Golfe de Fos-sur-Mer, Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhône and Fédération d'Action Régionale pour l'Environnement (FARE Sud) regarding compliance by France with its obligations under the Convention in relation to decision-making processes and access to justice for a domestic waste disposal plant.

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I. Background

1. On 21 December 2007, the three French associations L'Association de Défense et de Protection du Littoral du Golfe de Fosse-sur-Mer, Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhône, and Fédération d'Action Régionale pour l'Environnement (hereinafter the communicant), represented by Mr. Jean-Daniel Chetrit of Cabinet Pichavant-Chetrit, submitted a communication to the Committee, alleging non-compliance by France with its obligations under article 3, paragraph 1, article 6, paragraphs 1, 2, 3, 4, 5 and 8, and article 9, paragraphs 2 and 5, of the Convention.

2. The communication alleges that the Party concerned failed to provide for public participation in the decision-making processes that led to the construction by Communauté Urbaine Marseille Provence Métropole (CUMPM) of a centre for the processing of waste by incineration at Fos-sur-Mer. First, in not arranging for the public concerned to participate properly in this decision-making procedure, it is alleged that France failed to comply with its obligations under article 6 of the Convention. Second, France is alleged to have also violated that article by not correctly transposing the list of activities mentioned in article 6, paragraph 1 (a), of the Convention and featuring it in its annex I. Moreover, the communication alleges that in neglecting to take remedial action with respect to the case law of the Conseil d'Etat, which according to the communicant denies the public concerned by a project the opportunity to avail itself directly of the provisions of article 6, paragraphs 4, 5 and 8, and article 9, paragraph 5, of the Convention, France failed to comply with its obligations under the Convention. More specifically, according to the communication:

(a) The CUMPM failed to provide for public participation, as set out in article 6, paragraph 4, of the Convention, before adopting, on 20 December 2003, resolutions which decided (i) on the particular method of processing household wastes, basically through incineration, (ii) on the site for the installations, and (iii) to resort to a public service concession procedure for the construction and management of the installations;

(b) The information made available by CUMPM about the project through a press release in July 2004 was provided at too late a stage and did not reach the public concerned, thus resulting in a violation of article 6, paragraph 4, of the Convention;

(c) The decision of the National Commission for Public Debate on 28 September 2004 to reject a request for a public debate violated article 6 of the Convention;

(d) CUMPM did not provide for public participation in accordance with article 6 of the Convention before adopting the resolution, on 13 May 2005, that approved the choice of concessionaire for the waste treatment project and defined the modalities for the processing of the waste;

(e) In the authorization procedure in 2005 and 2006, the Prefect of Bouches-du-Rhône failed to provide for effective public participation when all options were open, as set out in article 6 of the Convention, by informing members of the public at too late a stage about the authorization procedure, limiting the public inquiry to only three locations and allowing too short a period of time for participation in the decision-making process;

(f) Members of the public did not have access to justice to challenge the resolutions of 20 December 2003;

(g) In violation of article 9 of the Convention, members of the public were not granted access to justice to challenge the omission of not arranging a public debate before the National Commission for Public Debate in 2004;

(h) Members of the public did not have access to justice to challenge the authorization by the Prefect on 12 January 2006, and it is impossible in France to obtain the suspension and/or annulment of a decision taken at the end of a decision-making process;

(i) Members of the public did not have access to justice to challenge the construction permit, given on 20 March 2006;

(j) The lack of clear legislation to implement the provisions of the Convention constitutes a violation of article 3, paragraph 1, of the Convention.

3. The communication was forwarded to the Party concerned on 17 April 2008, together with a number of questions from the Committee, following a preliminary determination by the Committee at its nineteenth meeting (5–7 March 2008) that it was admissible. On 17 April 2008, the secretariat also sent a letter to the communicant with questions on behalf of the Committee.

4. In its reply, dated 17 September 2008, the Party concerned disputed the claim of non-compliance and stated, inter alia, that the resolutions adopted by CUMPM in 2003 and 2005 only established the outline for the municipality's plan to build a waste management plant, but did not form a part of the decision-making process; nor did they in any way bind the Prefect in the decision whether or not to grant authorization to the waste management plant.

5. In a letter to the secretariat, received on 17 September 2007, the communicant replied to the questions posed by the Committee. The communicant provided a modified version of this letter on 9 October 2008.

6. The Committee discussed the communication at its twenty-second meeting (17-19 December 2008), with the participation of representatives of both the Party concerned and the communicant.

7. In the discussion, the communicant argued that there were gaps in French environmental law with respect to the requirements of the Convention, since under French law, the principle of independence of legislation applied. Thus, if several laws applied, each one must comply with the Convention. According to the communicant, CUMPM was obliged to provide for a tender, since it decided not to operate the waste management service itself, but to invite a private operator. The communicant also held that once the tender was finalized, by the CUMPM resolution of 13 May 2005 approving the choice of concessionaire for the plant, the municipality was bound to comply with the resolution.

8. The Party concerned disagreed with the communicant, and argued that only the authorization by the Prefect of 12 January 2006 amounted to a decision according to article 6 of the Convention. According to the Party concerned, the preceding acts and decisions made by CUMPM did not imply an authorization of the plant. Moreover, the Party concerned argued that the Prefect's decision of 12 January 2006 was a single act that covered all aspects of the installation, and that it had been preceded by public participation, in accordance with the Convention. Thus, the Party concerned held that at the stage of the Prefect's decision, all options were open, and the application could have been turned down if the Prefect so decided, also taking into account the views of members of the public. During the discussion, the Party concerned pointed out that there were about 50 such refusals by prefects per year in France.

9. At its twenty-second meeting, the Committee confirmed the admissibility of the communication. It requested further information from the communicant and the Party concerned relating to possibilities for injunctive relief. Additional information was provided by the communicant and the Party concerned by letters of 27 and 28 January 2009.

10. The Committee began to prepare draft findings at its twenty-second meeting and completed the preparation of draft findings at its twenty-third meeting (31 March–3 April 2009). In accordance with paragraph 34 of the annex to decision 1/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 15 May 2009. Both were invited to provide any comments by 15 June 2009.

11. The Party concerned and the communicant provided comments on 25 June 2009 and 17 June 2009, respectively.

12. At its twenty-fourth meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

13. The communication concerns the alleged lack of opportunity for the members of the public to participate in the decision-making processes leading to the construction by CUMPM of a centre for the processing of waste by incineration at Fos-sur-Mer. The complex involves a total incineration capacity of 450,000 tons of waste per year.

A. French law

14. The French Town Planning Code provides for different town planning documents. Integrated land-use plans (*schémas de cohérence territoriale*) establish the basic town planning guidelines for a group of municipalities, with prospects for their development. Local town plans (*plans locaux d'urbanisme*) or land-use plans (*plans d'occupation des sols*) establish the rules and restrictions that are directly applicable to any public or private person executing any works or construction or the opening of classified installations as specified in the plan. Concerted development zones (*zones d'aménagement concerté*) are zones in which a competent public authority or institution decides to intervene to develop and equip sites, often in order to transfer them or grant them on concession to public or private users. In addition, each Department must define its priorities with regard to the disposal of household wastes and related wastes in a particular departmental plan, as set out in the Environmental Code (*code de l'environnement*).

15. Classified installations, such as installations for the storage or management of wastes by incineration, are subject to a particular authorization procedure under the Environmental Code, which contains provisions on public participation (*enquête publique*). Installations such as the waste treatment plant in Fos-sur-Mer require a permit by the Prefect (*Préfecture*), which is a State authority.

16. In addition to the environmental permit mentioned in paragraph 14, construction permits (*permis de construire*) are required under French law. However, these only govern the construction of the buildings of an installation, and do not deal with the environmental impact of the operations.

17. In addition to the standard procedures mentioned under paragraphs 14 and 15, the Environmental Code also provides for the establishment of a National Commission for Public Debate (*Commission nationale du débat public*, CNDP) in cases where the estimated

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

cost of the buildings and infrastructure is more than €150 million. This is an independent administrative authority responsible for ensuring public participation in the process of preparation of development and infrastructure projects of national importance relating to certain categories of operations, as listed by a decree of the Conseil d'Etat, whenever substantial socio-economic interests are at stake or the impact on the environment or land use is likely to be significant. In such cases, public participation may take the form of a public debate on the desirability, objectives and main characteristics of the project.

B. Procedures, decisions and resolutions

18. On 20 December 2003, CUMPM adopted two resolutions for the purpose of implementing a project for the construction and management of a complex for the disposal of household and related wastes with a total incineration capacity of 450,000 tons of waste per year, together with a sorting-methanization centre for about 150,000 tons per year. Thereby, the municipality chose the method of processing its household wastes as well the location for the installations. Finally, it decided to resort to the public service concession procedure, i.e. to have a private operator carry out public services. At the time of the resolutions, a land-use plan of 1991 and a zone development plan for the industrial and port zone of 1993 were in place. Neither of these plans forbade the construction of the incinerator.

19. As mentioned in paragraph 2, the communicant alleges that the public was never invited to participate in the procedure leading up to the 2003 resolutions. One of the non-governmental organizations (NGOs) subscribing to the communication therefore applied to the Chairman of CUMPM to have the resolutions reconsidered. The Chairman rejected this application, and on 24 June 2004 the association filed an application to the Administrative Court of Marseille to have the resolutions set aside. On 12 July 2005, the Administrative Court of Marseille dismissed the application, and the association then lodged an appeal with the Administrative Court of Appeal of Marseille.

20. In the summer of 2004, CUMPM informed the public about the project through the press. According to the communicant, this was too late in the procedure to comply with the Convention. Due to the lack of public debate, two NGOs (not the communicant) requested the CNDP to arrange a public debate, according to the procedure set out in the Environmental Code. However, that request was turned down by CNDP because the estimated costs for the buildings and infrastructure were below the threshold mentioned in paragraph 16. Legal proceedings were instituted against the decisions not to provide for public debate, but the Conseil d'Etat dismissed this action on 28 December 2005.

21. By a resolution of 13 May 2005, CUMPM approved the choice of concessionaire for the waste treatment public service together with a draft concession contract, authorizing the Chairman of CUMPM to sign the contract. The resolution also defined the modalities for the processing of the waste. On 4 July 2005, the contract between CUMPM and the private operator was signed. According to the communicant, the decision to choose the concessionaire was made without due public participation and, once passed, the resolution prevented CUMPM from modifying the project's technical options and geographic location. Moreover, according to the communicant, the signing of the contract precluded any effective remedy for the communicant.

22. By a notice in two local daily papers on 30 August 2005, the Prefect of Bouches-du-Rhône announced that a public inquiry was to take place between 19 September and 19 October 2005, with regard to the application by the private company to operate the waste treatment plant in Fos-sur-Mer. The Prefect chose three places for the inquiry: Fos-de-Mer, Port-Saint-Louis-du-Rhône and Saint-Martin-de-Crau.

23. On 12 January 2006, the Prefect of Bouches-du-Rhône granted the authorization of the waste treatment centre.

24. As mentioned in paragraph 2, the communicant alleges that in many respects the decision-making of the Prefect failed to provide for public participation as required by the Convention. Three appeals were lodged against the Prefect's authorization. One sought to have the interim relief judge of the Administrative Court of Marseille to suspend the authorization on the grounds that members of the public should have been better informed. This appeal was dismissed, and the judgement was later upheld by the Conseil d'Etat. Another appeal was made by two of the NGOs comprising the communicant, applying to the interim judge of the Administrative Court of Marseille to have the authorization suspended by ruling on the ordinary suspension of administrative decisions. On 24 May 2006, the interim judge decided to suspend the authorization. This decision was appealed against by the Minister of Environment and Sustainable Development to the Conseil d'Etat, which, on 15 February 2007, set aside the suspension. Finally, an appeal was lodged against the Prefect's authorization to the Administrative Court of Marseille, seeking the annulment of the 12 January 2006 decision. The court dismissed this appeal on 13 November 2007.

25. On 20 March 2006, the Prefect of Bouches-du-Rhône granted the company a construction permit for the incinerator.

26. Applications were made to the interim judge of the Administrative Court of Marseille to suspend the construction permit, in part because the decision had been made in violation of the Convention. In two orders of 16 June 2006, the applications were rejected. The decisions by the interim judge were upheld by the Conseil d'Etat in a judgment of 15 February 2007. On 29 June 2007, the Administrative Court of Marseille dismissed the applications for annulment on the merits.

III. Consideration and evaluation by the Committee

A. General considerations

27. France deposited its instrument of approval of the Convention on 8 July 2002. The Convention entered into force for France on 6 October 2002.

28. Waste treatment installations such as the one in Fos-sur-Mer are listed in annex I, paragraph 5, of the Convention and thus decisions on whether to permit such installations are subject to the requirement for public participation in article 6 of the Convention. Moreover, decisions, acts and omissions related to permit procedures for such installations are subject to the review procedure set out in article 9, paragraph 2, of the Convention.

29. For the Committee, when examining whether the Party concerned complied with the Convention, it is essential to consider the legal implications of the resolutions adopted by CUMPM on 20 December 2003 and on 13 May 2005 in order to establish whether they amounted to decisions under article 6 or 7 of the Convention. The Committee also needs to examine whether the authorization by the Prefect on 12 January 2006, in accordance with the Environmental Code, meets the requirements of article 6 of the Convention. However, the Committee will not consider whether the procedure before the National Commission for Public Debate (CNDP) as such satisfies the requirements of the Convention in cases when it is applied. The reason for not doing so is that, as stated below, compliance by the Party concerned in the given case does not depend on that participatory procedure. The relevance of examining whether the judicial procedures fulfilled the criteria of article 9, paragraphs 2 and 5, depends on the assessments of the examination of the 2003 resolutions and the 2006

authorization. The Committee limits its review concerning access to justice to the decisions that fall under the scope of article 6 of the Convention.

30. The Committee observes that in the Department of Bouches-du-Rhone there was no plan for disposal of household and related waste (PDEDMA) in the period when the decisions were taken (from 2003 to 12 January 2006). If such a plan had been in place, it could have provided guidance on whether new installations for waste incineration would be constructed, and if so, indicated their possible locations. According to the Convention, such a plan should have been elaborated with the participation of the public concerned and the public would thereby have been given the right to a say at an earlier stage of the decision-making process. Focusing on plans and programmes as a useful tool in the hierarchy of governmental decisions is an advantage in any decision-making process. However, the Committee finds that the lack of a PDEDMA does not entail any violation of the Convention.

31. According to the communicant, because of the lack of clear legislation in conformity with the provisions of the Convention, the Party concerned failed to comply with article 3, paragraph 1, of the Convention. However, the Committee finds that there is no information provided in this case that substantiates such a violation by the Party concerned.

B. Resolutions of 20 December 2003 and 13 May 2005

32. By the two resolutions of 20 December 2003, CUMPM chose the method of processing its household wastes and the location for the installations, and decided to resort to the public service concession procedure, i.e. to a tender in order to have a private operator carry out public services. While the resolutions to choose modalities and location were instrumental to the formation of the installation and for the municipality's work on the management of household wastes, in no way did they as such permit the waste treatment centre. Nor did the resolution to launch a tender procedure imply a permit for the installation or the operator *in spe*. Rather, for such classified installations, the Environmental Code sets out that a permit is required by the Prefect. Thus, while there may be many good reasons to provide for public participation before adopting municipal resolutions of this kind, they did not amount to decisions on whether to permit the activity, as set out in article 6 and annex I of the Convention. The Committee is fully aware that different types of decisions and acts, regardless of whether they amount to a decision under article 6, may narrow down the scope of options for the final decision. Whether that is the situation in this case will be considered when examining the 2006 authorization by the Prefect. In any case, the Party concerned did not fail to comply with article 6 of the Convention, by not ensuring public participation before the adoption of the resolutions of 20 December 2003.

33. When the resolutions were adopted, on 20 December 2003, there was already a land-use plan of 1991 and a zone development plan of the industrial and port zone of 1993 in force for the location in Fos-sur-Mer. According to the information given to the Committee, none of these plans forbade the construction of the waste treatment centre. The resolutions neither had any legal effect on these plans, nor conferred any right to construct or operate the waste treatment centre or to use the site, nor in any other respect did they entail legal effects amounting to that of the applicable planning instruments. Moreover, they did not take the form of programmes or policies. Thus, the Party concerned did not fail to comply with article 7 of the Convention either, by not ensuring public participation before the 2003 resolutions were adopted.

34. The resolution adopted by CUMPM on 13 May 2005 approved the municipality's choice of concessionaire for the waste treatment project. In the resolution, the municipality also defined the modalities for the processing of the waste. While this resolution was also

instrumental for the formation of the installation as well as for the permit application to be examined at a later stage by the Prefect, it did not imply or amount to a permit for the waste treatment plant or the means of processing the waste that would fall within the scope of article 6 of the Convention. Thus, the adoption of the resolution as such without public participation did not result in a violation of article 6 of the Convention. As stated in paragraph 32, the Committee realises that different formal and informal decisions, regardless of whether they amount to a decision under article 6 of the Convention, may narrow down the scope of options for the final decision. This issue will be considered when examining the 2006 authorization by the Prefect, however.

C. Authorization of 12 January 2006 and related decisions

35. According to the Committee, the decision of the Prefect of Bouches-du-Rhône on 12 January 2006 to authorize the application for the waste treatment centre in Fos-sur-Mer amounts to a decision on a specific activity according to article 6 in conjunction with annex I of the Convention. Thus, the procedure leading to the authorization must fulfil all the requirements of article 6 of the Convention.

36. Whether all options were in fact open to the Prefect and effective public participation could take place in the decision-making procedure, as required under article 6, paragraph 4 of the Convention, depends on many factors. The first issue to consider is whether the Prefect was in any way constrained by earlier decisions, so that all options were no longer open and, for that reason, effective public participation could not take place.

37. As shown by the communicant, the authorization by the Prefect was preceded by several acts by CUMPM and the private operator. Leaving aside the plans from 1991 and 1993, respectively, the resolutions by CUMPM had the effect of narrowing down what was considered by CUMPM as only relevant method and site for treatment of household wastes. When deciding to establish a public tender, to approve the choice of concessionaire and to enter into a contract with the private operator, CUMPM in practice also narrowed down its scope of considerations of relevant forms of waste treatment. However, the question is whether any of these steps and decisions, together or in isolation, had the effect of "closing" different options in the decision-making process. As stated by the Committee in its findings with regard to communication ACCC/C/2006/17 (European Community), where several permit decisions are required in order for an activity covered by article 6, paragraph 1, to proceed, it is not necessarily sufficient to apply the public participation procedures of article 6 to just one of the permitting decisions (ECE/MP.PP/2008/5/Add.10, para. 42). When deciding whether public participation is required in several procedures for one activity, the legal effects of each decision, and whether it amounts to a permit, must be taken into account.

38. According to the communicant, when examining the application the Prefect is in no circumstance in the position of questioning the usefulness of the activity for which the permit is required. While in many national laws, the question of whether an application for a permit concerning an activity that is potentially harmful to the environment should be approved may, at least in part, depend on the usefulness of the project, this is not a requirement of the Convention. The Convention Parties may apply different criteria for approving and dismissing an application for authorization, for instance with regard to the standard of technology, the effects on health and the environment, and the usefulness of the activity in question. However, these issues are not addressed by the Convention. Rather, from the viewpoint of compliance with article 6, paragraph 4, of the Convention, the decisive issue is whether "all options are open and effective participation can take place" at the stage of decision-making in question. This implies that when public participation is provided for, the permit authority must be neither formally nor informally prevented from

fully turning down an application on substantive or procedural grounds. If the scope of the permitting authority is already limited due to earlier decisions, then the Party concerned should have also ensured public participation during the earlier stages of decision-making.

39. In the present case, to meet the criteria that all options are open and effective public participation can take place, it is not sufficient that there is a formal possibility, de jure, for the Prefect to turn down the application. If the practice in the jurisdiction of the Party concerned is such that, despite the possibility of the permit authority to reject an application, this never or hardly ever happens, then de facto all options would not be open at the stage in question. Thus, there would be no room for effective public participation as required by the Convention. The information given to the Committee does not suggest that this is the case with the authorization procedures before the French Prefects. According to the Party concerned, about 50 applications before the Prefects are refused in France each year. While the communicant argued that the Prefect could not question the usefulness of the activity, it neither confirmed nor contested the figure of refusals given by the Party concerned. It thus appears to the Committee that at the stage of deciding on the application, the Prefect indeed was in a position to reject the application on environmental or other grounds, as set out in French law. For that reason, the Committee cannot see that the Prefect was already constrained during the procedures for public participation or was unable to take due account of the views of members of the public on all aspects raised. Thus, the Party concerned did not fail to comply with article 6, paragraph 4, of the Convention on this ground.

40. Related to this question is whether any of the other decisions referred to by the communicant were such that they would also require public participation in accordance with article 6, paragraph 1, of the Convention. As held in paragraphs 28 and 29, the CUMPM resolutions of 20 December 2003 did not entail such legal effects that they amounted to permit decisions. Nor was the resolution of 13 May 2005 by the municipality to choose the concessionaire such as to entail the legal effects of a permit for the concessionaire. While it was not for the Prefect to try the application on its usefulness, in the Committee's view the decision-making procedure before the Prefect appears as a single act that covers all aspects of the location, design and operation of the installation. Thus, the fact that no provision was made for public participation with respect to the other decisions referred to does not constitute failure to comply with article 6, paragraph 1, of the Convention. However, while the Committee does not find that the Party concerned failed to comply with article 6 of the Convention, it notes that the French decision-making procedures, as reflected in the present case, involve several other types of decisions and acts that may de facto affect the scope of options to be considered in a permitting decision under article 6 of the Convention.

41. The next question is whether the public was duly informed about the decision-making procedures. According to article 6, paragraph 2, of the Convention, the public concerned shall be informed, either by public notice or individually as appropriate, "early in an environmental decision-making procedure and in an adequate, timely and effective manner". The communicant alleges that the public notice of the decision-making before the Prefect did not meet the requirements of the Convention. While the public was informed about the project by CUMPM through the press in 2004, that was not related to the decision-making procedure before the Prefect. Provided that all options were open and effective participation could take place in the decision-making before the Prefect, the question is rather whether the public concerned was informed early enough about the authorization procedure. As held by the Committee with regard to communication ACCC/C/2006/16 (Lithuania) (ECE/MP.PP/2008/5/Add.6), the requirement for the public to be informed in an "effective manner" means that the public authorities should seek to provide a means for informing the public which ensures that all those who could potentially

be concerned have a reasonable chance to learn about decision-making on proposed activities and their possibilities to participate.

42. In the present case, the Prefect informed the public by a public inquiry notice in two local daily newspapers, *la Provence* and *la Marseillaise*, on 30 August 2005. Information about the decision-making procedure was also put on the Internet site of the prefecture of Bouches-du-Rhône and Saint Martin-de-Crau. The notice contained information about the dates and locations for the inquiries in Fos-sur-Mer, Port-Saint-Louis-du-Rhône and Saint-Martin-de-Crau, as well as the places where the information was publicly available. It also provided information on the time frames. While the Committee stresses the importance of adequate public notice, based on the information provided by the communicant and the Party concerned, the Committee cannot conclude that the Party concerned failed to comply with the Convention. This form of public notice appears to the Committee to satisfy the requirements of article 6, paragraph 2, of the Convention.

43. The communicant also alleges that by only providing for public inquiries in the three aforementioned communes in the decision-making before the Prefect, the Party concerned failed to provide for effective public participation. According to the Committee, however, whether effective participation can take place does not only depend on the number of inquiries. Provided that adequate information had been given about the inquiries and that they were held in an open and transparent manner, limiting the number of inquiries to three locations in this case does not as such amount to a failure to comply with the Convention. Based on the information given to the Committee, these three hearings seem to have been open to anybody and duly announced, so that they provided adequate opportunities for the public concerned to give its views about the project. Thus, the Committee cannot conclude that the Party concerned failed to comply with article 6, paragraphs 3, 4 or 7, on these grounds.

44. When examining the time frame, the Committee recalls that the 2003 resolutions did not amount to permit decisions under article 6 of the Convention, nor did the decision to choose the private operator or establish the contracts with the operator. Therefore, the timing for public participation cannot be related to the entire timespan since the 2003 CUMPM resolutions. Thus, the question is whether the time frames given in the decision-making before the Prefect as such were sufficient for allowing the public to prepare and participate effectively, and to allow the public to submit any comments, information, analyses or opinions it considered relevant, as set out in article 6, paragraphs 3 and 7, of the Convention. The Committee notes that the announcement of the public inquiry, made on 3 August, provided a period of approximately six weeks for the public to inspect the documents and prepare itself for the public inquiry. Furthermore, the public inquiry held from 19 September to 3 November 2005 provided 45 days for public participation and for the public to submit comments, information, analyses or opinions relevant to the proposed activity. The Committee is convinced that the provision of approximately six weeks for the public concerned to exercise its rights under article 6, paragraph 6, of the Convention and approximately the same time relating to the requirements of article 6, paragraph 7, in this case meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention.

45. The communicant implies that the fact that the report of the inquiry commission was filed on 7 December 2005 and the authorization was made about a month later shows that there was no room for effective participation. The communicant also argues that the timespan during the procedure before the Prefect was too tight to ensure adequate public participation. In the view of the Committee, however, the fact that the authorization was made on 12 January 2006, about a month after the inquiry report was filed, does not as such amount to a failure to comply with the requirement for reasonable time frames as specified in article 6, paragraph 3, of the Convention. Nor is there any other information that shows

that the timespan of the decision-making before the Prefect as such was too tight to ensure effective public participation. As already stated, it is also the impression of the Committee that all options were open at the stage of the decision-making before the Prefect, as required under article 6, paragraph 4.

46. In all, the Committee does not find that the Party concerned failed to comply with article 6 of the Convention in the decision-making before the Prefect of Bouches-du-Rhône.

D. Access to Justice

47. The communicant also alleges that, in different respects and with regard to different decisions, in particular the 2003 resolutions, the Party concerned failed to comply with article 9, paragraphs 2 and 5, of the Convention. Since the Committee did not find that the 2003 resolutions amounted to permit decisions under article 6, it will limit its examination to consider whether the Party concerned complied with article 9 with respect to the authorization by the Prefect.

48. Three appeals were lodged against the authorization by the Prefect, two of which sought the suspension of the authorization and one of which sought the annulment of the authorization. Whereas the interim judge of the Administrative Court of Marseille rejected one of the applications for interim measures, the other application was approved, thus resulting in a decision to suspend the authorization. However, upon appeal by the Ministry of Environment and Sustainable Development, the Conseil d'Etat reversed the decision. Thus it set aside the suspension on the grounds that the urgency requirement had not been met, in particular because the incinerator was unlikely to start operating before July 2008. While in the Committee's view refusing interim measures can amount to non-compliance with article 9, paragraph 4, of the Convention, the Committee is not convinced that the reasoning of the Conseil d'Etat in the given case implies such a violation.

49. The Administrative Court of Marseille rejected the application to annul the authorization on the merits, stating that when considering which provisions have a direct effect according to French law, paragraphs 2 and 3 of article 6 have such effect, but that this is not the case with paragraphs 4 and 5 of article 6. The Committee notes that while the Parties may implement the Convention in different ways, e.g. by fully transforming the provisions through national legislation or by, to some extent relying on notions of direct effect, it is apparent that paragraph 5 of article 6 cannot be complied with unless it is fully reflected in the national law of the Parties.

IV. Conclusions

50. Having considered the above, the Committee does not find that the matters examined by it in response to the communication establish non-compliance by France with its obligations under the Convention. However, as stated in paragraph 40, the Committee notes that, while the Committee does not find that the Party concerned failed to comply with the Convention, the French decision-making procedures, as reflected in the present case, involve several other types of decisions and acts that may de facto affect the scope of options to be considered in a permitting decision under article 6 of the Convention.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-ninth meeting
Geneva, 21–24 September 2010

Report of the Compliance Committee on its Twenty-Ninth meeting

Addendum

Findings and recommendations with regard to communication ACCC/C/2008/23 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 24 September 2010

I. Background

1. On 21 February 2008, Mr. Morgan and Mrs. Baker of Keynsham, United Kingdom, (hereinafter "the communicants"), represented by Mr. Paul Stookes of Richard Buxton Environmental & Public Law, submitted a communication to the Committee, alleging non-compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under article 9, paragraph 4, of the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (hereinafter "the Aarhus Convention" or "the Convention").

2. The communicants alleged that the Party concerned failed to ensure the availability of fair, equitable, timely and not prohibitively expensive review procedures in their private nuisance proceedings against Hinton Organics (Wessex) Ltd (hereinafter, "the operator") seeking an injunction to prohibit offensive odours arising from the operator's waste composting site near the communicants' homes. Following the discharge (cancellation) of an interim injunction in respect of the offensive odours, the communicants were ordered to

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pay the costs of the operator and added parties (the Environment Agency and Bath & North East Somerset Council) amounting to approximately £25,000.

3. At its nineteenth meeting (5–7 March 2008), the Committee determined on a preliminary basis that the communication was admissible, subject to review following any comments from the Party concerned.

4. The communication was forwarded to the Party concerned on 17 April 2008, together with a number of questions from the Committee. Also on 17 April 2008, the Committee wrote to the communicants seeking further background information regarding its communication.

5. By letter dated 7 July 2008, the Party concerned requested the Committee to extend the five-month deadline for its response until the Court of Appeal delivered its judgement regarding an appeal of the costs order by the communicants.

6. On 26 September 2008, the Committee wrote to the Party concerned indicating that, in light of the fact that the request related to some of the issues addressed in the communication which were currently subject to review by the Court of Appeal and that the communicant did not have objections to the extension of the time limit for the Party's response, the Committee had agreed to postpone the deadline. At the same time, the Committee requested that the Party concerned provide to it by 31 October 2008 an initial response dealing with some of the questions posed in the Committee's letter of 17 April 2008.

7. By letter dated 29 September 2008, the communicants provided their response to the Committee's questions of 17 April 2008.

8. On 30 October 2008, the Party concerned provided its initial response, including its answers to the questions posed by the Committee on 17 April 2008. Due to further postponement of the hearing of the communicants' appeal in the Court of Appeal, the response of the Party concerned was provided before the matter of costs had been resolved in the national courts. On 22 May 2009, the Party concerned provided an amended version of its letter of 30 October 2008.

9. On 24 March 2009, the communicants sent a further letter enclosing the judgement of the Court of Appeal dated 2 March 2009 regarding the communicants' appeal of the costs order against them. By letter dated 26 March 2009, the Party concerned asked the Committee to close the case, on the grounds that the interim costs order complained of in the communication had been quashed by the judgement of the Court of Appeal and substituted with one which reserved the question of the operator's costs until the end of the trial, and that the communicants' remaining liability to pay the costs of the Environment Agency and Bath & North East Somerset Council in the amount of £5,130 had no deterrent effect. The communicants, by letter of 27 March 2009, objected to the request of the Party concerned and asked the Committee to proceed with the case.

10. At its twenty-third meeting (31 March–3 April 2009), the Committee decided to proceed with the case and to discuss the substance of the communication together with communication ACCC/C/2008/27, which also concerned compliance by the United Kingdom with the provisions of article 9 of the Convention, at its twenty-fourth meeting (30 June–3 July 2009). Both the Party concerned and the communicants were informed of the Committee's decision.

11. By letter dated 12 May 2009, the Party concerned asked to postpone the planned discussion of communications ACCC/C/2008/23 and ACCC/C/2008/27 and to consider them later on, jointly with communication ACCC/C/2008/33. By letter of 14 May 2009, the communicants opposed the proposal to postpone the consideration of the communications. After considering the views of both parties and consulting with members of the Committee,

the Chair of the Committee decided to hold the discussions of the communications ACCC/C/2008/23 and ACCC/C/2008/27 at the twenty-fourth meeting. The Chair indicated that, in reaching this decision, he had been guided by the need to strike a balance between making progress in the processing of communications received some time ago and, on the other, the desire to group together discussions on different communications that dealt with common issues.

12. On 22 May 2009, the Party concerned submitted a revised version of its letter of 30 October 2008.

13. Also on 22 May 2009, the Committee received written submissions in respect of ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 from an observer, Coalition for Access to Justice for the Environment, a coalition of six environmental non-governmental organizations from the United Kingdom.[1]

14. On 23 June 2009, the communicants presented written submissions clarifying the allegations set out in their communication. By letter of 23 June 2009, the Party concerned also provided additional written submissions for consideration by the Committee, setting out its view.

15. The Committee discussed the communication at its twenty-fourth meeting, with the participation of representatives of both the Party concerned and the communicants. At the beginning of the discussion, the Committee confirmed the admissibility of the communication.

16. After the discussion, additional information was provided by an agreed statement of the communicants and the Party concerned dated 22 July 2009. The communicants and the Party concerned provided further clarification on certain aspects of the case by letters of 23 and 30 July 2009, respectively.

17. By letter dated 22 July 2009, the United Kingdom alleged that a member of the Committee had a conflict of interest with respect to communications ACCC/C/2008/23 and ACCC/C/2008/27. The Committee member concerned did not participate in the deliberations on the findings in this case. Further details regarding the United Kingdom's allegation, the Committee's response and the views of the communicants are set out in paragraphs 6–11 of the report of the twenty-fifth meeting of the Committee (22–25 September 2009).[2]

18. The Committee began its deliberations on draft findings at its twenty-fifth meeting, following a very preliminary discussion at its twenty-fourth meeting, and continued its deliberations at its twenty-sixth meeting. By letter dated 9 March 2010, the Committee sought further clarification from the parties. The communicants provided the requested clarification on 12 and 13 April 2010, respectively. Following receipt of these clarifications, the Committee completed the preparation of draft findings. In accordance with paragraph 34 of the annex to decision 1/7, the draft findings were then forwarded for comments to the Party concerned and to the communicants on 7 June 2010. Both were invited to provide any comments by 4 July 2010.

[1] The six members of the coalition are Friends of the Earth, WWF-UK, Greenpeace, the Royal Society for the Protection of Birds, Capacity Global and the Environmental Law Foundation.

[2] Statements by the Committee, the Party concerned and the communicant are annexed to the report of the twenty-fifth meeting (ECE/MP.PP/C.1/2009/6) and can also be accessed at http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm.

19. The communicants and the Party concerned provided their comments on the draft findings on 11 and 18 June 2010, respectively. The communicants provided additional comments by letter of 22 June 2010.

20. At its twenty-ninth meeting (21–24 September 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicants.

II. Summary of facts, evidence and issues[3]

21. The communication concerns a costs order awarded against the communicants upon the discharge of an interim injunction they had earlier been granted in respect of offensive odours emanating from the operator's waste composting site near their homes. The communicants allege that they were subjected to unfair, inequitable and prohibitively expensive procedures in their private nuisance proceedings against the operator of the waste composting site contrary to the standards required by article 9, paragraph 4, of the Convention. In addition, the communicants allege that the demands from the Bath & North East Somerset Council and the Environment Agency for their costs to be paid forthwith and not to await the outcome of the trial amounted to non-compliance of the Party concerned with article 3, paragraph 8, of the Convention, which requires that persons exercising their rights in conformity with the Convention are not to be penalized in any way for their involvement.

22. According to both the communicants and the Party concerned, there are other procedural routes in the United Kingdom enabling members of the public to challenge odour nuisance other than private nuisance proceedings. In respect of the case presented by the communicants, they include, inter alia, the following:

(a) Summary proceedings by persons aggrieved by statutory nuisances under section 82 of the Environmental Protection Act 1990;

(b) A complaint to the Parliamentary Ombudsman or Local Government Ombudsman about the Environment Agency or the Council, respectively;

(c) An application for judicial review to challenge administrative actions or failure to take such actions by the Environment Agency or the Council; and

(d) A private prosecution (this right is preserved by section 6 (1) of the Prosecution of Offences Act of 1985).

23. According to the communicants, a private nuisance action was considered the most effective course of action in this case, inter alia, because they had legal expenses insurance for it.

24. The operator's recycling and composting site is located near a residential road and a few hundred meters from the communicants' homes. A planning permission was granted for this site by the Council in 1999 and was to expire in April 2010. A waste management licence was issued in January 2001 by the Environment Agency. The Agency and the Council are the two primary environmental regulators of the site.

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

25. During recent years, the activities of the operator were the subject of numerous complaints by residents to the Agency and Council, especially in respect of odours emanating from the composting processes. In response to such complaints, a number of enforcement actions have been taken by the regulators, including compliance notices, warning letters and cautions. The Agency also brought proceedings against the operator in the Magistrates' Court, resulting in fines being imposed on the operator by the Court on two occasions (£4,000 plus costs of £1,200 in January 2005 and £3,000 plus costs of £2,960 in March 2009). There is disagreement between the parties as to whether the enforcement actions taken by the regulators with regard to the operator have been adequate. In the communicants' view, the Agency and the Council have failed to protect local residents and to properly regulate the site, while the position of the Party concerned is that the regulators have taken enforcement action against the operator where, in their judgement, it was proportionate and appropriate to do so.

26. In July 2006, the communicants began their own private nuisance proceedings for an injunction and damages. On 9 November 2007, an interim injunction was granted by the High Court. The terms of the injunction prohibited the defendant from "causing odours" in the vicinity of the claimants' properties "at levels that are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the boundary, as perceived by an authorized officer of [either the Agency or the Council]."

27. The above formulation of the injunction followed substantially the wording of the condition in paragraph 5.2.2 of the operator's waste management licence, but made it specific to odours on the properties owned and occupied by the communicants. Also, it specified that whether such odours caused pollution of the environment, harm to human health or serious detriment to amenity was to be perceived by an authorized officer of the Agency and the Council. The Agency and Council were not consulted before the interim injunction order was made. While the operator opposed the granting of an order for an injunction, there is no evidence before the Committee that the operator objected to the Agency and the Council being named in the order.

28. Upon being informed by the communicants and the operator of the terms of the interim injunction, the Agency and Council wrote to the Court expressing concerns about the possible conflict between their statutory functions as regulators and their position as "de facto arbiters" of breaches of the injunction in the private dispute between the communicants and the operator of the site. They invited the parties to the dispute to agree to amend the order of 9 November 2007, by deleting the reference to them in the formulation of the injunction, and suggested as an alternative to substitute it by a reference to independent experts agreed upon by the operator and the communicants. In correspondence labelled as "without prejudice", the communicants invited the operator to nominate experts, but the operator rejected this proposal as unworkable. Being "without prejudice" that correspondence was not put before the High Court. By a judgement dated 21 December 2007, the High Court discharged the interim injunction on the ground that it would be unworkable without some objective means of assessment. In respect of the suggestion that the reference to the Council and Agency could be replaced by a reference to an independent expert, the High Court commented: "That in my view would be appropriate if, but only if, there was an agreement between the claimants and the defendant as to the identity of such a person. That is not the position…."

29. Following the discharge of the interim injunction, in an order dated 21 December 2007, the Court ordered the communicants to pay the costs of the added parties (the Agency and Council) in the amount of £5,130 and the defendant's costs as assessed on the standard basis. The defendant's costs were estimated to be £19,190.

30. The communicants sought leave to appeal the costs order of 21 December 2007 on the grounds, inter alia, that the order was "unfair and prohibitively expensive" and therefore contrary to article 9, paragraph 4, of the Aarhus Convention. Initially the communicants sought leave to appeal the costs order in favour of both the operator and the Agency and Council. Subsequently, the communicants narrowed the ground of their appeal so as to seek the dismissal of the costs order in favour of the operator in its entirety, and the costs order in favour of the Agency and Council regarding liability, but not regarding quantum.

31. The communicants allege that they chose not to challenge the quantum aspect of the costs order in favour of the Agency and Council following correspondence from the Agency in which the latter indicated that it would be seeking further costs if it had to appear before the Court of Appeal.

32. The communicants were initially refused leave to appeal the costs order but this was ultimately granted and their appeal was heard, together with an appeal by the operator on an issue not within the scope of the Convention, on 2 and 3 February 2009.

33. In its judgement of 2 March 2009, the Court of Appeal set aside the costs order requiring the communicants to pay the defendants' costs. In making its decision, it noted that the High Court judge had found that the balance of convenience lay in some form of interim protection, damages not being an adequate remedy. It also noted that the communicants had been willing to agree to replace the regulators in the interim injunction with independent experts, and had invited names from the operator, who had rejected the proposal out of hand as unworkable. The Court of Appeal held that, in a case of this kind, where the merits of the interim application were so closely tied up with the merits of the case overall, "the correct order would have been to reserve the defendant's costs of the interim application (including the costs of the hearings on 9th November and 21st December 2007) to the trial judge". The Court made some general observations on the application of the Convention in the United Kingdom which had been raised by the communicants, although it did not use the Convention as a basis for its decision as the Convention had not been raised before the judge in the High Court.

34. In paragraph 17 of the judgement, the Court of Appeal noted that the communicants had asked it to consider whether it was outside the Court's proper discretion to order the Claimant to pay the costs of the authorities. However, the judgement itself did not address the issue of liability for the Agency and Council's costs at length, but rather noted in paragraph 53:

> For reasons we have explained, the order in favour of the two authorities has not been the subject of argument, but in any event we would find it hard to see any objection to it. There being no appeal from the judge's decision that they were wrongly included in the order, they were entitled to their costs on ordinary principles. Since they would be no longer involved as parties to the case, it was obviously appropriate to deal with them then and there.

35. The Court of Appeal allowed both the communicants' and the operator's appeals.[4] The Court of Appeal order dated 2 March 2009, which accompanied the Court of Appeal's judgement, stated in paragraph 3: "The interim costs order made by His Honour Judge Seymour QC on 21st December 2007 is set aside and replaced by an order that costs be reserved to the trial judge."

36. By letter dated 5 March 2009, the Agency and Council wrote to the registry of the Court of Appeal asking that paragraph 3 of the Court Order of 2 March 2009 be amended to

[4] As noted at paragraph 32 above, the operator's appeal is not within the scope of the Convention.

reflect paragraph 74 of the Court of Appeal's judgement which stated that: "Both appeals are accordingly allowed. For the interim costs order there will be substituted an order reserving the costs of the defendant to the trial judge."

37. The communicants objected to the Agency and Council's request, indicating that their view was that the Order was correct as it stood, i.e., that the costs order regarding both the operator and the authorities was set aside and reserved to trial.

38. On 19 March 2009, the Court of Appeal amended paragraph 3 of the Court Order of 2 March 2009 (set out in para. 35 above) to reflect paragraph 74 of the judgement of 2 March 2009, so that paragraph 3 of the amended Court Order stated: "Paragraph 3 of the interim costs order made by His Honour Judge Seymour QC on 21st December 2007 is set aside and replaced by an order that the costs of the Defendant be reserved to the trial judge."

39. On 2 April 2009, the communicants, through their solicitor, wrote to the Agency and the Council, enclosing payment of £5,130 plus interest in accordance with the order of 21 December 2007.

40. The communicants allege that the conduct of the Agency and Council, in pursuing the communicants for the costs of their participation in the proceedings regarding the discharge of the injunction on 21 December 2007, instead of awaiting the outcome of the main trial, constitutes a breach of article 3, paragraph 8, of the Convention. The communicants assert that by doing so the public authorities have penalized the communicants for seeking to exercise their rights under the Convention.

41. The communicants also allege that they were subjected to unfair, inequitable and prohibitively expensive procedures in their private nuisance proceedings in contravention of the United Kingdom's obligations under article 9, paragraph 4 of the Convention. The Committee notes that at the discussion in open session at its twenty-fourth meeting, the communicants' representative acknowledged that the order of £5,130 plus interest was not in fact prohibitively expensive in this case, while observing that a similar order might be prohibitively expensive in other circumstances.

III. Consideration and evaluation by the Committee

General considerations

42. The United Kingdom deposited its instrument of ratification of the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

Private nuisance proceedings — article 9, paragraph 3

43. Before the Committee is able to consider whether the Party concerned has complied with the requirements of article 9, paragraph 4, of the Convention, it must establish that the procedures referred to in the communication fall within the scope of article 9, paragraph 3, of the Convention.

44. Article 9, paragraph 3, of the Convention requires each Party to ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. In their legal proceedings against the operator, the communicants allege

that the operator is in breach of the United Kingdom's private nuisance law. The question for the Committee is whether a breach of the United Kingdom's law of private nuisance should be considered a contravention of provisions of its national law relating to the environment.

45. Private nuisance is a tort (civil wrong) under the United Kingdom's common law system. A private nuisance is defined as an act or omission generally connected with the use or occupation of land which causes damage to another person in connection with that other's use of land or interference with the enjoyment of land or of some right connected with the land. The Committee finds that in the context of the present case, the law of private nuisance is part of the law relating to the environment of the Party concerned, and therefore within the scope of article 9, paragraph 3, of the Convention.

46. The Committee, having found that article 9, paragraph 3, of the Convention is applicable to the law of private nuisance in the context of the present case, also finds that article 9, paragraph 4, requiring that the procedures referred to in paragraph 3 shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive, is thereby also applicable.

47. The Committee notes that the Party concerned acknowledges that private nuisance proceedings in the context of the present case are within the scope of article 9, paragraph 4, of the Convention.

Costs order of 21 December 2007 — article 9, paragraph 4

48. The communicants allege that, in their case, the judicial procedures for private nuisance were unfair, inequitable and prohibitively expensive, in breach of article 9, paragraph 4, of the Convention. In this regard, they point to:

(a) The costs order of 21 December 2007, under which the communicants were held to be liable for £5,130, representing the costs of the Agency and the Council as added parties;

(b) The fact that the costs order of 21 December 2007 ordered the communicants to pay the whole of the Council and Agency's claimed costs, while the operator was not ordered to contribute at all; and

(c) The fact that the Council and Agency demanded that their costs be paid forthwith, rather than awaiting the outcome of the main trial.

49. With respect to the communicants' allegations that the costs order of 21 December 2007 of £5,130 plus interest was prohibitively expensive under article 9, paragraph 4, the Committee finds that the quantum of the order was not prohibitively expensive in this case. This was also acknowledged by the representative of the communicants.

50. With regard to the communicants' allegation that the costs order of £5,130 plus interest was unfair and inequitable under article 9, paragraph 4, the Committee notes that the High Court granted the interim injunction order on 9 November 2007, having been satisfied that there was a "serious issue to be tried" as to whether odours from the defendant's premises were interfering with the claimants' enjoyment of their properties, and that damages would not be an adequate remedy. The reason that the interim injunction was discharged on 21 December 2007 was not because the communicants' case no longer contained a serious issue to be tried, but rather because the Court held that it had itself erred in naming the Council and Agency to adjudicate the terms of the injunction. In paragraph 15 of the judgement of 21 December 2007, the High Court noted:

> It has been suggested that it might be possible to substitute, for the references to "an authorized officer of the Environment Agency or an authorized officer of the Council", some independent expert. That in my judgement would be appropriate if, but only if, there was an agreement between the claimants and the defendant as to the identity of such a person. That is not the position.

51. In paragraph 11 of its judgement of 2 March 2009, the Court of Appeal comments on the events leading up to the hearing on 21 December 2007:

> [The Council and Agency] wrote to the parties reiterating their concern about the potential for conflict between their statutory functions, and their position as "de facto arbiters" of breaches of the injunction. They invited the parties to agree to amend the order by deleting the reference to them, and suggested that an alternative might be to substitute a reference to an agreed independent expert. The claimants accepted this proposal in principle and wrote to the defendants inviting them to propose names of three possible experts. The defendants replied that they did not see how such an appointment would "work in practice or assist the parties generally". They considered that the only "sensible and effective" way to resolve the issues was to proceed to trial as soon as possible.

52. The above excerpt of the Court of Appeal's judgement makes it clear that if the operator had cooperated with the communicants' invitation (at the Council and Agency's suggestion) to name an alternative expert, the injunction may have been varied by consent without the need for the Council and Agency to incur the costs of instructing counsel to attend the Court of Appeal hearing. Thus, it was the operator's refusal to cooperate in naming an expert that led to the Council and Agency having to attend the hearing on 21 December 2007, incurring the £5,130 legal costs as a result. In these circumstances, the Committee considers that the Court of Appeal's subsequent order that the communicants pay the whole of the Council and Agency's legal costs (without the operator being ordered to contribute at all) was unfair and inequitable and constitutes stricto sensu non-compliance with article 9, paragraph 4, of the Convention, also given the fact that the Court could have decided to reserve the whole of the costs issue to the trial judge. The trial judge may have been in a better position to ascertain what allocation of cost would be fair and equitable given the overall proceedings of the case. However, taking into consideration that no evidence has been presented to substantiate that the non-compliance in this case was due to a systemic error, the Committee refrains from presenting any recommendations.

Agency and Council's pursuit of costs — article 3, paragraph 8

53. With regard to the communicant's allegation under article 3, paragraph 8, the Committee has taken into consideration the events leading up to the application for the interim injunction, the order for the interim injunction dated 7 November 2008, the judgement of 21 December 2007 discharging the interim injunction, correspondence between the communicants and the Environment Agency in the period from November 2008 to January 2009, the judgement and order of the Court of Appeal dated 2 March 2009 and the correspondence between the Civil Appeals Office and the communicants and the Environment Agency of March 2009. In the light of the agreement between the communicants and the Environment Agency recorded in the correspondence of 14 and 16 January 2009, the Court of Appeal's judgement of 2 March 2009 (notably, para. 53), and the order of the court as amended on 19 March 2009, the Committee finds that the seeking of the costs by the Environment Agency does not amount to the communicants being penalized within the meaning of article 3, paragraph 8, of the Convention in this case. The Committee does not exclude, however, that pursuing costs in certain contexts may be

unreasonable and amount to penalization or harassment within the meaning of article 3, paragraph 8.

Assisting the public to seek access to justice — article 3, paragraph 2

54. Although it was not raised by the communicants, the Committee considers that the United Kingdom's compliance with article 3, paragraph 2, of the Convention warrants scrutiny in this case. Article 3, paragraph 2, states that "each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in, inter alia, seeking access to justice in environmental matters". While not going so far as to make a finding of non-compliance on this ground, the Committee has some doubts that the conduct of the Party concerned in this matter meets its obligation to endeavour to ensure that officials and authorities assist the public in seeking access to justice in environmental matters. The communication was forwarded to the Party concerned in April 2008. It was thus already aware of this case by the time the authorities sought immediate payment of the costs awarded to them rather than accepting the communicants' offer to place them in an interest-bearing account pending the outcome of the substantive proceeding. The authorities' demand for immediate payment did not assist the communicants in seeking access to justice. It was open to the Party concerned to intervene in this matter to assist the communicants, e.g., by asking the authorities to accept the costs be paid into an interest-bearing account, but there is no evidence before the Committee that they did so.

IV. Conclusions

55. Having considered the above, the Committee adopts the findings set out in the following paragraphs.

56. With regard to the communicants' allegation under article 3, paragraph 8, the Committee finds that the seeking of the costs by the Environment Agency did not amount to the communicants being penalized within the meaning of article 3, paragraph 8, in this case.

57. With respect to the communicants' allegations that the costs order of 21 December 2007 of £5,130 plus interest was prohibitively expensive under article 9, paragraph 4, the Committee finds that the quantum of the order was not prohibitively expensive in this case.

58. In respect of the requirements of article 9, paragraph 4, for procedures referred to in paragraph 3 to be fair and equitable, related to the fact that in the above circumstances where the communicants were ordered to pay the whole of the costs while the operator was not ordered to contribute at all, the Committee finds that this constitutes stricto sensu non-compliance with article 9, paragraph 4.

59. Taking into consideration that no evidence has been presented to substantiate that the non-compliance with article 9, paragraph 4, was due to a systemic error, the Committee refrains from presenting any recommendations in the present case.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-sixth meeting
Geneva, 15–18 December 2009

Report of the Compliance Committee on its Twenty-sixth meeting

Addendum

Findings and recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain

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I. Introduction

1. On 13 May 2008, the Spanish non-governmental organization (NGO) Association for Environmental Justice (*Asociación para la Justicia Ambiental* (AJA)) submitted a communication to the Compliance Committee on behalf of itself and the Association of *Senda de Granada Oeste* Neighbours (hereinafter collectively the communicant),[1] alleging non-compliance by Spain with article 4, paragraph 8, article 6, paragraphs 1 (a), 2 (a), 2 (b), 4 and 6, and article 9, paragraphs 2, 3, 4, and 5, of the Aarhus Convention. The communicant included supporting documents as annexes to the communication.

2. The communicant first alleges that responses to information requests were excessively delayed and argues that by imposing a fee for environmental information related to decision-making on a residential development project in the city of Murcia, Spain, the Party concerned failed to comply with article 4, paragraph 8, and article 6, paragraph 6, of the Convention.

3. The communicant next alleges that proper public participation was not provided for in the context of the decision-making processes concerning the land use planning for and the implementation of the urbanization project in a residential area, and also concerning the decision of the City of Murcia to allocate special land for that purpose. This constitutes, according to the communicant, failure of the Party concerned to comply with article 6, paragraphs 1 (a), 2 (a), 2 (b) and 4, of the Convention.

4. The communicant finally claims that the Party concerned was in non-compliance with article 9 of the Convention. It alleges that the refusal by the courts to suspend administrative decisions that lacked an environmental impact assessment (EIA), as well as the length of the related judicial review procedure, were not in compliance with article 9, paragraph 4. The communicant furthermore claims that imposing high court costs on a non-profit organization, while there were no assistance mechanisms available to offset such costs, constituted a failure by the Party concerned to comply with the requirements of article 9, paragraphs 2, 3, 4 and 5.

5. On 6 June 2008, the Committee notified the Party concerned, through the designated national focal point, that it would make a preliminary determination on the admissibility of the case at the Committee's twentieth meeting (8–10 June 2008) in Riga, Latvia, and invited the Party concerned to attend the scheduled discussion. No reply was received from the Party concerned. At its twentieth meeting, the Committee determined on a preliminary basis that the communication was admissible. It also requested the communicant to present some clarifications and additional information, in particular regarding the timing of the events referred to in the communication and the use of domestic remedies. The clarification was sent by the communicant to the secretariat on 28 August 2008.

6. The communication was officially forwarded by the secretariat to the Party concerned, through its designated national focal point, on 7 August 2008, asking for a response within five months. No reply was received from the Party concerned. On 12 January 2009, the secretariat notified the Party concerned that the Committee would discuss the communication at its twenty-third meeting (31 March–3 April 2009) and invited

[1] According to the communication (paragraph 25) most of the facts refer to the actions by AJA or the Association of *Senda de Granada Oeste* Neighbours. The Committee does not make a distinction in its findings between the AJA and the Association of *Senda de Granada Oeste* Neighbours and treats them collectively as the communicant.

the Party concerned to send its representative(s) to the meeting. No reply was received from the Party concerned.

7. The Committee discussed the communication at its twenty-third meeting with the participation of representatives of the communicant. At the same meeting, the Committee confirmed the admissibility of the communication. The Party concerned did not respond to the invitation to participate in the meeting and was not represented at it.

8. On 25 June 2009, the Party concerned sent comments in the form of a "report" in the Spanish language; and on 29 June 2009, one day before the Committee's twenty-fourth meeting (30 June–3 July 2009), it provided the English translation of the report (hereinafter the 25 June 2009 report). The report was forwarded to the communicant the same day that it was received and the communicant responded to the report on 1 July 2009. In spite of the very late arrival of the comments by the Party concerned, the Committee decided to take them into account, to the extent possible, because it acknowledged that this was the first time that the Party concerned had provided substantive comments on the case.

9. On 23 September 2009, the communicant submitted additional information to the Committee, with regard to a Decision of the Constitutional Court of Spain of 9 September 2009.

10 In accordance with paragraph 34 of the annex to decision I/7 of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Committee prepared draft findings and recommendations at its twenty-fourth and twenty-fifth meetings (30 June–3 July and 22–25 September 2009, respectively). These were forwarded to the Party concerned and the communicant on 13 November 2009 with an invitation to provide comments, if any, by 4 December 2009.

11. The Party concerned and the communicant provided comments on 11 December 2009. The Party concerned provided additional remarks on 15 December 2009 and the communicant on 17 December 2009.

12. At its twenty-sixth meeting (15–18 December 2009), the Committee completed the preparation of its findings in closed session, taking account of the comments received. Further to the letter of the Party concerned dated 13 January 2010 expressing Spain's agreement that the Committee's recommendations would enhance the application of the Convention in Spain, the Committee used its electronic decision-making procedure to finalize and adopt its findings, and agreed that they should be published as an official document. [2] It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of the facts, evidence, and issues[3]

Chronology of plans, projects and lawsuits

13. In February 2003, a private company, *Joven Futura* (Future Youth), made a proposal to the Murcia City Council to start negotiations for the development of a residential area near the city of Murcia covering 92,000 square meters to construct houses for young

[2] The document was subsequently published as addendum to the report of the Committee's twenty-sixth meeting.

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

families. The proposal also envisaged the conclusion of an agreement between the company and the Murcia City Council to enable urbanization of the land concerned near the city of Murcia. The proposed agreement included an obligation for the City Council to take the steps necessary to reclassify part of the land, where the houses would be constructed, from "non-residential" to "residential".

14. In July 2003, the Murcia City Council approved the agreement and later the regional government also approved it. On 8 October 2003, the *Convenio de modificación del planeamiento urbanistico para desarrollar actuaciones de vivienda protegida* (or Agreement for the modification of the urban planning for the development of apartment buildings) was signed by the Autonomous Community of the Region of Murcia (*Comunidad Autónoma de la Región de Murcia*), represented by its adviser in charge of Public Works, Housing, and Transportation; by the City Council of Murcia (*Ayuntamiento de Murcia*), represented by its Mayor; and by the company *Joven Futura* (*Sociedad Cooperativa Limitada Joven Futura*), represented by its president. On 24 October 2003, the agreement was published in the *Official Journal of the Murcia Region*.[4] Among others, the agreement included the following legal obligations for the City Council: to adopt a modification to the urban plan, to reclassify a land allotment of 110,000 square meters and to approve a project for the urbanization of the area. The agreement also committed the regional government to approve the planning steps and to incorporate the area into the building zone ("City General Plan") of the city of Murcia. The land would become the property of *Joven Futura* for the construction of approximately 733 apartments.

15. As mentioned above, at the time of the conclusion of the agreement, the land in question was classified as non-residential by the Murcia City General Plan, last revised on 31 January 2001. This latest revision of the City General Plan had been subject to an EIA before its adoption, as required by national and European Community (EC) law. The EIA verified the historical, cultural, environmental, scientific and archaeological values of the land, in order to classify some of it as non-residential. Such non-residential land is subject to a special protection regime that is incompatible with urbanization.

16. The land allotments allocated for the project are located within the area of *Huerta Tradicional* (traditional garden). Those allotments were under special protection under the City General Plan and were classified as non-residential because their conservation was considered to be essential for the quality of the environment of the metropolitan area of the valley.

17. In May 2004, the Urbanization Unit of the municipality submitted to the City Council a formal draft "Modification" to the City General Plan for the new residential zone, known as ZM-Ed3, *Espinardo*, accompanied by a document called "Environmental Accident Study", developed by the company, and by a draft EIA study for the creation of the urban zone ZM-Ed3, *Espinardo*. The last of these documents followed the requirements stipulated in Spanish legislation to develop an EIA for modifications introduced on city plans. The Environmental Accident Study claimed that the land proposed for reclassification "has no special significance as a garden".

18. On 24 June 2004, the Murcia City Council decided to initiate the procedure regarding Modification No. 50 to the City General Plan for the establishment of the residential zone ZM-Ed3, *Espinardo*. The notice was published on 22 July 2004 in the *Murcia Region Official Journal* and set one month for public comments.

[4] *Boletín Oficial de la Región de Murcia*, Número: 247, Viernes, 24 de octubre de 2003, p. 17,232, published on the Internet at: http://www.carm.es/borm/documento;jsessionid=B4CC75A56585C1C6B48BA94983254CC7?obj=bol&id=15069 (last accessed on 14 September 2009).

19. Despite the existence of the draft EIA study on the urban zone ZM-Ed3 submitted in May 2004, on 24 September 2004 the Environmental Quality Office adopted a resolution saying that no EIA was needed for the proposed modification of the City General Plan. The resolution was based on a decision taken at an extraordinary session of the EIA Commission on 23 September 2004, which stipulated that the land allotments in question should "abandon their non-urbanizable" condition because of their low agricultural and environmental values as well as low profitability. The same rationale had been stated in 2003 in the agreement signed by the City of Murcia and the regional government.

20. On 28 April 2005, the City Council adopted Modification No. 50 to the City General Plan, reclassifying the land in question as "residential" and allowing higher density of construction than in the draft decision of 24 June 2004. Final approval of Modification No. 50 by the regional authority followed on 24 June 2005 on the condition that several deficiencies would be corrected by the City Council. On 20 October 2005, the communicant filed an administrative lawsuit seeking judicial review of the approval and requesting interim injunctive relief. The request for interim injunctive relief was denied. According to information provided by the communicant on 28 August 2008, it was expected that it would take at least two more years for the Court to issue a decision on the merits.

21. In the meantime, the procedure for the adoption of the Land Allotment Plan ZA-Ed3 ("*Plan Parcial*") setting out details for the future development in the area (residential construction) was initiated on 11 May 2005. On 25 August 2005, the proposal was published in the *Official Journal*, providing one month for the public to submit comments. The Land Allotment Plan ZA-Ed3 was approved on 24 November 2005. On 26 February 2006, the communicant filed an administrative lawsuit seeking judicial review of the approval of the Land Allotment Plan ZA-Ed 3 and requesting interim injunctive relief. The request for interim injunctive relief was denied. According to information provided by the communicant on 28 August 2008, it was expected that it would take at least three years for the Court to issue a decision on the merits.

22. Meanwhile, on 7 December 2005, the city initiated the process to approve the construction project with the official name Urbanization Project UA1 of the Land Allotment Plan ZA-Ed3. It published the official notice of the proposal in the *Official Journal* on 22 December 2005 and a public commenting period of 20 days was provided. During this period the public could access the file consisting of about 1,000 pages, containing plans related to the construction of 23 buildings.

23. The Urbanization Project UA1 was approved by a resolution of the City Council on 5 April 2006. Information about the approval was published in the *Official Journal* on 3 May 2006. No EIA study was conducted for this project approval. On 3 July 2006, the communicant filed an administrative lawsuit seeking judicial review of the approval of the Urbanization Project UA1 and requesting interim injunctive relief. The request for interim injunctive relief was refused. According to information provided by the communicant on 28 August 2008, it was expected that it would take at least one additional year for the Court to issue a decision on the merits.

24. Apart from the aforementioned administrative lawsuits, the communicant also initiated a procedure at the Constitutional Court and a number of criminal proceedings relating to breach of official duties. On 15 September 2009, the Constitutional Court of Spain rejected the communicant's appeal on procedural grounds that no constitutional issues were raised.

Access to information — costs and response deadlines

25. Since 2004, the communicant filed several requests for information concerning the agreement between the Murcia City Council and *Joven Futura*. The requests were based on Spanish legislation granting access to environmental information. In particular, the communicant refers to two requests, one in 2005 on the proposal for Modification No. 50, and one in 2006 on the Urbanization Project UA1 of the Land Allotment Plan ZA-Ed3, briefly described below. The communicant included supporting documents to demonstrate that in one instance the City imposed a charge of €2.05 per page as a condition to provide copies of documents.[5]

26. On 17 February 2005, the communicant requested access to the administrative records involving the proposed Modification No. 50, namely a copy of the adaptation of the City General Plan, which included the proposal for Modification No. 50, as well as documents related to studies and official reports of the Murcia City Council and other relevant authorities. The request was reiterated on 24 June 2005. According to the communicant, access was granted on 28 June 2005, almost four months after the submission of the request and only after the charge of €67.68 for approximately 30 pages had been paid. The information was released after the approval of the Modification No. 50 to the 2001 Murcia City General Plan had already been concluded in April 2005.

27. On 29 September 2006, the communicant submitted a request for information to the Urban Planning Department for the documentation relating to the construction authorization, including the construction project. On 19 December 2006, the representative of the communicant received a telephone call from the authorities asking him to appear in person and answer some questions with regard to the request. On 26 December 2006, the said representative appeared at the offices of the Urban Planning Department. On 2 March 2007, the communicant repeated its request; on 9 March and 27 March 2007, members of the communicant appeared in person at the offices of the authority, but the file was not available. On 30 March 2007, access to some of the information was granted and access to review the files was granted on 17 April 2007, almost seven months after the submission of the initial request. However, not all relevant information requested by the communicant had been reproduced. The Department copied 34 pages out of the 600-page file and requested the communicant to pay a total charge of €68 (or €2 per page). Also, the information provided did not include copies of 10 plans (an additional €65.10 per plan was necessary). The communicant decided it could not afford to pay the required amount of approximately €1,200 for the entire file and requested the authority to provide the information in electronic format (CD-ROM), which would cost €13. The local authority rejected the communicant's request to obtain the information in electronic format on a CD-ROM and, according to the communicant, it did not provide any reasons.

28. In its 25 June 2009 report to the Committee, the Party concerned did not specifically address the above facts but generally rejected allegations about access to information, saying that "at no time was any impediment or restriction placed on access by this association or any other interested party to the dossiers requested, saving the possible

[5] Annexes 3 and 4 to the communication. Relating to Annex 4, the tariff in force during 2008 was implemented by City Council agreement of 25 October 2007 (published in the *Murcia Regional Official Bulletin* on 24 December 2007); the charge of €2.05 per page is established (see http://www.carm.es/borm/documento?obj=anu&id=330104, last accessed on 14 March 2009). The tariff in force during 2007 was published in the *Murcia Regional Official Bulletin* of 22 December 2006; the charge of €2 per page was established. The communicant complains about it also, for instance in annex 3 of the clarification (see http://www.carm.es/borm/documento?obj=anu&id=309655, last accessed on 14 March 2009).

limitations imposed by the complicated handling process undergone by the respective files […]".

29. The communicant considers the charge of €2.05 per page to exceed the "reasonable amount" under article 4, paragraph 8, of the Convention and the refusal to provide the information in the form requested (CD-ROM) as contrary to article 4, paragraph 1 (b). The Party concerned in its 25 June 2009 report maintains that the existing scheme for fees is in compliance with article 4, paragraph 8, of the Convention authorizing each party to charge a "reasonable amount" for supplying information; in its view the fee schedule constitutes a "reasonable amount" and is further supported by an economic study conducted before the adoption of the scheme. The Party concerned informed the Committee, however, that the "Murcia City Council Planning Department has considered it appropriate to submit the question to the Municipal Tax Office so that it may present a review of the amount of the fee in question with a view to the coming budgetary year or so that is may set a new fee for the cases of the issue of copies of documents subject to the Aarhus Convention."

30. The communicant, in its comments on the views of the Party concerned cited above maintains that by setting a fee of €2.15 (according to the 2009 fees chart) for copies of information contained in a planning process, when the Murcia Council had set fees of €0.15 for copies of information relating to many other areas and when copies could be ordered in a shop for €0.03 per page, the Party concerned intended to avoid access to information and public participation. Furthermore, the communicant alleges that the additional provision of Act 27/2006 of 18 July 2006 regulating the rights of access to environmental information, public participation, and access to justice in environmental matters was not applied and copies of documents up to 20 pages were not provided free of charge. Also, the communicant informs the Committee that the communicant's repeated requests to receive the information in electronic form were constantly ignored.

Public participation

31. Arguments are made concerning compliance with the Convention of procedures related to:

(a) The agreement between the Murcia City Council and *Joven Futura* in 2003;

(b) The screening decision of the Environmental Quality Office in September 2004;

(c) The approval of Modification No. 50 to the Murcia City General Plan in April 2005;

(d) The approval of the Land Allotment Plan ZA-Ed3 in November 2005;

(e) The approval of the Urbanization Project UA1 of the Land Allotment Plan ZA-Ed3 in April 2006.

32. The communicant maintains that the three approvals mentioned above under letters (c), (d) and (e) have "a permitting nature" in relation to projects covered by article 6 of the Aarhus Convention. Moreover, according to the communicant, applicable Spanish laws require the carrying out of an EIA procedure for all the steps; hence these three approvals fall within the ambit of paragraph 20 of the annex I to the Convention and therefore under article 6, paragraph 1 (a), or alternatively within the ambit of article 6, paragraph 1 (b).

33. Furthermore, the communicant maintains that the 2003 agreement between the Murcia City Council and *Joven Futura* (under subpara. 31 (a) above), as well as the screening decision (under subpara. 31 (b) above) are parts of the decision-making process

leading to approval of the Modification No. 50 to the Murcia City General Plan, and therefore they both also fall within the ambit of article 6.

34. The Party concerned, in its 25 June 2009 report to the Committee, generally questions the application of article 6 to the above processes, but does not specifically address the allegations of the communicant.

Public participation and Environmental Impact Assessment

35. The communicant maintains that early and effective public participation in environmental decision-making in Spain can happen only through EIA legislation, because of the procedures available and because "if no environmental study is made, the public cannot have access to reports and other documents evaluating environmental and health risks, which would enable the public to develop and express its own science-based opinion on the issue".

36. None of the approvals of the acts mentioned in paragraph 31 (c), (d), and (e) above were subjected to EIA procedures, which, according to the communicant, was in contravention of the applicable laws. The screening decision that an EIA for Modification No. 50 was not necessary was taken through an "emergency" procedure and did not provide for public participation. Given the role of the EIA in providing information for decision-making (para. 35 above), the screening decision not to require an EIA limited, according to the communicant, the effectiveness of public participation. The communicant challenged the screening decision in court for lack of impartiality and lack of sufficient legal and scientific arguments. The communicant argues that the screening decision related to Modification No. 50 was not in compliance with the requirement set out in article 6, paragraph 1 (a) of the Convention.

37. The Party concerned, in its 25 June 2009 report to the Committee, maintains that, as confirmed by the courts, all screening procedures complied with the applicable laws and that the particular features of the planned activities did not necessitate the carrying out of an EIA.

Informing the public (notification) under article 6, paragraph 2

38. According to the communicant, the public was not informed about plans to develop and sign the agreement between the City of Murcia and the developer *Joven Futura* in 2003. The public was informed about the conclusion of the agreement between the City Council and the developer through its publication in the *Official Journal of Murcia Region* in October 2003, after the agreement had been reached. The communicant also points out that the Murcia City Council Department released information about Modification No. 50 to the 2001 Murcia City General Plan only after the approval had taken place in 2005. As a result, according to the communicant, the public, including the owners of plots of land affected by the construction, were not properly informed of the decision-making on Modification No. 50, as required by article 6, paragraph 2, of the Convention and did not have any opportunity to participate

39. The communicant further maintains that the draft decision on Modification No. 50 to the 2001 City General Plan underwent major changes in 2004 at the request of the developer, after the public comment period had closed, and that the final approval took place in 2005 without a new opportunity for the public concerned to comment on the changes. Specifically, the public was not informed about the change in the decision on the density of construction that took place after the closing of the public comment period. Thus, the communicant alleges that in relation to Modification No. 50, the public concerned was

not informed in an adequate, timely and effective manner of the proposed activity and the application on which a decision would be taken and of the nature of the possible decision, as required by article 6, paragraphs 2 (a) and 2 (b), respectively.

40. The Party concerned, in its 25 June 2009 report to the Committee, does not specifically address the above allegations and maintains that all planning procedures complied with the applicable laws.

Reasonable time frames for participation under article 6, paragraph 3

41. The procedure for the approval of Land Allotment Plan ZA-Ed 3 was initiated on 11 May 2005. On 25 August 2005, the proposal concerning Land Allotment Plan ZA-Ed 3 was published in the *Official Journal* providing one month for the public to submit comments. The communicant alleges that, given that the commenting period started during the summer holiday season, and considering the time necessary to study the proposal and to prepare sound comments on it, one month was an unreasonably short time frame for the public to effectively take part in the decision-making process.

42. The procedure for the approval of the Urbanization project UA1 of Land Allotment Plan ZA-Ed3 was initiated on 7 December 2005. The notice was published in the *Official Journal* on 22 December 2005, and a period of 20 days was provided for the public to access the file containing all relevant information and to submit comments. The relevant information consisted of more than 1,000 pages and a number of plans related to the construction of 23 buildings containing 1,390 apartments. Obtaining a full copy of the file took several days. Given that the comment period started during the Christmas holiday season and considering the size and content of the file, as well as the time necessary to study it and to prepare sound comments, the communicant alleges that 20 days was an unreasonably short time frame for the public to be informed and participate effectively in the decision-making process, and that this constituted a failure by the Party concerned to comply with article 6, paragraph 3.

43. The Party concerned, in its 25 June 2009 report to the Committee, does not address specifically the above allegations and maintains that all planning procedures complied with the applicable laws.

Early public participation when all options are open — article 6, paragraph 4

44. According to the communicant, all decisions taken with regard to the whole project were triggered from the agreement between the City Council and *Joven Futura*. The public was informed about the conclusion of the agreement by the City Council through its publication in the *Official Journal of Murcia Region* (para. 38 above). According to the communicant, public participation opportunities came at a time when the city of Murcia had already assumed legal obligations towards the developer as to land and project decisions; thus, public participation was not provided at a time when all options were open and effective public participation could take place, and this constituted a failure to comply with article 6, paragraph 4, of the Convention.

45. The Party concerned, in its 25 June 2009 report to the Committee, does not specifically address the above allegations and generally maintains that all planning procedures complied with the applicable laws.

Information to be made available — article 6, paragraph 6

46. On 17 February 2005, the communicant requested access to a number of documents because, in its view, these records were necessary for its participation in subsequent processes (see paras. 25-30), and access was granted on 28 June 2005. In addition, according to the communicant, it had requested documents related to the decision-making process (at various stages the requests were related to land decisions or project decisions), and the City Council of Murcia imposed a charge of €2.05 per page for copying. The communicant claims that these instances amount to a failure of the Party concerned to comply with article 6, paragraph 6.

47. The Party concerned, in its 25 June 2009 report to the Committee, does not specifically address the above allegations and generally maintains that all planning procedures complied with the applicable laws.

Due account taken of the outcome of the public participation — article 6, paragraph 8

48. From the start of the procedure regarding Modification No. 50 in 2004, the communicant claims that various affected persons notified the City Council about their concerns; over 2,000 people expressed their disagreement with the proposed reclassification of land, including owners of land and houses. In addition, the communicant made numerous comments relating to the following key issues: the absence of an EIA; the legality of the agreement between the City Council and *Joven Futura* (since neither was owner of the land subject to reclassification); and the landscape and environmental values of the land protected by the City General Plan. According to the communicant, these comments were never answered or acknowledged by the City Council. The final approval of Modification No. 50 was made on 24 June 2005 by the regional authority on the condition that several deficiencies would be corrected by the City Council. The Modification was published in the *Official Journal* and specifically required that the City Council to correct the deficiencies. Until now, according to the communicant, the City Council has not corrected the identified deficiencies, as requested by the regional authority, for the approval to become effective. Nevertheless, the Land Allotment Plan and the Urbanization Project went forward and were subsequently approved, and the urbanization project is nearly complete.

49. With regard to the procedure related to Land Allotment Plan ZA-Ed3, in 2005, although the procedure was at the end of the summer holiday season, about 500 affected people submitted comments. Yet, according to the communicant, the comments were not duly taken into account, despite the fact that many individuals identified infringement of the requirements set by national law. Comments referred to the following key issues: that Modification No. 50 to the Murcia City General Plan should not yet be considered effective due to the fact that the conditions imposed by the regional authority had not been duly fulfilled; the failure to conduct an EIA; that the proposed density of buildings exceeded the limit allowance set by law; that not enough land had been set aside for public facilities; the lack of green areas and parks; and the lack of measures protecting against noise. Concerned members of the public also denounced the fact that local authorities had failed to consider a report issued by the Water Authority stating that there would be insufficient water resources to supply the 1,974 apartments to be built and criticizing the potential effect on and destruction of ancient water infrastructures located in the urbanization zone. Final approval was nevertheless issued on 24 November 2005, as originally planned in the agreement of 2003.

50. With regard to the procedure related to the Urbanization Project UA1 of Land Allotment Plan ZA-Ed3, although the public comment period was during the Christmas

holiday season and a period of only 20 days was provided for the public to access the file containing all relevant information and to submit comments, a number of people did submit comments. However, all the comments, according to the communicant, were ignored by the public authority even though the comments identified severe breaches of legal requirements, including the failure to conduct an EIA and the argument that the modification of the Murcia City General Plan was not effective. The final approval of the Urbanization Project UA1 took place on 5 April 2006, as originally planned in the agreement of 2003, and was published in the *Official Journal* on 3 May 2006.

51. The communicant alleges that by failing to take into account any of the concerns raised in the comments submitted by the communicant and the affected neighbours in any of the public participation procedures, the decision-making authorities failed to comply with article 6, paragraph 8, of the Convention. The public, through the communicant, had sought relief by lodging administrative appeals and then administrative lawsuits. Some of the administrative appeals failed because the authorities considered they were submitted after the set deadline, although the communicant disagrees with the method adopted by the authorities to calculate the appeal time.

52. The Party concerned, in its 25 June 2009 report to the Committee, does not specifically address the above allegations and, as already mentioned, generally maintains that all planning procedures complied with the applicable laws.

Access to justice, financial barriers and remedies

53. The decision by the Administrative Proceedings Court on the appeal by the communicant against the denial of precautionary measures required that all the costs be covered by the plaintiff, i.e., the communicant. The costs were €2,148, mostly covering the fees for the lawyers of the City Council. The communicant asserts that the costs imposed in just one of the court proceedings of the appellate court were equal to the full monthly budget of a local family or three monthly budgets of a single person in Murcia; it also asserts that no State assistance mechanisms were available for members of the communicant. Criminal proceeding No. 4444/2006 was initiated by a complaint submitted in 2006 by the communicant before the Murcia Magistrate's Court. The complaint asserted the application of article 404 of the Criminal Code on wilful breach of official duty for failure to afford due protection of archaeological remains found within the boundaries of the land affected by the urbanization project. The Magistrate's Court shelved the case and imposed upon the communicant a "bond" (deposit) requirement of €60,000 in the event the Court decides to take up the case.

54. The Party concerned, in its 25 June 2009 report to the Committee, does not agree with the communicant's allegations. It maintains that its Constitution and national legislation guarantee the rights specified in the Aarhus Convention. Specifically, article 119 of its Constitution "establishes that justice shall be free of charge when so disposed by the law and, in any case, when evidence is shown of lack of resources to go to law". Moreover, the Spanish Law on Free Legal Assistance 1/1996 of 10 January 1996 "guarantees the right to free legal assistance recognized by the Constitution, depending on the person's economic circumstances". In the opinion of the Party concerned, these norms represent a guarantee of the right to effective legal protection "much more far-reaching and comprehensive than that specified in generic terms in the precepts of the Aarhus Convention […]".

55. The communicant claims that all of its requests for preliminary suspension of the decisions challenged (interim injunctive relief) were rejected, but in its view, even if a request for suspension had been successful, the decision granting the suspension would have taken place after the initiation of construction works. Specifically, in its judgment (case 487/2005), the court refused to suspend the decision on Modification No. 50, because

in its view it "[could not] have [an] irreversible impact on the environment since Modification No. 50 does not grant directly the right to start development of the area and is subject to future approval by other decisions". The communicant filed a lawsuit to challenge the decision approving the construction project and requested the court to suspend the decision, but, according to the communicant, the court refused to suspend the decision because the environmental aspects had already been considered in previous decisions relating to the project, namely Modification No. 50 and the Land Allotment Plan, and since neither of them were suspended by courts, there was not an adequate legal basis to suspend the decision approving the construction project.

Use of domestic remedies

56. The communicant attempted to make use of the domestic remedies available by initiating six judicial proceedings — three administrative lawsuits, one constitutional appeal, and two criminal complaints — to pursue its rights under the Aarhus Convention (see also paras. 20–24 and 53–55 above). All administrative decisions — approving Modification No. 50 to the City General Plan, the Land Allotment Plan and the Urbanization Project — had been challenged. The communicant also filed an administrative complaint challenging the difficulties it encountered in exercising its right to access information relating to the urbanization project.[6] The communicant argues that it decided not to challenge the local copying fees before the courts, in order to save resources and use them instead for its participation in the decision-making process and its work to influence decisions regarding the urbanization project. The communicant also explained that the community had found more effective ways to obtain the information requested from representatives of the local opposition parties, who had the right to obtain this information without charge from the local government.

III. Consideration and evaluation by the Committee

A. Legal basis and scope of considerations

57. The Convention was signed by Spain on 25 June 1998, ratified on 29 December 2004, published in the *Spanish Official Journal* on 16 February 2005, and entered into force for Spain on 29 March 2005. On 18 July 2006, the Party concerned adopted Act 27/2006 regulating the rights of access to environmental information, public participation, and access to justice in environmental matters.

58. Noting that some of the activities described in the communication took place prior to the Convention's entry into force for Spain, the Committee decides not to address acts or omissions related to procedures leading to the agreement between Murcia City Council and *Joven Futura* in 2003 (para. 14 above), as well as the screening decision of 2004 (para. 19).

59. With respect to Modification No. 50 to the City General Plan of April 2005 (para. 20) the Committee notes that, although the City Council approved Modification No. 50 to the City General Plan in April 2005 and the final approval was granted in June 2005, many significant events of the procedure relating to Modification No. 50 took place well before the entry into force of the Convention for Spain. The procedure was initiated in June 2004, the public notice and subsequent commenting period started in August 2004 and the screening decision was taken in September 2004. Moreover, the agreement between the

[6] Annexes 3 and 4 to the additional information provided by the communication on 28 August 2008.

Murcia City Council and *Joven Futura* had already been concluded in 2003. Bearing the above in mind, the Committee decides not to render findings on these events.

60. The decision-making procedures concerning Land Allotment Plan ZA-Ed3 of November 2005 (para. 21) and Urbanization Project UA1 of Land Allotment Plan ZA-Ed3 of April 2006 (para. 22), were both fully conducted after entry into force of the Convention for Spain, and thus all the requirements of the Convention are applicable.

61. The legal nature of the decisions mentioned in paragraphs 59 and 60 above is not clear enough for the Committee to determine whether they are subject to the requirements of article 6 or article 7 of the Convention. The names of the decisions could suggest that they have the legal nature of plans subject to article 7, although the name "project" of the Urbanization Project UA1 suggests that this decision may be subject to article 6. The Party concerned denies that any of these decisions qualify as permitting decisions under article 6, but fails to provide any explanation as to their legal nature.

62. The Committee has been confronted with similar problems and refers to its previous findings where it stated that the Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions when it determines how to categorize the relevant decisions under the Convention (ECE/MP.PP/2006/2/Add.1, para. 28 (Armenia)), their labels under the domestic law of the Party concerned are not decisive (ECE/MP.PP/2006/4/Add.2, para. 29 (Belgium)), but rather the issue is determined on the basis of the context, taking into account the legal effects of the decision (ECE/MP.PP/2008/5/Add.6, para. 57 (Lithuania)).

63. In this case, the Committee recognizes that different interpretations are possible and decides, as it has previously done, to "focus on those aspects of the case where the obligations of the Party concerned are most clear-cut. In this respect, […] the public participation requirements for decision-making on an activity covered by article 7 are a subset of the public participation requirements for decision-making on an activity covered by article 6. Regardless of whether the decisions are considered to fall under article 6 or article 7, the requirements of paragraphs 3, 4 and 8 of article 6 apply. Since each of the decisions is required to meet the public participation requirements that are common to article 6 and article 7, the Committee decides to examine the way in which those requirements have or have not been met" (ECE/MP.PP/2007/4/Add.1, para. 70 (Albania)).

64. The Committee further notes that while no EIA procedure was carried out in either of the approvals, the public was informed about the decision-making procedure and had some opportunity to submit comments in relation to all three approvals. However, in the case of the Urbanization Project UA1 of the Land Allotment Plan ZA-Ed 3, the opportunity was not effective, since it was provided during the Christmas holiday season (see para. 92 below).

65. The Committee regrets that it did not have any opportunity to discuss the matter with both the communicant and the Party concerned, and that where the observations of the Party concerned do not address specifically some of the communicant's allegations, the Committee must rely mostly on the facts and evidence provided by the communicant, bearing in mind, however, that the Party concerned was provided with the opportunity to discuss the matter but chose not to do so.

66. The Committee takes note of information available in the public domain that the European Parliament recently criticized extensive urbanization practices in Spain. The resolution adopted by the European Parliament in March 2009 refers to the "frequently excessive powers often given to town planners and property developers by certain local authorities" at the expense of communities and the citizens who have their homes in the area. The resolution calls for the suspension and revision of all new building projects which

do not respect the environment or guarantee the right of ownership and calls for adequate compensation for those affected.[7]

B. Substantive issues

Access to information in the form requested — article 4, paragraph 1 (b)

67. The Convention requires in article 4, paragraph 1, that public authorities, when responding to a request for environmental information, make such information available in the form requested, unless it is reasonable for the public authority to make it available in another form (in which case reasons shall be given for making it available in that form) or the information is already public available in another form.

68. It is not disputed that the information requested (see paras. 25–30 above) was recognized as environmental information in the meaning of the Aarhus Convention. The Party concerned denies any unlawful conduct in a general way, but has not provided any specific explanation in relation to the situation described above; in particular, it does not give either of the reasons envisaged in article 4, paragraph 1 (b) (i) or (ii) for not providing the information in the form requested.

69. The Party concerned, in its 25 June 2009 report, states that "sending of information by electronic means is exempt from payment of the fee". It is not clear to the Committee from this statement whether providing information on a CD-ROM is not considered under Spanish law as "sending of information by electronic means" and therefore whether charging €13 for making information available in the form of a CD-ROM raises an issue of compliance with article 4, paragraph 8. However, the Committee decides to focus its attention only on the issue raised by the communicant which is directly related to compliance with article 4, paragraph 1 (b).

70. The Committee finds that by failing to ensure that the public authority provided the environmental information in the form requested (in the form of a CD-ROM at a cost of €13, instead of paper copies of the documentation of 600 pages at a cost of €2.05 /page), Spain failed to comply with article 4, paragraph 1 (b), of the Convention.

Access to information within one month — article 4, paragraph 2

71. The Committee notes that the request of 17 February 2005 was made before the entry into force of the Convention for Spain, but was not addressed until three months after the date the Convention entered into force on 29 March 2005. The Committee decides therefore to focus on the request of 29 September 2006 submitted by the communicant to the Urban Planning Department, for which access was granted on 17 April 2007.

72. Article 4, paragraph 2, of the Convention requires that environmental information be made available as soon as possible and at the latest within one month after the request has been submitted. The volume and the complexity of the information may justify an

[7] European Parliament resolution of 26 March 2009 on the impact of extensive urbanisation in Spain on individual rights of European citizens, on the environment and on the application of EU law, based upon petitions received (2008/2248(INI)). Published on the Internet at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0192+0+DOC+XML+V0//EN&language=EN (last accessed on 5 October 2009).

extension of this period until up to two months after the request, in which case the applicant should be accordingly informed.

73. The Committee notes that the first reaction of the authorities to the communicant's request took place on 19 December 2006, when the authorities called the communicant's representative to enquire about the request, almost three months after the request had been submitted and with the objective of seeking clarification about the formal position of the person representing the communicant. The reaction of the authorities constitutes non-compliance with article 4, paragraph 2.

74. The Committee further notes that information itself was provided only three to seven months after the request for information had been submitted. The Committee notes that article 4, paragraph 2, providing for an extension where justified by the volume and complexity of the information, means that irrespective of the number of extensions, the total time of all extensions provided cannot exceed two months after the submission of the request for environmental information. Upon lapse of this two-month period, the Party concerned should either grant access to the requested information or deny access on the basis of the exceptions of article 4, paragraphs 3 and 4, of the Convention. Thus, the Party concerned failed to comply with article 4, paragraph 2, of the Convention.

Unreasonable costs — article 4, paragraph 8

75. It is not disputed that, as a condition for receiving copies of documents, the city imposed a charge of about €2 per page. The price for photocopies of agreements or records held by the offices or municipal archives was established at €2.05 per one-sided page in 2008. The 2009 fees chart provided by the communicant shows that the currently applicable charges for copies amount to €2.15 per page.

76. Article 4, paragraph 8, of the Convention provides that public authorities may charge for supplying information, under the condition that such charge does not exceed a reasonable amount. The Party concerned maintains that the charges imposed by its authorities have been set in compliance with article 4, paragraph 8, and are thus reasonable, because they comply with article 25 of the Local Finances Regime Law as "special utilization of the public domain" and are supported by economic analysis.

77. In considering the issue, the Committee took note of decisions by the Court of the European Community[8] and national courts and appeal bodies[9] on the meaning of

[8] More than 10 years ago the Court of Justice of the European Communities (CJEC) ruled in Case C-217/97 *Commission v. Germany* (para. 47) that: "[A]ny interpretation of what constitutes 'a reasonable cost' for the purposes of Article 5 of the [EC] directive [on information, 1990] which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected. […] [C]onsequently, the term 'reasonable' for the purposes of Article 5 of the directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search."

[9] By way of indication, the Information Tribunal of the United Kingdom in a recent case ruled that "the Council should adopt as a guide price the sum of 10p per A4 sheet [about €0.11], as identified in the Good practice guidance on access to and charging for planning information published by the Office of the Deputy Prime Minister and as recommended by the DCA [Department of Constitutional Affairs]. […] The Council should be free to exceed that guide price figure only if it can demonstrate that there is a good reason for it to do so." See, Information Tribunal, Appeal Number: EA/2005/0014, *David Markinson v. Information Commissioner* (14 March 2006), published on the Internet at

reasonable costs. Although the Committee is not bound by decisions of these courts and appeal bodies, their jurisprudence can shed light on how the term "reasonable" of the Convention may be understood and applied at the domestic level.

78. The considerations of the Committee are based on the assumption that Spanish law does not envisage any charges for the applicant to examine/retrieve information in situ and/or to receive the information by electronic means, and thus the fee scheme in question relates only to making the information available in copies.

79. The Committee notes that the Party concerned has failed to provide any argument justifying why the fees charged for making the planning documents in question available in copies differ from the fees charged for copying other documents. Given that the commercial fee for copying in Murcia is €0.03 per page, which seems to be generally equivalent to the standard commercial fee for copying in the United Nations Economic Commission for Europe (UNECE) countries, the Committee concludes that the charge of €2.05 per page for copying cannot be considered reasonable and constitutes non-compliance with article 4, paragraph 8, of the Convention.

Public participation and Environmental Impact Assessment — article 6, paragraph 1 (a)

80. The communicant makes a number of general observations concerning the importance of EIA for ensuring effective public participation. In this context, it alleges that the screening decision related to Modification No. 50 was not impartial and not based on sufficient legal and scientific arguments, amounting to non-compliance with article 6, paragraph 1 (a).

81. As already noted, the Committee decides not to consider the screening decision (para. 58 above). Nevertheless, it comments on the general observations made by the communicant to the extent that these seem to be related to procedures leading to decisions that the Committee has decided to consider.

82. The Committee notes that it cannot address the adequacy or result of an EIA screening procedure, because the Convention does not make the EIA a mandatory part of public participation; it only requires that when public participation is provided for under an EIA procedure in accordance with national legislation (para. 20 of annex I to the Convention), such public participation must apply the provisions of its article 6. Thus, under the Convention, public participation is a mandatory part of the EIA, but an EIA is not necessarily a part of public participation. Accordingly, the factual accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention, in particular decisions that there is no need for an environmental assessment, even if such decisions are taken in breach of applicable national or international laws related to environmental assessment, and cannot thus be considered as failing to comply with article 6, paragraph 1, of the Convention.

83. The Committee, however, in principle acknowledges the importance of environmental assessment, whether in the form of an EIA or in the form of a strategic environmental assessment (SEA), for the purpose of improving the quality and the effectiveness of public participation in taking permitting decisions under article 6 of the Convention or decisions concerning plans and programmes under article 7 of the Convention.

http://www.informationtribunal.gov.uk/DBFiles/Decision/i161/Markinson.pdf (last accessed on 15 September 2009).

Informing the public and effective participation — article 6, paragraph 2 (a) and (b) — and early participation — article 6, paragraph 4

84. The allegations concerning informing the public and providing early participation when all options are open are all related to the procedures which the Committee decides not to consider on the merits, namely to the agreement between the City of Murcia and the developer *Joven Futura*, the screening decision regarding Modification No. 50 and the procedure leading to the approval of the Modification No 50. Nevertheless, the Committee notes with concern that the final approval of Modification No. 50 by the City Council and the regional authority took place in 2005, shortly after the ratification of the Convention, without the public concerned having been informed or having been granted an opportunity to comment on the changes that were introduced after the lapse of the public comment period concerning the density of construction (see para. 39).

85. The Committee is not examining the agreement between the City of Murcia and the developer *Joven Futura*, and its role in further decision-making, on the merits because of the timing. It nevertheless recalls its previous findings whereby, in relation to the resolutions of local authorities allowing for contracts with private operators for the carrying out of public services, it held that such resolutions were not subject to the provisions of article 6 or 7 of the Convention, if they did not have any legal effect on these plans, confer any rights for the use of the sites or amount to the legal effect of a change in a planning instrument (findings for communication ACCC/C/2007/22, paras. 32 and 33 (France)).

Reasonable time-frames for effective public participation — article 6, paragraph 3

86. The communicant reports two instances of time frames that did not allow for effective participation: (a) for the Land Allotment Plan ZA-Ed 3 of November 2005, the notice was published on 25 August 2005 providing a time frame of one month for the public to submit comments; and (b) for the Urbanization Project UA1 of the Land Allotment Plan ZA-Ed3 of April 2006, the notice was published in the *Official Journal* on 22 December 2005 providing a time frame of 20 days for the public to submit comments (on a file consisting of more than 1,000 pages and on many plans related to the construction of 23 buildings containing 1,390 apartments).

87. The communicant alleges that, considering that the comment period started during the summer holiday season for the first case and at the Christmas holiday season for the second case, as well as the volume of the related documentation and the time necessary for the public to process the documentation, the time frames of one month and 20 days, respectively, were unreasonably short for the public to prepare and participate effectively in the environmental decision-making process regarding those activities.

88. In its findings with regard to communication ACCC/C/2006/16 (Lithuania), the Committee stated that "[t]he requirement to provide 'reasonable time frames' implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project". Further, the Committee established that the "time frame of only 10 working days, set out in the Lithuanian EIA Law, for getting acquainted with the documentation, including EIA report, and for preparing to participate in the decision-making process concerning a major landfill, does not meet the requirement of reasonable time frames in article 6, paragraph 3" (ECE/MP.PP/2008/5/Add.6, paras. 69 and 70 (Lithuania)).

89. In its findings with respect to communication ACCC/C/2007/22 (France), the Committee was "convinced that the provision of approximately six weeks for the public concerned to exercise its rights under article 6, paragraph 6, of the Convention and approximately the same time relating to the requirements of article 6, paragraph 7, in this case meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention" (findings for communication ACCC/C/2007/22, para. 22 (France)).

90. The Committee considers that the present case is slightly different from the two cases mentioned above with regard to article 6, paragraph 3, in that in the present case it is not only the time span itself which is questioned, but most importantly the timing of the commenting period, which was during the summer holiday season or during the Christmas holiday season. In that respect, the Committee is fully aware that in many countries of the UNECE region the period between 22 December and 6 January is considered as Christmas holiday season, despite the fact that officially many offices work during that time.

91. Considering that, as already established in previous cases, the requirement for reasonable time frames relates both to the time frames for inspecting the relevant documentation and to those for submitting comments, the Committee assumes that in Spanish law the time frame set for commenting includes the time frame for inspecting the relevant documentation and is deemed to start immediately after the public notice.

92. On the basis of the above, the Committee finds that a period of 20 days for the public to prepare and participate effectively cannot be considered reasonable, in particular if such period includes days of general celebration in the country. Moreover, the Committee notes that the initial proposal was made on 12 December 2005, and that the time span between this initial proposal and the public notice on 22 December 2005 was 10 days, indicating that the authority was in an extraordinary rush to initiate the commenting period; this can indeed give reason to suspect that making the notice so fast was not a routine procedure, as also evidenced by other cases reported in the current communication. Therefore the Committee finds that the Spain was in non-compliance with article 6, paragraph 3.

93. As for the allegation concerning the Land Allotment Plan ZA-Ed 3, the Committee has not been provided with sufficient evidence to prove that the volume and complexity of the documentation justified the claim that the one month time-frame was unreasonable for the public to prepare and submit comments. In particular, the Committee notes that while the month of August is indeed a traditional summer holiday season month in many countries, the given time frame began on 25 August 2005 and included most of the month of September, which is considered a "regular" working month. Under these circumstances, the Committee does not consider the given time-frame as amounting to non-compliance with the Convention.

Information to be made available — article 6, paragraph 6

94. Article 6, paragraph 6, of the Convention does not apply to plans and programmes and therefore, consistent with its decision to focus only on compliance with the provisions that are common to both articles 6 and 7 (see para. 63 above), the Committee is not considering the allegations in this respect.

95. The Committee makes two general remarks/observations concerning this provision. First, the Committee notes that article 6, paragraph 6, does require authorities to give the public concerned access to the relevant information free of charge, but only "for examination". Thus this provision does not allow making a charge for the examination of the information in situ but does not forbid making a charge for copying.

96. Furthermore, this provision applies "at the time of the public participation procedure". Therefore outside the time of public participation procedure, the right to examine information under article 6, paragraph 6, does not apply and the public needs to rely on the rights of access to information under article 4.

Due account taken of the outcome of the public participation — article 6, paragraph 8

97. The communicant alleges that none of the serious concerns raised in comments submitted by the communicant and affected neighbours were taken into account by decision-making authorities in any of the public participation procedures.

98. The Committee recalls its earlier observation that the requirement in article 6, paragraph 8, of the Convention that public authorities take due account of the outcome of public participation does not amount to the right of the public to veto the decision, and that this provision should not be read as requiring that the final say about the fate and the design of the project rests with the local community living near the project, or that their acceptance is always needed.[10]

99. Furthermore, it is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received.

100. The Committee recalls that the obligation to take "due account" under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to "make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based". Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.[11]

101. The Committee cannot assess, on the basis of the information provided, if indeed all the comments were ignored, as alleged by the communicant. Nevertheless, the Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.

Access to justice, injunction and financial barriers — article 9, paragraphs 2, 3, and 4

102. The communicant asserts that the Party concerned failed to comply with article 9, paragraphs 2 and 3, of the Convention. However, since the allegations are not substantiated, the Committee makes no findings in this respect.

103. The communicant filed three administrative lawsuits challenging the decisions approving Modification No. 50 to the City General Plan, the Land Allotment Plan and the Urbanization Project. In all three lawsuits the communicant requested the courts to suspend the three decisions. According to the communicant, the courts rejected all three requests.

[10] See para. 29 of the report of the Compliance Committee at its twenty-fourth meeting in Geneva, 30 June–3 July 2009 (ECE/MP.PP/C.1/2009/4).

[11] See *The Aarhus Convention: An Implementation Guide* (United Nations Publication, Sales No. E.00.II.E.3), p. 109; available at http://www.unece.org/env/pp/acig.pdf.

The communicant appealed to the Constitutional Court to consider the constitutional redress claim regarding the Murcia High Court Decision of 21 December 2007. The constitutional redress claim, inter alia, sought to overturn the lower court's decision to impose all costs upon the communicant. On 15 September 2009, the Constitutional Court rejected the communicant's appeal on the procedural grounds that no constitutional issue had been raised.

104. The Party concerned, in its 25 June 2009 report, stated that the communicant was arguing simply that it had a right to a favourable decision. However, the Committee notes that in case 487/2005, the court held that the request for suspension of Modification No. 50 and of the Land Allotment Plan were too early; it also held that there would be no irreversible impact on the environment because the construction could not start without additional decisions. Yet, when the Urbanization Project was approved and the communicant requested suspension of the decision until the court hearing was completed, the court in case 539/2006 held that it was too late, because this decision was subject to consideration and the subject of preceding decisions, namely Modification No.50 and the Land Allotment Plan. As a consequence, the court held that the project could not be suspended, since neither of these decisions had been suspended by the courts. On appeal, the court (case 953/2007) endorsed this judgment and did not suspend the decision.

105. The Committee finds that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late; it indicates that while injunctive relief is theoretically available, it is not available in practice. As a result, the Committee finds that the Party concerned is in non-compliance with article 9, paragraph 4, of the Convention, which requires Parties to provide adequate and effective remedies, including injunctive relief.

106. As to financial barriers, on 3 July 2006 the communicant filed an administrative lawsuit to the Administrative Proceedings Court challenging Urbanization Project UA1 and also requesting suspension of the decision. On 12 March 2007, the Administrative Proceedings Court took a separate decision on the suspension request, rejecting the application. The communicant lodged an appeal on 17 April 2007, which was rejected by the Murcia High Court on 21 December 2007. The High Court decided to impose all costs (€2,148) on the communicant.

107. The cost of €2,148 imposed a financial burden on the communicant. The communicant has substantiated the allegation that the costs were equal to the average monthly budget of a local family or the budget of a single person in Murcia for three months. However, the information provided is not sufficient to conclude in this respect whether the costs imposed and the procedures applied by the Party concerned are prohibitively expensive and, accordingly, in conflict with the requirements of article 9, paragraph 4.

108. The Committee emphasizes that article 9, paragraph 4, of the Convention applies also to situations where a member of the public seeks to appeal an unfavourable court decision that involves a public authority and matters covered by the Aarhus Convention. Thus the Party concerned is obliged to implement the Convention in an appropriate way so as to prevent unfair, inequitable or prohibitively expensive cost orders being imposed on a member of the public in such appeal cases.

109. The Committee has taken note of the basic provisions governing the cost issues relating to Court proceedings. However, it received information from the communicant to the effect that if a citizen loses a case against a public authority at a procedure before a court of first instance, the citizen does not have to pay the costs of the public authority's lawyers, except if the citizen proceeded in bad faith or with recklessness.

110. From a formal point of view, Spanish legislation does not appear to prevent decisions concerning the cost of appeal from taking fully into account the requirements of article 9, paragraph 4, that procedures be fair, equitable and not prohibitively expensive. However, the evidence presented to the Committee demonstrates clearly that in practice if a natural or legal person loses in the court of first instance against a public authority, appeals the decision and loses again, the related costs are being imposed on the appellant. The Committee therefore stresses that if the trend referred to reflects a general practice of courts of appeal in Spain in such cases this constitutes non-compliance with article 9, paragraph 4, of the Convention.

111. In 2006, the communicant submitted a complaint before the Murcia Magistrate's Court initiating criminal proceedings no. 4444/2006 on the basis of article 404 of the Criminal Code on wilful breach of duty, for failure of the authorities to afford due protection to archaeological remains found on land within the boundaries of the urbanization project. The Magistrate's Court shelved the case and imposed upon the communicant a "bond" requirement of €60,000, in the event the Court decided to take up the case. It is not clear to the Committee what the bond costs aim to cover. The bond fee has been appealed to the High Court and the case is pending. For that reason, the Committee declines to consider this matter, noting, however, that according to article 9, paragraph 3, each Party must ensure that members of the public have access to procedures to challenge acts and omissions which contravene provisions of its national law relating to the environment.

112. Regarding the requirement of timely remedies, a decision on whether to grant suspension as a preventive measure should be issued before the decision is executed. In the present case, it took eight months for the court to issue a decision on whether to grant the suspension sought for the Urbanization Project. Even if it had been granted, the suspension would have been meaningless as construction works were already in progress. The Committee has already held that "if there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question" (ECE/MP.PP/2008/5/Add.10, para. 56 (European Community)). In the present case, since no timely, adequate or effective remedies were available, the Party concerned is in non-compliance with article 9, paragraph 4.

113. The communicant also argues that Spain failed to comply with article 9, paragraph 5, of the Convention, by not considering "the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice." Law 1/1996 on Free Legal Assistance provides for such assistance to be made available at least in some cases. The Committee, however, does not have at its disposal sufficient information to ascertain whether "appropriate assistance mechanisms to remove or reduce financial [...] barriers to access justice" have been considered as required by article 9, paragraph 5, of the Convention.

IV. Conclusions

114. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

115. The Committee finds that as a result of a public authority ignoring a request for environmental information for a period of three months after the submission of the request, by failing to provide the information in the form requested without giving any reasons and by imposing an unreasonable fee for copying the documents, Spain failed to comply with article 4, paragraphs 1 (b), 2, and 8, of the Convention (see paras. 70, 74 and 80 above).

116. The Committee finds that as a result of a public authority setting a time frame of 20 days during the Christmas holiday season for the public to examine the documentation and to submit comments in relation to the Urbanization Project UA1, Spain failed to comply with the requirements of article 6, paragraph 3, of the Convention, referred to in article 7 (see para. 94 above).

117. The Committee finds that the failure of Spanish system of access to justice to provide adequate and effective remedies as shown in this case constitutes non-compliance with article 9, paragraph 4, of the Convention (see para. 105 above). Furthermore, if the trend referred in paragraph 110 above reflects a general practice of court of appeals in Spain regarding costs, this would also constitute non-compliance with article 9, paragraph 4.

118. In addition to the above main findings and conclusions, the Committee notes with regret that Spain, by failing to submit written explanations or statements clarifying the matter addressed by the communication (para. 6 above), it failed to comply with its obligations under the Convention as related to paragraph 23 of the annex to decision I/7. In the view of the Committee it is of the utmost importance for the effectiveness and credibility of the compliance mechanism that the procedural rules laid down in decision I/7 on review of compliance are complied with not only by the Committee, communicants and the secretariat, but also by the Parties to the Convention.

B. Recommendations

119. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, and noting the agreement of the Party concerned that the Committee take the measure referred in paragraph 37 (b) of the annex to decision I/7, recommends to the Party concerned:

(a) To take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(i) Only reasonable costs, equivalent to the average costs of a photocopy on paper or electronic means (CD-ROM/DVD) are charged for providing access to environmental information to the public at central, regional and local level, with such measures including a review of the Murcia City Council Fees Chart for Services;

(ii) Information requests be answered as soon as possible, and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months from the date of the request; and that related legislation be reviewed to provide for an easy and specific procedure to be followed, in the event of a lack of response to a request;

(iii) Clear requirements be established for the public to be informed of decision-making processes in an adequate, timely and effective manner, including informing public authorities that entering into agreements relevant to the Convention that

would foreclose options without providing for public participation may be in conflict with article 6 of the Convention;

(iv) A study be carried out on how article 9, paragraph 4, is being implemented by courts of appeal in Spain; and in case the study demonstrates that the general practice is not in line with the provision at issue, to take appropriate measures to align it to the Convention;

(v) Public participation procedures include reasonable time frames for the different phases allowing for sufficient time for the public to prepare and participate effectively, taking into account that holiday seasons as part of such time frames impede effective public participation; due to the complexity and the need to consult with experts, land use legislation be reviewed to expand the existing time frame of 20 days in the light of the findings and conclusions of the Committee;

(vi) Adequate, timely, and effective remedies, including injunctive relief, which are fair, equitable, and not prohibitively expensive be made available at first and second instance in administrative appellate courts for members of the public in environmental matters; and

(b) To develop a capacity-building programme and provide training on the implementation of the Aarhus Convention for central, local and regional authorities responsible for Aarhus-related issues, including provincial commissions granting free legal aid, and for judges, prosecutors and lawyers; and to develop an awareness-raising programme on Aarhus rights for the public.

United Nations ECE/MP.PP/C.1/2009/6/Add.1

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-fifth meeting
Geneva, 22–25 September 2009

Report of the Compliance Committee on its Twenty-fifth meeting

Addendum

Findings with regard to communication ACCC/C/2008/26 concerning compliance by Austria

Adopted by the Compliance Committee on 25 September 2009

Summary

These findings were prepared by the Compliance Committee in accordance with its mandate as set out in paragraphs 13, 14 and 35 of the annex to decision I/7 of the Meeting of the Parties. They concern communication ACCC/C/2008/26 submitted by the non-governmental organizational Nein Ennstal Transit-Trasse Verein für menschen- und umweltgerechte Verkehrspolitik (NETT) regarding compliance by Austria with its obligations under the Convention in connection with decision-making processes related to alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320.

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I. Background

1. On 15 July 2008, the Nein Ennstal Transit-Trasse - Verein fuer Menschen- und Umweltgerechte Verkehrspolitik (NETT – No to the Enns Valley Transit Route: Organization for a socially and environmentally responsible transport policy), represented by Dr. Rolf-Michael Seiser and with powers of attorney granted to MMag. Johannes Pfeifer, hereinafter "the communicant", submitted a communication to the Committee alleging failure by Austria to comply with its obligations under article 7, in conjunction with article 6, paragraphs 3, 4 and 8, article 8 and article 9, paragraphs 2, 3 and 4, of the Convention.

2. The communication concerns decision-making processes related to the consideration of alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320, as well as a link between the two decision-making processes:

(a) In its initial communication the communicant alleges that in the decision-making process regarding the consideration of alternative transport solutions for the Enns Valley, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention by not providing for adequate public participation in that decision-making process. In relationship thereto, the communicant also alleges that Austrian authorities failed to comply with article 2, paragraph 5, of the Convention by not allowing the communicant to participate in the decision-making process. In addition, the communicant alleges that the Austrian authorities failed to comply with article 8 of the Convention by not providing adequate public participation opportunities in connection with decision-making on executive regulations. The communicant further alleges that no opportunity to challenge relevant decisions was available and thus that Austrian authorities failed to comply with article 9 of the Convention.

(b) In its initial communication with respect to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320, the communicant alleges that the Austrian authorities failed to comply with article 7 in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention by not providing for adequate public participation. The communicant also alleges that the Austrian authorities failed to comply with article 8 of the Convention by not providing adequate public participation in connection with decision-making on executive regulations. The communicant furthermore alleges failure to comply with article 9 of the Convention because procedures were not available to challenge the omission to introduce the ban.

(c) The communicant also submits that there is a link between the two decision-making processes in that the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320 would diminish the need for large-scale transport alternatives in the Enns Valley.

3. The communication was supplemented with a number of supporting documents.

4. At its twenty-first meeting (17–19 September 2008), the Committee determined on a preliminary basis that communication ACCC/C/2008/26 was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7, the Committee forwarded the communication to the Party concerned on 26 September 2008. The Committee also raised a number of questions in relation to the communication with both the Party concerned and the communicant.

6. A response was received from the communicant on 15 January 2009, addressing the questions raised.

7. A response was received from the Party concerned on 25 February 2009, disputing the claims in the communication, addressing the questions raised and providing the Committee with relevant background information.

8. During its twenty-third meeting (31 March–3 April 2009), the Committee discussed the communication with the participation of representatives of both the Party concerned and the communicant, both of whom answered questions, clarified issues and presented information. On 31 March 2009, the communicant, in writing, also presented further allegations contending that both when considering alternative transport solutions for the Enns Valley and in not introducing a 7.5 tonnage restriction for lorries on route B 320, the Austrian authorities had failed to comply with article 6 of the Convention. In addition, the communicant submitted further information to substantiate its allegation that the Austrian authorities had failed to comply with articles 7, 8 and 9 of the Convention. The Party concerned informed the Committee that in its view the decision-making process regarding the alternative transport solutions was neither in the permitting stage nor in the planning stage, and thus not subject to the public participation requirements of article 6 or article 7, respectively, of the Convention. Furthermore, the Party concerned asserted that during the Strategic Traffic Assessment (STA), all options would be open. As for the proposed introduction of the 7.5-tonnage restriction for lorries, the Party concerned stated that under Austrian law, such a ban was considered as a traffic regulation concerned with the regulation and safety of traffic.

9. The Committee confirmed that the communication was admissible. It requested clarification of various aspects of the arguments put forward by the Party concerned and the communicant with regard to, inter alia, the starting point of the planning phase. It requested from the Party concerned a written list of all options that were going to be considered during the STA phase of the planning process, together with further information and legal references to substantiate the claim by the Party concerned that all options remained open. The Committee also agreed to take into consideration new information offered by the communicant, within the framework of the communication.

10. On 23 April 2009, the communicant submitted further information to the Committee upholding its allegations that the Austrian authorities had failed to comply with articles 6, 7, 8 and 9 of the Convention, both when considering alternative transport solutions for the Enns Valley and in the decision-making process related to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320. More specifically, the communicant submitted that the motion dated 31 March 2008 and adopted by the Styrian Provincial Government on 21 April 2008 constituted a final choice for a specific route, namely the 4-lane middle route.

11. On 27 May 2009 (with corrections submitted on 12 June 2009), the Party concerned submitted further information to the Committee disputing the claims presented by the communicant, both those presented in writing and orally at the twenty-third meeting of the Committee. The Party concerned informed the Committee that in its view the planning process was initiated by the decision of the Styrian Provincial Government of 21 April 2008 and submitted a list of options to be considered in that process (zero option, construction of new major roads, construction of new local roads, expansion of existing roads, public transportation option, combined option). The Party concerned also noted that the communicant had raised a new point in its submission of 31 March 2009 and orally at the twenty-third meeting of the Committee. This point concerned the manner in which strategic environmental assessments are conducted in the field of transport in Austria. The Party concerned suggested that this point should not be part of the present proceedings because it was not raised in the original communication submitted by the communicant. The Party concerned nevertheless provided information on how strategic environmental assessments in the field of transport are conducted in Austria.

12. In accordance with paragraph 34 of the annex to decision I/7, the Committee prepared draft findings at its twenty-fourth meeting (30 June–3 July 2009). These were forwarded to the Party concerned and the communicant on 20 August 2009 with an invitation to provide comments, if any, by 15 September 2009.

13. The Party concerned provided comments on 18 September 2009, accepting the draft findings, and the communicant provided comments on 14 September 2009 reiterating its position.

14. On 15 September 2009, comments were received from Oekobuero, criticizing the findings.

15. At its twenty-fifth meeting (22–25 September 2009), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

A. National legal framework

16. The communication concerns decision-making processes related to the consideration of alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the introduction of a 7.5 tonnage restriction for lorries on route B 320, as well as the link between the two decision-making processes.

1. Alternative transport solutions in the Enns Valley

17. The Federal Act on the Strategic Assessment of Transport (SP-V Act), published in the Federal Law Gazette (FLG) I No. 96/2005, requires that network alterations of the major road network, such as some of the transport solutions being considered in the Enns Valley, be submitted to a strategic assessment in which potential substantial adverse environmental impacts are to be considered. After the conduct of the strategic assessment, the remaining option(s) would be subject to an environmental impact assessment based on the Federal Act on Environmental Impact Assessment 2000 (EIA Act 2000), FLG I No. 697/1993, last amended in 2008 (see FLG I No. 2/2008). Both Acts serve to implement the Convention and relevant European Community Directives.

18. The SP-V Act requires the initiator, which in case of the high-level road network (such as motorways) is ASFINAG (Austrian Organization for Financing Motorways), when suggesting alterations to the network, to present a proposal including an environmental report, prepared in cooperation with the Ministry of Transport (article 4 of the SP-V Act). The aim of the proposal is the inclusion of the proposed road on the Annex to the 1971 Federal Roads Act by way of a decision taken in Parliament (article 3(1)(3) of the SP-V Act). The Act requires the operator when assessing alterations to the high-level network , inter alia, to ensure sustainable passenger and freight transport, taking into account social and safety conditions, to ensure a high level of environmental protection, to ensure optimal utilization of available capacity and to provide interoperability and intermodality within and between different modes of transport. In addition, possible substantial adverse impacts of,

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

as well as reasonable alternatives to, the proposed alterations of the network have to be considered in the proposal (article 5(1) of the SP-V Act). The Act, furthermore, requires the operator to consult the Federal Minister of Agriculture, Forestry, Environment and Water Management as well as the environmental authorities of the provinces involved. The proposal and the environmental report are to be published on the Internet on a page hosted by the Federal Ministry of Transport, and notifications are to be placed in at least two daily newspapers (article 8(1) of the SP-V Act). After the publication of the report, the public is entitled to make statements during a period of six weeks (article 8(1) of the SP-V Act). In conducting the strategic assessment, the Minister of Transport is to collect statements by the public and other public authorities and to take such statements into account (article 5(2) and article 8 of the SP-V Act). The draft parliamentary decision as well as a document indicating how statements from the public and environmental considerations have been taken into account is also to be published on the website of the Ministry of Transport (article 9 of the SP-V Act). Subsequently, a decision is taken in Parliament, which is subject to the general legislative procedure.

19. The EIA Act 2000 regulates the conduct of environmental impact assessment, including participation of the public therein. Depending on whether the option chosen qualifies as a provincial road (e.g. adjustments to route B 320, which is a provincial road) or federal road (e.g. a new 4-lane route included on the Annex to the 1971 Federal Roads Act), either the Styrian Provincial Government or the Federal Government would be responsible for the environmental impact process. Concomitantly, either section 2 or 3 of the EIA Act 2000 would apply. Either way, provisions on public participation and access to justice govern the decision-making processes. In the case that the option chosen qualifies as a provincial road, article 19 of the EIA Act 2000 regulates public participation; in the case that it qualifies as a federal road, article 19 applies mutatis mutandis (see e.g. article 24 (5) and article 24h(8) of the EIA Act 2000). Article 19(6) provides the conditions which NGOs must meet to qualify as an environmental organization and which the Minister of Agriculture, Forestry, Environment and Water Management must apply, based on article 19(7), in deciding whether a non-governmental organization (NGO) is entitled to locus standi in the procedures envisaged in the EIA Act 2000.

2. Introduction of 7.5 tonnage restriction for lorries on route B 320

20. The Austrian Highway Code qualifies the imposition of a 7.5 tonnage restriction for lorries on route B 320 as a measure to regulate traffic or the safety of traffic. According to established Constitutional Court practice, hearings are held prior to such a regulation being issued. If no such hearings are held the regulation is deemed unlawful. No regulations have been issued which determine how such hearings are to be held.

B. Decision-making processes

21. The communicant was recognized as an environmental organization for, among other provinces, the province of Styria, by a decision of the Federal Minister of Agriculture, Forestry, Environment and Water Management taken on 10 July 2007, on the basis of article 19(7) of the EIA Act 2000. The communicant thereby has locus standi regarding environmental impact assessment procedures and is entitled to act, including by submitting complaints, in order to secure the observance of environmental law.

1. Alternative transport solutions in the Enns Valley

22. Alternative transport solutions in the Enns Valley have been the object of study since 1971. The most recent study concerns the so-called “Basler Study” presented in July 2003. This study served as a basis for a “route finding process” (Trassenfindungsprozess)

which the Provincial Government initiated by a decision of 22 January 2004 and in which alternative transport solutions in the Enns Valley were considered. During these considerations, various options for addressing the traffic situation in the Enns Valley were presented and considered by, among other forums, the Regional Planning Council, an advisory body for regional planning, constituted in 2004. Pursuant to a decision of 25 April 2005, the Regional Planning Council approved the functional evaluation of the road network as set out in the draft Regional Traffic Concept. This evaluation was subsequently approved by the Provincial Government. One of the options that played a role in this process is the realization of a 4-lane route through the Enns Valley, an option favoured by the Regional Planning Council. Since 2004, various meetings involving communities (Community Forums) and NGOs (Round Tables) have been organized to discuss alternative transport solutions in the Enns Valley. The communicant participated in these Round Tables until February 2006 when, after the presentation of unmet demands (regarding the content of the discussions, which according to the communicant were limited to the 4-lane route option), the communicant and other NGOs left the process.

23. In 2007, a public survey was conducted in the Enns Valley which according to the communicant illustrated the rejection of the 4-lane option. The communicant subsequently tried to engage in a discussion with the Regional Planning Council, which, according to the communicant, refused to engage in a discussion regarding the results of the public survey and the interim results of an intermodal traffic planning project. On 14 February 2008, the communicant applied for membership to the Regional Planning Council. Its application was rejected, based on the argument that the composition of the Council was determined by the Styrian Regional Planning Act, which does not provide for the participation of entities such as the communicant in the Council. This rejection was communicated to the communicant by letter from the Provincial Government of Styria, dated 17 March 2008. The communicant appealed the rejection of its application for membership to the Regional Planning Council before the Constitutional Court. The Court rejected the appeal on the grounds that it was not for the Styrian Government to decide on the composition of the Council on an ad hoc basis and that the communicant was not legally affected by the proceedings of the Council.

24. On 21 April 2008, the Styrian Provincial Government adopted a motion in which the proposed planning process and the results of the route selection process were noted with approval, and in which the negotiations for a funding option and the conclusion of a contract as well as the conduct of other necessary procedures were authorized. At the basis of the motion is a document dated 27 March 2008 which summarizes the planning process and the route selection process. Under the heading “Remaining routes – Method of Choosing” (Verbleibende Trassen – Auswahlverfahren), the document mentions “Als Ergebnis der Untersuchungen wird empfohlen, die Mittelvariante weiter zu verfolgen” (“As a result of the investigations it is recommended to further pursue the middle option”).

2. Introduction of 7.5 tonnage restriction for lorries on route B 320

25. In 2004, eight municipalities and other interested parties, including the communicant, submitted applications for the imposition of a 7.5 tonnage restriction on route B 320. No decisions regarding the imposition of such a restriction have been taken. The District Commissioner has obtained or is in the process of obtaining relevant expert opinions, regarding, for example, medical and environmental effects. Part of the expert opinions were presented and discussed in public by the District Administration of Liezen on 11 April 2007. NETT requested access to the available expert opinions, but such access was denied.

26. On 14 February 2008, the communicant submitted an application to participate in the decision-making process regarding the proposal to introduce a 7.5 tonnage restriction on

route B 320. Its application was rejected for lack of a legal, as opposed to actual, interest. In addition, it was pointed out that its status as an environmental organization under article 19(7) of the EIA Act 2000 only applied to environmental impact procedures conducted pursuant to that Act and not to decisions taken within the framework of road traffic regulations. The communicant appealed this decision before the Highest Administrative Court on 4 August 2008. The case is still pending.

27. Also, on 1 July 2008, the communicant submitted a complaint to the European Commission regarding the non-imposition of a 7.5 tonnage restriction on route B 320. The complaint is still pending.

C. Substantive issues

1. Alternative transport solutions in the Enns Valley

Informing the public and early public participation when all options are open – article 6, paragraphs 3, 4 and 8

28. The communicant alleges that in the decision-making process regarding the decision of the Regional Planning Council of 25 April 2005, there was "no sufficient participation and information of the public in the planning process" and that this constitutes a violation of article 6 of the Convention (written statement submitted 31 March 2009 and orally at the twenty-third meeting of the Committee).

29. Furthermore, the communicant alleges that the motion adopted by the Styrian Provincial Government dated 21 April 2008 amounted to a decision to permit what is known as the "4-lane middle variant" and that in the decision-making process, the Austrian authorities failed to comply with article 6 of the Convention (written statement submitted 31 March 2009 and orally at the twenty-third meeting of the Committee).

30. The Party concerned maintains that the process for considering alternative transport solutions for the Enns Valley had not reached the permitting stage, neither when the Regional Planning Council adopted its advisory decision on 25 April 2005 nor when the Styrian Federal Government took its decision on 21 April 2008, and that therefore article 6 of the Convention is not applicable.

Public participation concerning plans, programmes and policies – article 7, in conjunction with article 6, paragraphs 3, 4 and 8

31. The communicant alleges that the decision of the Regional Planning Council of 25 April 2005 precludes consideration of options other than a 4-lane route. It consequently alleges as follows:

(a) Since the public was not informed about the planned decision of the Regional Planning Council, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraph 3, of the Convention.

(b) Since the public, in general, and the communicant, in particular, were not entitled to participate in the Regional Planning Council, the decisions were taken without early public participation when all options are open; and because participation in the Round Tables did not amount to effective public participation, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraph 4, of the Convention.

(c) Because the input of NGOs in general and of the communicant in particular in the Round Table process was not properly taken account of and because the results of a household survey could not be presented to the Regional Planning Council, the Austrian

authorities failed to comply with article 7, in conjunction with article 6, paragraph 8, of the Convention.

32. In addition, the communicant alleges that the decision of the Styrian Provincial Government dated 21 April 2008 amounts to a decision to pursue the "4-lane middle variant", and that in the decision-making process, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention. In particular, the communicant alleges that the Round Tables for NGOs in which it participated until February 2006 did not provide for effective participation when all options were open and amounted to a failure to comply with article 7, in conjunction with article 6, paragraph 4, of the Convention; and that the outcome of those Round Tables as well as other submissions by the public were not given due account in the planning process, which according to the communicant amounts to a failure to comply with article 6, paragraph 8, of the Convention.

33. The Party concerned maintains that the participatory processes undertaken prior to 21 April 2008 involved a pre-planning phase in which possible options for a road in the Enns Valley were assessed having regard to the legal limitations on the available options, in view of, among others, the European Community Habitats and Birds Directives[2]. Consequently, the Party concerned maintains that article 7 of the Convention does not apply to the actions challenged by the communicant. It maintains that the planning process and thus the application of article 7 will only start with the launching of the Strategic Traffic Assessment in furtherance of the motion adopted by the Styrian Provincial Government on 21 April 2008. The Party concerned submits that in this process, public participation is envisaged in conformity with the Convention. Furthermore, the Party concerned maintains that in that process, all options remain open. The Party concerned also points to the five Round Tables which were organized in the pre-planning stage in order to involve NGOs and points out that since February 2006 the communicant declined to participate in these Round Tables. Finally, the Party concerned disputes the allegation by the communicant that at that stage all options were no longer open.

Public participation in the preparation of executive regulations and/or generally applicable legally binding normative instrument – article 8

34. The communicant alleges that some of the aforementioned decisions, without referring to specific decisions, constitute executive decisions within the purview of article 8 of the Convention, that these decisions have not been made publicly available and that the public has not been given the opportunity to comment thereon. It thus alleges a failure to comply with article 8 on the part of the Party concerned.

35. The Party concerned submits that no executive decisions have been taken.

Access to justice – article 9

36. The communicant alleges failure of the Party concerned to comply with article 9, paragraph 2, of the Convention on the grounds that insufficient means were available to challenge the composition of the Regional Planning Council or to challenge the rejection of its application for membership to the Council. The communicant in this respect also alleges failure by the Party concerned to provide effective remedies and thus failure to comply with article 9, paragraph 4, of the Convention.

[2] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

37. More generally, the communicant alleges that the Party concerned has failed to comply with article 9, paragraph 3, of the Convention.

38. The Party concerned submits that since article 6 of the Convention does not apply to the decision-making process at stake, thus article 9, paragraph 2, and consequently paragraph 4 of the Convention, are not applicable.

2. Introduction of 7.5 tonnage restriction for lorries on route B 320

Informing the public and early public participation when all options are open – article 6, paragraphs 3, 4 and 8

39. The communicant alleges that lack of public participation with respect to the proposal to introduce the 7.5 tonnage restriction for lorries on route B 320 constitutes a failure of the Party concerned to comply with article 6 of the Convention (written statement submitted on 31 March 2009 and orally at the twenty-third meeting of the Committee).

40. The Party concerned submits that article 6 of the Convention does not apply to the decision-making process in question, given that the decision at issue is not a permitting decision and does not come within any of the categories listed in annex I of the Convention.

Public participation concerning plans, programmes and policies – article 7, in conjunction with article 6, paragraphs 3, 4 and 8

41. The communicant alleges that lack of public participation with respect to the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320 constitutes a failure of the Party concerned to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

42. The Party concerned submits that the decision-making process in question concerns a measure that seeks to regulate traffic and the safety of traffic and does not constitute the development of a plan, programme or policy relating to the environment in the sense of article 7 of the Convention. It furthermore points out that the decision-making process is still ongoing and that any decision taken according to the Constitutional Court practice will have to be subjected to a hearing prior to becoming effective.

Public participation in the preparation of executive regulations and/or generally applicable legally binding normative instrument – article 8

43. The communicant alleges that the fact that the public does not have the opportunity to comment on that no decision has been taken regarding the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320, constitutes a failure of the Party concerned to comply with article 8 of the Convention.

44. The Party concerned submits that no decision has been taken in this respect and that any decision taken according to the Constitutional Court practice must be subjected to a hearing prior to becoming effective.

Access to justice – article 9

45. The communicant alleges that the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320 amounts to an omission. Given that no review or appeal procedure regarding this omission is available, the communicant alleges that the Party concerned has failed to comply with article 9, paragraph 2, of the Convention.

46. More generally, the communicant alleges that the Party concerned has failed to comply with article 9, paragraph 3, of the Convention.

47. The Party concerned submits that since article 6 of the Convention does not apply to the decision-making process at stake, thus article 9, paragraph 2, and subsequently paragraph 4, of the Convention are not applicable.

III. Consideration and evaluation by the Committee

A. Legal basis and scope of considerations by the Committee

48. Austria ratified the Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.

49. Noting that a number of events referred to in the proceedings took place before the entry into force of the Convention for the Party concerned, the Committee focuses on the activities that took place after 17 April 2005. The Committee notes that a number of significant events in the decision-making process have taken place since the entry into force of the Convention for Austria (ECE/MP.PP/C.1/2005/2/Add.1, para. 4) and notes that the application of the Convention was not disputed by the Party concerned.

50. The communication refers to a number of consecutive decisions and decision-making processes. Whether any one of these decisions amount to a permitting decision under article 6, or a decision to adopt a plan, programme or policy under article 7 of the Convention, must be determined on a contextual basis, taking into account the legal effects of each decision.

B. Admissibility and exhaustion of domestic remedies

51. As mentioned in paragraph 0 above, the Committee finds the communication to be admissible.

52. Given the phase of the decision-making process, the Committee concludes that the communicant has made all reasonable efforts to exhaust domestic remedies.

C. Substantive issues

Public participation in the preparation of executive regulations and/or generally applicable legally binding normative instrument – article 8

53. In line with the Committee's understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, para. 13), that decision I/7 does not require the Commission to address all facts and/or allegations raised in the communication, the Committee decides not to address the allegations that executive decisions, ex article 8 of the Convention, have been taken in regard of the consideration of alternative transport solutions in the Enns Valley and the proposal to introduce a 7.5 tonnage restriction for lorries on route B 320. The Committee comes to this decision because the communicant did not clearly indicate which decisions are at stake with respect to the consideration of alternative transport solutions in the Enns Valley and a decision, subject to a hearing, is still pending regarding the proposed introduction of the 7.5 tonnage restriction for lorries on road B 320.

1. Alternative transport solutions in the Enns Valley

Informing the public and early public participation when all options are open – article 6, paragraphs 3, 4 and 8

54. As for the consideration of alternative transport solutions in the Enns Valley, taking into account the advisory nature of the Regional Planning Council, the Committee concludes that the decision taken by the Regional Planning Council on 25 April 2005 does not amount to a permitting decision which authorizes a proposed activity listed in annex I of the Convention. Furthermore, taking into account the fact that the decision taken by the Styrian Provincial Government on 21 April 2008 does not authorize the construction of a road, the strategic assessment still to be conducted based on the SP-V Act and the EIA still to be conducted on the basis of the EIA Act 2000, the Committee concludes that the decision taken by the Styrian Provincial Government of 21 April 2008 does not amount to a permitting decision which authorize a proposed activity that is covered by any of the categories listed in annex I of the Convention.

Public participation concerning plans, programmes and policies – article 7, in conjunction with article 6, paragraphs 3, 4 and 8

55. As to whether any one of the decisions and decision-making processes referred to by the communicant amount to the preparation of plans, programmes or policies within the purview of article 7 of the Convention, the Committee refers to its previous findings where it stated that, when it determines how to categorize the relevant decisions under the Convention, their labels under domestic law of the Party concerned are not decisive (ECE/MP.PP/C.1/2006/4/Add.2, para. 29). In this case, the Committee will thus have to determine whether any of the decisions taken amount to part of a decision-making process regarding the preparation of plans, programmes or policies, and if so, whether the conditions of article 7, in conjunction with article 6, paragraphs 3, 4 and 8 of the Convention, have been met.

56. The Committee finds that the decision of the Styrian Provincial Government on 22 January 2004, well in advance of the entry into force of the Convention for the Party concerned, initiated a planning process which is still ongoing. Within that planning process, public participation, in the sense of public debate, has taken place through the so-called Round Tables, both before and after the Convention entered into force for the Party concerned. Whether these Round Tables as such amount to public participation in accordance with the article 7, in conjunction with article 6, paragraphs 3, 4 and 8, is not for the Committee to decide in this case, given that the relevant decision was taken and that no significant events relating to the decision-making process took place after the Convention entered into force for the Party concerned.

57. The Committee notes that the planning process is still ongoing. Important in this respect is the assurance of the Party concerned that during the strategic assessment, still to be conducted based on the SP-V Act, all options will be open and considered and participation in accordance with the Convention will be afforded. In this context, the Committee, however, expresses concern in respect of the motion adopted by Styrian Provincial Government of 21 April 2008 and the document dated 27 March 2008 which provides the basis for this motion. These documents express a strong presumption in favour of the 4-lane option (corroborated by information available on the website of the Styrian Government),[3] which may de facto narrow down the available options and thus hamper participation at an early stage when all options are still open and due account can be taken

[3] See http://www.verkehr.steiermark.at/cms/beitrag/10930541/11163579/ (last accessed 17 June 2009).

of the outcome of the public participation. Similarly, the Committee expresses concern with respect to the statements of the member of the provincial government, Mag. Kristina Edlinger-Ploder on public television and in newspapers that the 4-lane road will be built, excluding the consideration of other options.[4]

Access to justice – article 9

58. Given that none of the decisions taken amount to a permitting decision under article 6 of the Convention, the Committee finds that article 9, paragraph 2, and subsequently paragraph 4 of the Convention, do not apply to the phase of the decision-making process considered in the present case with respect to the consideration of alternative transport solutions in the Enns Valley.

59. The Committee, while aware of the information available in the public domain with respect to the limited manner in which the Party concerned has implemented article 9, paragraph 3, of the Convention,[5] finds that the communicant has insufficiently substantiated its allegation that article 9, paragraph 3, of the Convention has not been complied with in the present case with respect to the consideration of alternative transport solutions in the Enns Valley.

2. Introduction of 7.5 tonnage restriction for lorries on route B 320

Informing the public and early public participation when all options are open – article 6, paragraphs 3, 4 and 8

60. The Committee concludes that not introducing the 7.5 tonnage restriction for lorries on route B 320 does not amount to a decision to permit a proposed activity listed in annex I of the Convention.

Public participation concerning plans, programmes and policies – article 7, in conjunction with article 6, paragraphs 3, 4 and 8

61. The Committee concludes that the decision-making process regarding the proposal to introduce a 7.5 tonnage restriction for lorries on route B 320 does not constitute a decision-making process regarding a plan, programme or policy. As mentioned the Committee has decided not to deal with article 8 issues.

Access to justice – article 9

62. Given that no permitting decisions within the purview of article 6 of the Convention are at stake, the Committee concludes that article 9, paragraph 2, and consequently paragraph 4 of the Convention, does not apply in the present case, with respect to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320.

63. The Committee, while aware of the information available in the public domain with respect to the limited manner in which the Party concerned has implemented article 9, paragraph 3, of the Convention,[6] finds that the communicant has not sufficiently substantiated its allegation that article 9, paragraph 3, of the Convention has not been complied with in the present proceedings, with respect to the proposed introduction of the 7.5 tonnage restriction for lorries on route B 320.

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[4] See http://oesterreich.orf.at/steiermark/stories/272397/ (last accessed on 23 September 2009).

[5] Country Report for Austria, Measures on access to justice in environmental matters (Article 9(3)), Study prepared by Milieu Ltd. for the European Commission, DG Environment, 2007.

[6] Ibid.

3. Link between the two decision-making processes

64. As to the possible link between the two decision-making processes (see para. 0 (c) above), the Committee suggests that it would be logical to examine this possible link early on in the decision-making process, when all options are still open. The strategic assessment to be conducted pursuant to the SP-V Act might well provide opportunities in this respect.

IV. Submission by the OEKOBUERO

65. The Committee considered the submission by the Oekobuero asserting, inter alia, that the Austrian laws on EIA and SEA might in general not be in conformity with the Convention. The Committee noted that in the present communication the specific facts of the case were at stake and no decisions pursuant to either the EIA or SEA have yet been taken.

IV. Conclusions

66. The Committee concludes that, given the present phase of the decision-making process, the Party concerned has not failed to comply with the Convention. The Committee, however, notes that at least in part its conclusion is related to the fact that the planning process in the present case commenced well in advance of the entry into force of the Convention for the Party concerned. It is in this context that the Committee considers it important to reiterate its concern expressed in paragraph 0. The Committee emphasizes that participation in accordance with article 6 and article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention, should take place and that such participation does not only require formal participation. Importantly, participation is to include public debate and the opportunity for the public to participate in such debate at an early stage of the decision-making process, when all options are open and when due account can be taken of the outcome of the public participation.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-ninth meeting
Geneva, 21–24 September 2010

Report of the Compliance Committee on its Twenty-Ninth meeting

Addendum

Findings and recommendations with regard to communication ACCC/C/2008/27 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 24 September 2010

I. Background

1. On 18 August 2008, Cultra Residents' Association (hereinafter, "the communicant") submitted a communication to the Committee, alleging non-compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under articles 3, 7 and 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter, "the Aarhus Convention" or "the Convention").

2. The communicant alleged that the Party concerned failed to comply with article 3 of the Convention by making the decision to expand Belfast City Airport operations through a "private" Planning Agreement, a type of instrument enforceable only between its contracting parties and which allows the public no right of appeal other than judicial review. The communicant also alleged that, in making the Planning Agreement, the Party concerned failed to comply with the public participation requirements under the Convention, in particular by opting for an "examination in public" instead of a public

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inquiry. In addition, the communicant alleged that its rights under article 9 of the Convention were violated when it was ordered to pay the full costs (£39,454) of the Department of Environment for Northern Ireland (hereinafter, "the Department of Environment") following the dismissal of its application for judicial review proceedings.

3. The communication was forwarded to the Party concerned on 26 September 2008, together with a number of questions from the Committee, following a preliminary determination by the Committee at its twenty-first meeting (17–19 September 2008) that it was admissible. The communicant was also asked to answer certain questions to clarify its allegations of non-compliance by the United Kingdom with the Convention, inter alia, concerning the prohibitive nature of the costs and the reduced public participation possibilities in the examination in public procedure.

4. The Party concerned provided answers to the Committee's questions in a letter dated 26 February 2009. The communicant replied to the questions posed by the Committee by a letter of 26 March 2009.

5. At its twenty-third meeting (31 March–3 April 2009), the Committee decided to discuss the substance of the communication together with communication ACCC/C/2008/23, which also concerned compliance by the United Kingdom with the provisions of article 9 of the Convention, at its twenty-fourth meeting (30 June–3 July 2009), and informed the Party concerned and the communicant about its decision.

6. By letter dated 12 May 2009, the Party concerned requested to postpone the planned discussion of communications ACCC/C/2008/23 and ACCC/C/2008/27 so that they would be considered at the same time as communication ACCC/C/2008/33. The communicant, by letter dated 20 May 2009, opposed the proposal to postpone the discussion of communication ACCC/C/2008/27. After considering the views of both parties, the Chair of the Committee decided to hold the discussions on communications ACCC/C/2008/23 and ACCC/C/2008/27 at its twenty-fourth meeting.

7. On 22 May 2009, the Committee received written submissions in respect of ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 from an observer, Coalition for Access to Justice for the Environment (hereinafter, "CAJE"), a coalition of six environmental non-governmental organizations from the United Kingdom.[1]

8. On 17 June 2009, the Party concerned provided additional written submissions for consideration by the Committee clarifying certain aspects of its response to the communication.

9. The Committee discussed the communication at its twenty-fourth meeting, with the participation of representatives of both the Party concerned and the communicant. At the beginning of the discussion, the Committee confirmed the admissibility of the communication.

10. After the open discussion of the communication at the Committee's meeting, both the communicant and the Party concerned provided additional written submissions regarding certain points canvassed at that meeting. These included consideration of whether the activities at issue might fall within the scope of article 6 of the Convention. By letter dated 10 July 2009, the communicant provided further details of its position with respect to the alleged non-compliance by the Party concerned with article 6.

[1] The six members of the coalition are Friends of the Earth, WWF-UK, Greenpeace, the Royal Society for the Protection of Birds, Capacity Global and the Environmental Law Foundation.

11. By letter dated 22 July 2009, the Party concerned set out its view that article 6 was not engaged in this case.

12. In the same letter dated 22 July 2009, the United Kingdom alleged that a member of the Committee had a conflict of interest with respect to communications ACCC/C/2008/23 and ACCC/C/2008/27. The Committee member concerned did not participate in the deliberations on the findings in this case. Further details regarding the United Kingdom's allegation, the Committee's response and the views of the communicant are set out in paragraphs 6–11 of the report of the twenty-fifth meeting of the Committee (22–25 September 2009) (ECE/MP.PP/C.1/2009/6).

13. By letters dated 16 July 2009 and 20 January, 18 March and 20 May 2010, CAJE wrote to the Committee providing additional information for its consideration for the communication at issue.

14. The Committee began its deliberations on draft findings at its twenty-fifth meeting, following a very preliminary discussion at its twenty-fourth meeting, and completed the preparation of draft findings following its twenty-eighth meeting. In accordance with paragraph 34 of the annex to decision 1/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 25 August 2010. Both were invited to provide any comments by 22 September 2010.

15. By letter of 14 September 2010, CAJE forwarded an August 2010 update of the May 2008 report "Ensuring Access to Environmental Justice in England and Wales" (the Sullivan Report) together with its comments on the draft findings.

16. The communicant and the Party concerned provided their comments on the draft findings on 19 and 22 September 2010, respectively.

17. At its twenty-ninth meeting (21–24 September 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[2]

18. The communication concerns the alleged failures by the Party concerned to provide for public participation in accordance with article 6 and 7 of the Convention in the decision-making process on a proposed increase of the operations at Belfast City airport. In addition, the communication concerns the alleged failure of the Party concerned to ensure access to administrative or judicial procedures that are not prohibitively expensive in accordance with article 9, paragraph 4, of the Convention in relation to the communicant's attempt to challenge a decision of the Department of the Environment and a recommendation by an examination in public panel. The communicant also alleges that the Party concerned is in breach of its obligations under article 3, paragraph 1, of the Convention to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.

19. The decision-making process in question concerns a proposal to expand the operations at Belfast City Airport. The future growth of the airport was considered in the "Belfast Harbour Local Plan 1990 to 2005", prepared under the auspices of the "Belfast

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

Urban Area Plan 2001". At the time, it was subject to public participation through a public inquiry which was opened on 23 October 1990 and closed on 14 January 1991.

20. In March 2003, the Belfast City Airport management applied to the Department of the Environment under article 41 of the Planning (Northern Ireland) Order 1991 for determination of the question whether an increase in the seats for sale at the airport from 1.5 million to 2.5 million in any 12-month period would require planning permission. At that time, operators using the airport were not permitted to offer for sale more than 1.5 million seats on scheduled flights in any 12-month period according to the Planning Agreement of 22 January 1997. The application referred to a forecast 50 per cent increase in passenger numbers over the next decade and also indicated a forecast of 3 million passengers by 2018.

21. By letter dated 30 June 2003, the Department of the Environment informed Belfast City Airport of its determination issued pursuant to article 41 of the Planning (Northern Ireland) Order 1991 that an application for planning permission was not required on the basis that an increased offer of seats for sale did not constitute development as defined in that act. The determination clarified that the decision-making on the proposed activity would be made through the formal review of relevant revisions of the existing Planning Agreement of 22 January 1997, and that it was not subject to environmental impact assessment procedure according to the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999. The determination was not subject to public participation and the public was not informed of the determination at that time.

22. On 6 July 2004, the Belfast City Airport management made a submission to the Department of the Environment requesting the formal review of the Planning Agreement which governed its operations. The review commenced on 19 November 2004 with a public consultation process to decide on whether a public inquiry should be held. The Department of the Environment launched the consultation by inviting specific comments from relevant Councils as well as other key public representatives, stakeholders, local residents' groups and other interest groups. At the end of the consultation process, in October 2005, the Environment Minister announced that the next step in the process would be an examination in public (EiP) conducted by an independent panel.

23. In January 2006, the independent panel was appointed to conduct this EiP and, according to the terms of reference, the EiP panel was requested, inter alia, to have regard to representations made in respect of the public consultation exercise. While exercising this function it identified the following persons as the principal interested parties: the Department for Regional Development (interests include "noise" and the "Forum"), the Department of the Environment (interests include the Planning Agreement and environmental issues), the airport operator, the airlines, residents' groups and bodies representing the public and business at large, including Belfast City Council (BCC), North Down Borough Council (NDBC), the General Consumer Council for Northern Ireland (Consumer Council) and the Confederation of British Industry (CBI).

24. Preliminary meetings were held in March and May 2006 and a substantive hearing was held on 14 and 15 June 2006. The communicant attended and made representations during the various hearings in public. During the EiP, the public learned of the June 2003 determination for the first time.[3] The EiP panel report, including recommendations on the future content of the Planning Agreement, was published on 12 December 2006. One of the recommendations by the panel related to the restriction regarding seats for sale at Belfast City Airport. It recommended that this limit should be increased to 2 million (paras 5.6.37

[3] As noted by the Court of Appeal in its judicial review decision, 7 November 2007, paragraph 12.

and 7.1.11). Its recommendation was made as subject to the following terms: (a) the establishment of a forecasting and scrutiny system; and (b) the airport operator committing to install a noise and track keeping system.

25. Together with four other local residents' associations, the communicant sought to challenge the Department of Environment's determination of 30 June 2003 and the EiP panel report before the High Court, Northern Ireland Queen's Bench Division. In respect of the Department of the Environment's determination of June 2003, they alleged that the Department had erred in law in convening an EiP to consider amendments to the 1997 Planning Agreement. The applicants contended that the proper action would have been a formal planning application and new Environmental Impact Assessment and/or a public inquiry pursuant to Article 31 of the Planning (Northern Ireland) Order 1991. They requested an order from the High Court quashing the Department's June 2003 determination. The applicants also contested the recommendation made in paragraphs 5.6.37 and 7.1.11 of the EiP panel report that seats for sale from Belfast City Airport should be increased from 1.5 million per annum to 2 million per annum.

26. On 29 March 2007, the High Court granted the applicants leave to proceed with the case. The judge also held that the recommendation of the EiP panel was a decision capable of judicial review.

27. Following the hearing, by order dated 7 November 2007, the High Court dismissed the application in respect of both the recommendation of the EiP panel report and the determination of the Department of the Environment of 30 June 2003. Upon the dismissal of their application, the High Court ordered the applicants to pay the full fees and outlay of the Department of the Environment, totalling £39,454.

28. On 14 October 2008, Belfast City Airport and the Department for the Environment signed an amended Planning Agreement. The new agreement increases the permitted seats for sale allocation from 1.5 million to 2 million in any 12-month period.

29. The communicant alleges that the Party concerned is in breach of article 3, paragraphs 1 and 8, article 7 and article 9, paragraph 4, of the Convention. The communicant alleges that the Party concerned has breached its obligation under article 3, paragraph 1, in two main respects. First, it alleges that the use by the Party concerned of a "private" Planning Agreement to control operations at Belfast City Airport is a breach of article 3, paragraph 1, of the Convention to provide a clear and transparent framework to implement the provisions of the Convention because this type of instrument does not require an environmental impact statement, is enforceable only between its contracting parties and allows the public no right of appeal other than judicial review. Second, the communicant claims that the Party concerned acted in a non-transparent manner regarding the development of the airport. For example, the communicant points to the report of the EiP panel, which, in paragraph 6.4.5 (p. 91) states that: "some of the earlier replies [the residents' groups] received from the Departments were, in the Communicant's view, rather vague, evasive and not very helpful. This will have done little to encourage development of the openness and trust on which the success of the whole consultative process of [Belfast City Airport] depends."

30. With respect to article 7, the communicant alleges that the 30 June 2003 determination by the Department of the Environment was in breach of article 6, paragraph 3, in conjunction with article 7, of the Convention as it permitted the 2008 Planning Agreement to increase the number of seats for sale without the possibility for public participation at that stage. It alleges that the determination excluded the proposed activity from an environmental impact assessment and relevant opportunities for the public to participate in the decision-making process. The communicant also alleges that article 6, paragraph 4, in conjunction with article 7, has been violated by the Party concerned through

its choosing the EiP procedure instead of a public inquiry. The EiP procedure prevented all options being presented and effective public participation on the proposed expansion of the operations at Belfast City Airport.

31. In addition, the communicant alleges that the Party concerned has failed to ensure access to administrative or judicial procedures that are not prohibitively expensive in accordance with article 9, paragraph 4, of the Convention in relation to the communicant's application for judicial review of the June 2003 determination and one of the recommendations of the EiP panel. The communicant also alleges that the Party concerned, by pursuing its full costs of defending the judicial review proceedings, has penalized the communicant in breach of article 3, paragraph 8 of the Convention.

32. In response to the communicant's allegations, the Party concerned takes the view that article 7 of the Convention is not engaged with respect to the expansion of operations of the Belfast City Airport, since there is no relevant plan, programme or policy relating to the environment. Moreover, even if either article 6 or 7 were applicable to the decision to expand the operations of the Belfast City Airport, there has been no breach of the public participation requirements under the Convention. In respect of the costs order of £39,454 against the communicant, the Party concerned considers that this was neither deterrent nor prohibitive, taking into account the involvement of five residents' associations and the number of their members. The Party concerned does not consider that there are any grounds for a complaint under article 3.

III. Consideration and evaluation by the Committee

General considerations

33. The United Kingdom deposited its instrument of ratification of the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

Adoption of amended "Planning Agreement" — article 6 and/or article 7

34. The communication refers to a number of consecutive actions by the Department of the Environment that affected the decision-making on the proposed expansion of the operations at Belfast City Airport. Noting that some of the activities described in the communication took place prior to the Convention's entry into force for the United Kingdom, the Committee is focusing on the activities that took place after 24 May 2005. However, as pointed out by the Committee in its previous findings, in determining whether or not to consider certain domestic procedures initiated before the entry into force of the Convention for the Party concerned, it will consider whether significant events of those processes had taken place since the Convention's entry into force (cf. ECE/MP.PP/C.1/2005/2/Add.2, para. 4, findings and recommendations with regard to communication ACCC/C/2004/02).

35. After reviewing the written submissions of the parties and having the benefit of hearing from both parties at the Committee's twenty-fourth meeting, the Committee considers that there are two decisions that are particularly significant to the obligations of the Party concerned under the Convention to provide for public participation in this case.

36. The first significant decision is the determination by the Department of the Environment in June 2003 that the proposal to expand the operations at the Belfast City

Airport did not require planning permission and was not subject to an environmental impact assessment procedure. The June 2003 determination was taken almost two years before the Convention entered into force for the United Kingdom. Other relevant decisions relating to the proposed activity on the level of plans, programmes or policies — e.g., Belfast Harbour Local Plan 1990 to 2005, the Belfast Urban Area Plan 2001 — took place even earlier. Because the June 2003 determination took place before the Convention entered into force, the Committee does not consider further whether this determination was in line the Convention's requirements on public participation.

37. The second significant decision is the adoption of the amended Planning Agreement on 14 October 2008. The adoption of the amended Planning Agreement raised the permitted seats for sale allocation from 1.5 million to 2 million in any 12-month period. This decision was taken after the Convention had entered into force for the Party concerned. The Committee has considered whether the adoption of the amended Planning Agreement is a decision within either article 6 or article 7 of the Convention.

38. Because the amended Planning Agreement does not fit within any of the activities listed in annex I to the Convention, the Committee finds that the adoption of the amended Planning Agreement is not a decision within the scope of article 6, paragraph 1 (a) of the Convention. Paragraph 8 (a) of annex I is the only paragraph of the annex relating to airports, but it concerns the construction of airports with a basic runway length of 2,100 metres or more. At the time of the events in question, the Belfast City Airport's runway was 1,829 metres, which is below the threshold set out in annex I. The amended Planning Agreement of 14 October 2008 concerned an increase in the number of permitted seats for sale. As noted in paragraph 22 above, the amended Planning Agreement did not change the existing runway length of the airport.

39. Paragraph 20 of annex I covers any activity not covered by the other paragraphs of the annex where public participation is provided for under an environmental impact assessment (EIA) procedure in accordance with national legislation. The Committee understands that the relevant legislation specifying which activities in Northern Ireland are subject to an EIA procedure is the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999. For the purposes of those regulations, an "EIA development" means either development which is listed in schedule 1 of those regulations, or development, which is listed in schedule 2 and which is likely to have significant effects on the environment by virtue of factors such as its nature, size or location. Schedule 1, paragraph 7 (a), of the Regulations refers to the construction of airports with a basic runway length of 2,100 metres or more. Schedule 2, paragraph 10 (e), of the Regulations refers to the construction of airfields (unless included in schedule 1) where the development involves an extension to a runway or the area of works exceeds 1 hectare. The increased seat allocation is not an activity subject to an EIA procedure under national legislation and, as noted above, the amended Planning Agreement did not alter the runway length. Thus, paragraph 20 of annex I does not apply.

40. The Committee similarly finds that the amended Planning Agreement of 14 October 2008 is not within the scope of article 6, paragraph 1 (b), of the Convention. There has been no determination by the Party concerned that the proposed activity in question is subject to the provisions of article 6. Thus, the amended Planning Agreement of 14 October 2008, which increased the permitted seats for sale from 1.5 million to 2 million, is not subject to either article 6, paragraph 1 (a), or paragraph 1 (b), of the Convention.

41. The Committee also considers whether the amended Planning Agreement of 14 October 2008 is a plan relating to the environment within the scope of article 7 of the Convention. What constitutes a "plan" is not defined in the Convention. The fact that the document is entitled "Planning Agreement" does not necessarily mean that it is a plan; rather, it is necessary to consider the substance of the document. Having considered the

substance of the document, the Committee finds that the "Planning Agreement" in this case is in fact is a decision on a specific activity that would properly be the type of activity under article 6. However, as held above, the activity does not meet the threshold of article 6.[4] The Committee therefore finds that the "Planning Agreement" in this case is not covered by article 7.

Prohibitively expensive — article 9, paragraph 4

42. The review procedure in question concerns the judicial proceedings against the Department of the Environment regarding (a) a recommendation of the EiP panel in respect of issues relating to the Belfast City Airport Planning Agreement 1997; and (b) a decision by the Department of the Environment Planning Service on 30 June 2003 pursuant to article 41 of the Planning (Northern Ireland) Order 1991. In the communicant's view, the full costs in the amount of £39,454 sought by the Department of the Environment at the conclusion of the judicial review proceedings relating to the Belfast City Airport are a major deterrent against residents' groups seeking to protect their environment by legal action. Therefore it is contrary to the provisions of article 9, paragraph 4, of the Convention that access to justice procedures covered by the Convention not be prohibitively expensive.

43. The Committee notes that the decision challenged was made in 2003, whereas the judicial review proceedings were filed in December 2006, after the Convention come into force. The fact that the decision challenged was made before the entry into force of the Convention for the United Kingdom does not prevent the Committee from reviewing compliance by the Party concerned with article 9 with respect to the decision in question. Before considering whether the Party concerned complied with the requirements of article 9, paragraph 4, of the Convention, it is necessary to establish if the case in question is dealing with an access to justice procedure covered by either paragraph 2 or paragraph 3 of article 9. Because, as established above, neither the 2008 Planning Agreement nor the 30 June 2003 determination are covered by article 6, article 9, paragraph 2 cannot be invoked in the present case. In considering whether the judicial proceedings in question are a procedure referred to by article 9, paragraph 3, of the Convention, the Committee has considered the subject of the claims brought by the communicant in the High Court. In its application for judicial review, the communicant contended that the Department of the Environment had erred in law in making its June 2003 determination under article 41 of the Planning (Northern Ireland) Order 1991. Having reviewed the documentation, including the order of the High Court dated 7 November 2007, the Committee finds that these proceedings were intended to challenge acts and omissions by a public authority which the communicant alleged to contravene provisions of the law of the Party concerned relating to the environment. The Committee thus finds that the communicant's judicial review proceedings were within the scope of article 9, paragraph 3, of the Convention.

44. Since the communicant's judicial review proceedings were judicial procedures under article 9, paragraph 3, of the Convention, these proceedings were also subject to the

[4] In reaching this conclusion, the Committee refers to footnote 6 in its findings and recommendations with regard to compliance by Albania (ECE/MP.PP/C.1/2007/4/Add.1) and the definition of "plans" in the European Commission Guide for Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment. This states that "a plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas." The definition of "program" is "the plan covering a set of projects in a given area … comprising a number of separate construction projects....".

requirements of article 9, paragraph 4, of the Convention. The Committee finds that the quantum of costs awarded in this case, £39,454, was prohibitively expensive within the meaning of article 9, paragraph 4, and thus, amounted to non-compliance.

45. The Committee in this respect also stresses that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, finds that fairness in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs. The Committee accordingly finds that the manner in which the costs were allocated in this case was unfair within the meaning of article 9, paragraph 4, of the Convention and thus, amounted to non-compliance.

Use of "Planning Agreement" to control airport operations — article 3, paragraph 1

46. The communicant raised a number of issues in relation to article 3, paragraph 1. Regarding the EiP panel's observation that some of the Department's earlier replies were rather vague and evasive, the Committee finds that it has no evidence before it to establish that the correspondence complained of occurred after the Convention's entry into force for the Party concerned. Nor does the Committee have sufficient evidence to consider the communicant's allegation that the use of a "private" Planning Agreement by the Party concerned to control operations at Belfast City Airport is a breach of article 3, paragraph 1. The Committee therefore finds no breach of article 3, paragraph 1 in this case.

Pursuit of full costs — article 3, paragraph 8

47. The communicant alleges that the Party concerned, by pursuing the full costs of defending the judicial review proceedings, has penalized the communicant in breach of article 3, paragraph 8, of the Convention. The Committee notes that article 3, paragraph 8, does not affect the powers of national courts to award reasonable costs in judicial proceedings. The Committee takes the view that, based on the evidence before it, neither the pursuit of costs by the Party concerned or the Court's order for such costs amounted to a penalization under article 3, paragraph 8. The Committee does not exclude that pursuing costs in certain contexts may amount to penalization or harassment within article 3, paragraph 8.

IV. Conclusions

48. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

49. The Committee finds that, in the circumstances of this case, the adoption of the amended Planning Agreement was not a decision within the scope of article 6, paragraph 1 (a) or (b), of the Convention, nor was the Planning Agreement a plan under article 7 of the Convention. The Committee accordingly finds that article 9, paragraph 2, cannot be invoked in this case.

50. The Committee finds that the communicant's judicial review proceedings were within the scope of article 9, paragraph 3, of the Convention and thus were also subject to the requirements of article 9, paragraph 4, of the Convention. The Committee finds that the quantum of costs awarded in this case, £39,454, rendered the proceedings prohibitively expensive and that the manner of allocating the costs was unfair, within the meaning of article 9, paragraph 4, and thus, amounted to non-compliance.

51. The Committee finds that it had insufficient evidence before it to establish a breach of article 3, paragraph 1, in this case.

52. The Committee finds that, based on the evidence before it, neither the pursuit of costs by the Party concerned or the Court's order for such costs amounted to a penalization under article 3, paragraph 8. The Committee does not exclude that pursuing costs in certain contexts may amount to penalization or harassment within article 3, paragraph 8.

B. Recommendations

53. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned review its system for allocating costs in applications for judicial review within the scope of the Convention, and undertake practical and legislative measures to ensure that the allocations of costs in such cases is fair and not prohibitively expensive.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-fifth meeting
Geneva, 22–25 September 2009

Report of the Compliance Committee on its Twenty-fifth meeting

Addendum

Findings with regard to communication ACCC/C/2008/29 concerning compliance by Poland

Adopted by the Compliance Committee on 25 September 2009

Summary

These findings were prepared and adopted by the Compliance Committee in accordance with its mandate as set out in paragraphs 13, 14 and 35 of the annex to decision I/7 of the Meeting of the Parties. They concern communication ACCC/C/2008/29 submitted by Zabianka Housing Cooperative and Ms. Maria Cholewińska, president of the Protest Committee, regarding compliance by Poland with its obligations under the Convention in relation to access to information and decision-making processes for the construction of a multifunctional sports hall in the city of Gdansk.

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I. Background

1. On 20 October 2008, the management board of the Zabianka Housing Cooperative and Ms. Maria Cholewińska, president of the Protest Committee, (hereinafter collectively the communicant) submitted a joint communication to the Compliance Committee alleging non-compliance by Poland with its obligations under article 1, article 4 and article 6, paragraphs 2 (a), 2 (b) and 8, of the Convention.

2. Specifically, the communication alleged that by failing to ensure effective participation in the decision-making procedure concerning the construction of a multifunctional sports hall in the city of Gdansk and to make publicly available accurate and comprehensive information relating to the environmental impact assessment (EIA) of the project at issue, the Party concerned was not in compliance with article 1, article 4, and article 6, paragraphs 2 (a), 2 (b) and 8, of the Convention.

3. At its twenty-second meeting (17–19 December 2008), the Committee determined on a preliminary basis that the communication was admissible.

4. The communication was forwarded to the Party concerned on 15 January 2009 along with a number of questions put forward by the Committee in order to clarify the EIA procedure and the provisions on public participation under Polish legislation. On the same date, the secretariat forwarded to the communicant a number of questions posed by the Committee, requesting additional information on the EIA-related procedures for the project at issue.

5. The Party concerned responded by letter of 26 May 2009 to the questions of the Committee and stressed that the EIA procedures for the project were conducted according to the applicable law.

6. The Committee discussed the communication at its twenty-fourth meeting (30 June–3 July 2009). According to the normal practice, both the Party concerned and the communicant were invited to participate in the meeting, but no representative of either attended. Having reviewed the arguments put forward by the Party concerned in its response of 26 May 2009, at the same meeting the Committee confirmed the admissibility of the communication, deeming the points raised by the Party to be related to the substance of the case, rather than to its admissibility.

7. The Committee deliberated on the communication and completed the preparation of draft findings at its twenty-fourth meeting.

8. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comment to the Party concerned and to the communicant on 18 August 2009. Both were invited to provide any comments by 15 September 2009.

9. The communicant provided comments on 30 August 2009. It also addressed the questions posed by the Committee in its letter of 15 January 2009.

10. At its twenty-fifth meeting, the Committee proceeded to finalize its findings in closed session. The Committee decided not to consider the communicant's response of 30 August 2009 to the Committee's letter of 15 January 2009, because the comments were submitted with a great delay, after the date of the discussion of the communication at the Committee's twenty-fourth meeting (30 June–3 July 2009). The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

11. The communication concerns the construction of a multifunctional sports hall of a total area of approximately 22,641 m^2, including infrastructure works and access roads network, located at the limits of the towns Sopot and Gdansk, Poland, in close vicinity to the coast of Gdanska Bay and to the residential areas of the districts of Zabianka and Wejchera.

12. According to the communication, the implementation of the project, which is already under construction, involves a number of environmental risks, such as increased road traffic, land interface vibrations and increased water and air pollution levels, leading to the environmental degradation of the project area. The communicant claims that the EIA, which the developer prepared, failed to address the risks associated with the project in a comprehensive manner and that the public was excluded from the decision-making proceedings, in breach of the provisions of the 2001 Environmental Protection Law, as amended in 2005.[2] Following a complaint filed by the communicant on 5 February 2007 before the Voivodship Sanitary Inspector and the Voivodship Administrative Court, the developer was instructed by the Court to elaborate the EIA report; however, according to the communication, the developer did not comply with the Court's instructions. The communicant further stated that in June 2008, it was granted the status of the "party concerned" by the Voivodship Administrative Court, allowing for the reopening of the proceedings relating to the EIA report.

13. Hence, the communication argues that by not effectively involving the public in the decision-making process and by providing inaccurate and incomprehensive information on the EIA for the project, the Party concerned failed to comply with article 1, article 4 and article 6, paragraphs 2 (a), (b) and 8, of the Convention.

14. The Party concerned, in its letter of 26 May 2009, did not clearly dispute the above allegations, but limited itself to replying to the questions posed by the Committee. It generally maintained that the entire procedure was conducted in accordance with the applicable laws.

III. Consideration and evaluation by the Committee

15. Poland deposited its instrument of ratification on 15 February 2002. The Convention entered into force for Poland on 15 May 2002.

16. The Committee regrets that the Party concerned, although it replied by its letter of 26 May 2009 to the specific questions of the Committee, did not make any observations concerning the communicant's allegations on non-compliance.

17. As of the day of the scheduled discussion of the communication at the Committee's twenty-fourth meeting, the communicant had not provided the additional information requested by the Committee by letter of the secretariat dated 15 January 2009 (see para. 4 above).

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

[2] See the Act of 27 April 2001 on the Environmental Protection Law (Journal of Laws of 2001, No. 62, item 627) and the Act of 18 May 2005 on amendments to Act on the Environmental Protection Law and in certain other Acts (Journal of Laws of 2005, No. 113, item 954).

18. Moreover, the Committee regrets that neither the Party concerned nor the communicant responded to the invitation to discuss the communication with the Committee at its twenty-fourth meeting (30 June–3 July 2009).

IV. Conclusions

19. Due to the lack of sufficient information made available to the Committee by the parties and in particular by the communicant before the draft findings were prepared, and also to the fact that neither the communicant nor the Party concerned were present at the scheduled discussion of the communication at the Committee's twenty-fourth meeting, the Committee was not able to consider whether the allegations relate to the issues regulated by the Convention. Under these circumstances, the Committee was not able to reach a conclusion regarding the alleged failure by Poland to comply with its obligations under the Convention in relation to the project in question.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-fifth meeting
Geneva, 22–25 September 2009

Report of the Compliance Committee on its Twenty-fifth meeting

Addendum

Findings and recommendations with regard to communication ACCC/C/2008/30 concerning compliance by the Republic of Moldova

Adopted by the Compliance Committee on 25 September 2009

Summary

These findings were prepared by the Compliance Committee in accordance with its mandate as set out in paragraphs 13, 14, 35 and 36 of the annex to decision I/7 of the Meeting of the Parties. They concern communication ACCC/C/2008/30 submitted by the non-governmental organization Eco-TIRAS International Environmental Association of River Keepers regarding compliance by the Republic of Moldova with its obligations under the Convention in relation to access to information on contracts for rent of land of the State Forestry Fund.

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I. Background

1. On 3 November 2008, the Moldovan non-governmental organization "Eco-TIRAS" International Environmental Association of River Keepers (hereinafter the communicant or Eco-TIRAS) submitted a communication to the Committee alleging a failure by Moldova to comply with its obligations under article 3, paragraph 2, and article 4, paragraphs 1 and 2, of the Convention.

2. The communication alleged that by failing to provide information on contracts for rent of land of the State Forestry Fund, the Republic of Moldova was not in compliance with article 3, paragraph 2, and article 4, paragraphs 1 and 2, of the Convention. The communication further alleged that by adopting Regulation No. 187 of 20 February 2008 "On approval of the Regulation on the rent of Forest Fund for Hunting and Recreational Activities" (hereinafter Regulation No. 187) that set out a broad rule with regard to the confidentiality of the information received from the rent holder, the Party concerned was not in compliance with article 3, paragraph 1, and article 4, paragraph 4, of the Convention.

3. At its twenty-second meeting (17–19 December 2008), the Committee determined on a preliminary basis that the communication was admissible.

4. The communication was forwarded to the Party concerned on 24 December 2008 along with a number of questions put forward by the Committee soliciting additional information from the Party on matters relating, inter alia, to: (a) the applicability of the Convention in the Republic of Moldova; (b) the entry into force of Regulation No. 187, its legal status in the hierarchy of "normative acts" in the Moldovan legal system, and its retroactive effect; (c) the meaning of "State registration procedure" and its availability in the public domain; (d) the Moldovan legislation and procedures concerning the confidentiality of information and their scope and applicability in the case at issue; (e) the volume of the information as a reason for refusing a request for environmental information; (f) the way the Moldovan legal system deals with potential conflicts between contractual provisions and domestic law or international conventions such as the Convention; and (g) the enforceability of final and binding court decisions.

5. Also on 24 December 2008, the secretariat forwarded to the communicant a number of questions put forward by the Committee with regard, inter alia, to the applicability of the Convention in the Republic of Moldova, the exhaustion of domestic remedies and the enforceability of domestic decisions, and the disclosure of environmental information under Moldovan legislation.

6. At its twenty-third meeting (31 March–3 April 2009), the Committee agreed to discuss the content of the communication at its twenty-fourth meeting (30 June–3 July 2009).

7. On 20 May 2009, the communicant responded to the questions raised by the Committee clarifying several points of its communication.

8. On 22 May 2009, the Party concerned responded to the questions raised by the Committee, and provided additional information, inter alia, on the Moldovan legal system, including the direct applicability of the Convention in the Republic of Moldova, the retroactive effect of new legal provisions, the hierarchy of norms, the validity of contracts, and the enforceability of court decisions.

9. In addition, on 24 June 2009, the Party concerned sent a letter to the Committee, where it confirmed the supremacy of the norms of environmental treaties over national legislation, but argued that Eco-TIRAS had not exhausted all available means foreseen by

national legislation on access to information. The Party concerned also informed the Committee that its representatives would not be able to be present at the discussion of the case, scheduled to be held at the Committee's twenty-fourth meeting (30 June–3 July 2009).

10. The Committee discussed the communication at its twenty-fourth meeting (30 June–3 July 2009), with the participation of representatives of the communicant. At the same meeting, the Committee confirmed the admissibility of the communication and prepared the draft findings. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 18 August 2009. Both were invited to provide comments by 15 September 2009.

11. The Party concerned and the communicant provided comments on 16 September 2009.

12. At its twenty-fifth meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

13. On 9 January 2008, Eco-TIRAS submitted a request to Moldsilva State Forestry Agency (hereinafter Moldsilva), the Moldovan agency responsible for the management of the state forestry fund pursuant to the 1997 Forestry Code, to receive copies of all contracts, valid as of 1 January 2008, for the rent of lands administered by the State Forestry Fund.

14. On 31 January 2008, Moldsilva sent a written response to Eco-TIRAS reporting, inter alia, that there were at the time 57 signed contracts for the rent of lands administered by the Forestry Fund for recreation purposes on a total area of about 322 hectares, and twenty-two contracts for the rent of lands administered by the Forestry Fund for hunting purposes on a total area of about 15,941 hectares, and that State-protected natural areas were not included in these lands. Also, Moldsilva in its letter refused the request of the communicant to receive copies of the contracts, on the grounds of the large volume of the requested information, and asked the communicant to indicate its interest in the requested information and to prioritize the request. According to the communication, the letter by Moldsilva refusing the request for information submitted by Eco-TIRAS did not include any information on access to a review procedure according to article 9 of the Convention, as required by article 4, paragraph 7, of the Convention.

15. On 21 February 2008, Eco-TIRAS sent a second letter to Moldsilva repeating, with additional supporting arguments, its request for access to information. The letter was also addressed to the Government and the Ministry of Ecology and Natural Resources of the Republic of Moldova.

16. On 20 February 2008, the Government of the Republic of Moldova adopted Regulation No. 187, which in its paragraph 48 (e) sets out new requirements of confidentiality for any information the landowners may receive from the rent holders. Regulation No. 187 entered into force on 29 February 2008, the date of its publication in the Official Monitor No 42-44/254.

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

17. According to the communication, after having examined, pursuant to the Instruction of Government of the Republic of Moldova No. 1026-180 of 29 February 2008, the second request for access to information submitted by Eco-TIRAS on 21 February 2008 (see para. 12 above), Moldsilva again refused Eco-TIRAS' request by way of letter No. 01-07/362 of 14 March 2008, on grounds relating to the requirements of paragraph 48 (e) of Regulation No. 187 on the confidentiality of information submitted by the rent holders to the landowners. According to the communication, the letter by Moldsilva refusing the request for information submitted by Eco-TIRAS did not include any information on access to a review procedure according to article 9 of the Convention, as required by article 4, paragraph 7, of the Convention.

18. On 27 March 2008, Eco-TIRAS filed an administrative action before the Chisinau Court of Appeal (Curtea de Apel Chisinau) and made the claim that Moldsilva be obligated to provide copies of all contracts for rent of lands administered by the Forestry Fund of the Republic of Moldova valid as of 1 January 2008, as already requested by Eco-TIRAS. The administrative action was founded on the relevant provisions of Moldovan legislation, namely articles 21 and 25 of the Law on Access to Information and articles 5, 14, 16, 24 and 25, paragraph 1 (b), of the Law on Administrative Courts, and also referred to the definition of "environmental information" contained in article 2, paragraph 3, of the Convention.

19. On 23 June 2008, the Civil Chamber of Chisinau Court of Appeal issued a decision in favour of Eco-TIRAS and accordingly requested Moldsilva to provide to Eco-TIRAS the copies of all contracts for rent of lands of the State Forestry Fund, as previously requested by Eco-TIRAS, and to compensate the communicant's/plaintiff's lawyer fees.

20. On 16 August 2008, Eco-TIRAS forwarded by registered mail a copy of the Court's decision to Moldsilva, accompanied by a letter requesting compliance with the decision. In the beginning of January 2009, Eco-TIRAS sent a letter to Moldsilva reiterating its request to receive copies of all contracts on rent of lands administered by the State Forestry Fund, as of 1 January 2009. The communicant did not receive any response to these last two requests.

21. On 1 April 2009, the communicant asked the Chisinau Court of Appeal to execute its decision by issuing an enforcement order. On 10 April 2009, Eco-TIRAS received a response from the Court of Appeal notifying it that Moldsilva had been informed about the court decision in September 2008. On 13 April 2009, the communicant sent a copy of the Court's response, together with a copy of the Court's decision, to Moldsilva inquiring about compliance by Moldsilva with the Court decision. According to the communicant, Moldsilva received this letter on 14 April 2009, but has not yet responded.

22. The communicant claims that Moldsilva ignored not only the communicant's letters relating to the execution of the Court decision, but also the portion of the Court decision ordering disclosure of the rental contracts, as requested by the communicant (and plaintiff). Moldsilva has, however, complied with the portion of the Court decision relating to the reimbursement of the Eco-TIRAS lawyers' fees.

23. According to the communication, the Court Executors were not actively involved in the execution of the final decision of the Civil Chamber of Chisinau Court of Appeal. Pursuant to 149 of the Execution Code of the Republic of Moldova, the Court Executors' involvement would entail the order of a pecuniary penalty on Moldsilva and also the reimbursement of additional expenses incurred by the communicant. According to the communication, the execution of the Court decision depends exclusively on the willingness of Moldsilva to comply with the Court's decision; for this reason, and also in order to avoid additional expense, the communicant did not attempt to pursue another Court ruling to involve the Court Executors and enforce the Court's final decision.

24. All the facts, as outlined in the previous paragraphs, took place after Convention entered into force in the Republic of Moldova.

III. Consideration and evaluation by the Committee

25. The Republic of Moldova deposited its instrument of ratification of the Convention on 9 August 1999. The Convention entered into force for the Republic of Moldova on 30 October 2001.

26. The Convention, as an international treaty ratified by the Republic of Moldova, has direct effect in the legal system of the Republic of Moldova, and hence the provisions of the Convention are directly applicable by the courts.

27. The communicant is a non-governmental organization active in the field of environmental protection and falls under the definitions of "the public" and "the public concerned" as set out in article 2, paragraphs 4 and 5, of the Convention.

28. Moldsilva is a public authority within the definition of "public authority" in article 2, paragraph 2, of the Convention.

29. The contracts for rent of lands of the State Forestry Fund, to which access was requested by the communicant, constitute "environmental information" as defined in article 2, paragraph 3 (b), of the Convention.

30. As required by Moldovan legislation, the communicant was entitled to obtain copies of the contracts of rent of lands of the State Forestry Fund. However, the communicant's requests for access to information were refused by Moldsilva on the grounds that the requested information was of very large volume or of a confidential character or, in some instances, without specifying any grounds for refusal. The final decision of the Civil Chamber of Chisinau Court of Appeal of 23 June 2008 confirmed the failure of Moldsilva to comply with Moldovan law and respect the communicant's right to access environmental information.

31. The large volume of the information to which the communicant requested access and the confidential character attributed to this information, by a law that came into force after the submission of the request by the communicant, are reasons for refusal of access to information that go beyond the limits established by article 4, paragraphs 3 and 4, of the Convention. By refusing access to the contracts, as requested by the communicant, Moldsilva did not take into account the public interest served by disclosure.

32. Despite the direct effect of the Convention in the Moldovan legal system and the existing domestic laws providing for the rights of the public to have access to environmental information, Moldsilva based its refusal to grant access to information on Regulation No. 187 of 20 February 2008 and on Instruction of Government of the Republic of Moldova No. 1026-180 of 29 February 2008, namely on two lower-level rules in the Moldovan legal system. This fact confirms the need for, and the importance of, enhanced implementation of the requirements of the Convention at all levels of the Moldovan legal system.

33. Moldsilva refused the communicant's request for information twice and the two letters notifying the communicant of the refusal, namely letters No. 01-07/130 and No. 01-07/362 of 31 January 2008 and 14 March 2008 respectively, did not provide the communicant with information on access to a review procedure in line with article 9 of the Convention.

34. By not addressing the third request of the communicant submitted at the beginning of January 2009 for access to the contracts for rent of lands of the State Forestry Fund valid

as of 1 January 2009, Moldsilva ignored the communicant's request and failed to comply with article 4, paragraph 7, of the Convention, which requires that a refusal of a request shall be in writing if the request was in writing and sets the time limits within which such a response is due.

35. Moldsilva did not comply with the final decision of the Civil Chamber of Chisinau Court of Appeal, adopted on 23 June 2008, which ruled that Moldsilva had to provide the communicant with the copies of the requested contracts. If a public agency has the possibility not to comply with a final decision of a court of law under article 9, paragraph 1, of the Convention, then doubts arise as to the binding nature of the decisions of the courts within a given legal system. Taking into account article 9, paragraph 1, which implies that the final decisions of a court of law or other independent and impartial body established by law are binding upon and must thus be complied with by public authorities, the failure of Moldsilva to fully execute the final decision of the Civil Chamber of Chisinau Court of Appeal, adopted on 23 June 2008, implies non-compliance of the Party concerned with article 9, paragraph 1, of the Convention.

IV. Conclusions and recommendations

36. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

37. The Committee finds that the failure of the public authority Moldsilva to provide copies of the requested contracts of rent of lands of the State Forestry Fund to the communicant constitutes a failure by the Party concerned to comply with article 4, paragraphs 1 and 2, of the Convention.

38. The Committee finds that the adoption of article 48 (e) of the Government Regulation No. 187 of 20 February 2008 on Rent of Forestry Fund for Hunting and Recreational Activities setting out a broad rule with regard to the confidentiality of the information received from the rent holders and the refusal for access to information on the grounds of its large volume constitute a failure by the Party concerned to comply with article 3, paragraph 1, and article 4, paragraph 4, of the Convention.

39. The Committee finds that the failure of the public authority Moldsilva to state lawful grounds for refusal of access to information in its letters No. 01-07/130 and No. 01-07/362 of 31 January 2008 and 14 March 2008 respectively, and the failure of the same public authority to give in its letters of refusal information on access to the review procedure provided for in accordance with article 9, constitute a failure by the Party concerned to comply with article 3, paragraph 2, and article 4, paragraph 7, of the Convention.

40. The Committee also finds that the failure of the public authority Moldsilva to respond in writing and in a timely manner to the last request for information submitted by the communicant to Moldsilva in the beginning of January constitutes a failure by the Party concerned to comply with article 4, paragraph 7, of the Convention.

41. The Committee also finds that the failure of the public authority Moldsilva to fully execute the final decision of the Civil chamber of Chisinau Court of Appeal, adopted on 23 June 2008, implies non compliance of the Party concerned with article 9, paragraph 1, of the Convention.

B. Recommendations

42. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 and noting the agreement of the Party concerned that the Committee take the measure referred in paragraph 37 (b) of the annex to decision I/7, recommends to the Government of the Republic of Moldova that it:

(a) Ensure full execution of the final decision of the Civil Chamber of Chisinau Court of Appeal adopted on 23 June 2008 obliging Moldsilva to provide the communicant with the copies of the requested contacts;

(b) Take effective legislative and/or practical measures for better monitoring of the execution by public authorities of final court decisions under article 9, paragraph 1, of the Convention;

(c) Take effective measures (e.g. the development and implementation of adequate and effective regulations; the establishment, strengthening and/or enforcement of administrative penalties on public servants who do not comply with the legislative requirements on transparency of information; the involvement of representatives of the public in monitoring procedures; and the publication of statistics concerning requests for environmental information) for enhanced monitoring of the implementation by public authorities of the Convention and of the Moldovan legislation with regard to transparency of information, and for prevention of any future violation of the rights of the public under the Convention and the relevant Moldovan legislation by public authorities;

(d) Amend article 48 (e) of Regulation No. 187, so as to exclude its interpretation in contradiction with the requirements of article 4 of the Convention;

(e) Take effective measures, such as training activities, publications and conferences, with the objective of raising awareness of public servants, including representatives of Moldsilva and public servants of other public agencies responsible for the collection, maintenance and/or dissemination of environmental information, as well as the members of the judiciary, about requirements of the Convention;

(f) Examine the Moldovan regulatory framework on access to information in cooperation with representatives of the public and independent experts, in order to identify any provisions that may not be compatible with the provisions of the Convention, and accordingly decide on whether any amendments are necessary;

(g) Avoid inclusion in the contracts on the rent of lands administered by the State Forestry Fund of any clauses on confidentiality contradicting the requirements of article 4, paragraph 4, of the Convention;

(h) Develop and adopt an action plan for the implementation of the Convention, which would involve, inter alia, the measures recommended by the Committee under items (c), (e) and (f) above.

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Compliance Committee

Twenty-fifth meeting
Geneva, 22–25 September 2009

Report of the Compliance Committee on its Twenty-fifth meeting

Addendum

Findings and recommendations with regard to communication ACCC/C/2008/30 concerning compliance by the Republic of Moldova

Adopted by the Compliance Committee on 25 September 2009

Corrigendum

Paragraph 42 (a)

For requested contacts *read* requested contracts

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-fifth meeting
Maastricht, the Netherlands, 29 June–2 July 2014
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2008/31 concerning compliance by Germany*

Adopted by the Compliance Committee on 20 December 2013

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* This document is a late submission owing to editorial and secretariat capacity constraints and the need to give priority to the processing of documents for the fifth session of the Meeting of the Parties (Maastricht, the Netherlands, 30 June and 1 July 2014).

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I. Introduction

1. On 1 December 2008, the non-governmental organization (NGO) ClientEarth, supported by the NGO Nature and Biodiversity Conservation Union (*Naturschutzbund Deutschland*), (collectively, the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Germany failed to comply with the Convention's provisions on access to justice.[1]

2. Specifically, the communication alleges that the legislation of the Party concerned establishes criteria for standing for environmental NGOs which are narrower in scope than those set out in article 9, paragraph 2, of the Convention and also does not ensure that members of the public concerned may challenge the procedural legality of any decision subject to article 6, as required by article 9, paragraph 2.

3. In addition, the communication alleges that, by failing to provide environmental NGOs with the possibility to challenge acts and omissions of private persons and public authorities which contravene environmental law when the "impairment of rights" criterion is not satisfied, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention.

4. At its twenty-second meeting (Geneva, 17–19 December 2008), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 24 December 2008. By letters of 16 January 2009, the Party concerned and the communicant were invited to address questions from the Committee.

6. By letter of 26 March 2009, the Party concerned suggested the case be postponed as its courts had recently referred a similar case (later known as the *Trianel* case)[2] to the Court of Justice of the European Union (CJEU) where it was currently under consideration.

7. At its twenty-third meeting (Geneva, 31 March–3 April 2009), the Committee decided to suspend the deadline for the Party concerned to respond to the communication until two months after CJEU had delivered its opinion and agreed to seek the communicant's view on that approach.

8. By letter of 11 May 2009, the communicant expressed its support for that decision. The Committee, using its electronic decision-making procedure, decided to defer the deadline and its decision was communicated to the parties by letter of 18 May 2009.

9. On 12 May 2011, CJEU issued its preliminary ruling in the *Trianel* case. Considering the two-year delay in the Committee's consideration of the communication, the Committee using its electronic decision-making procedure instructed the secretariat to invite the Party concerned to submit its response by 20 June 2011 (i.e., before the two-month deadline from the issuance of the judgment originally envisaged) so that formal discussions might take place at its thirty-third meeting (Geneva, 28–29 June 2011). By letter of 18 May 2011, the secretariat conveyed this message to the Party concerned.

[1] The communication and related documents are available from http://www.unece.org/env/pp/compliance/Compliancecommittee/31TableGermany.html.

[2] Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen (intervening)* [2011] ECR I‑3673.

10. By letter of 20 May 2011, the Party concerned replied that the Government's assessment of the CJEU judgment would not be completed by the proposed deadline of 20 June 2011.

11. At its thirty-third meeting, the Committee considered that it should await the decision of the German court after the preliminary CJEU ruling.

12. On 6 July 2011, the communicant submitted additional information and on 25 July 2011 the Party concerned responded to the communication.

13. On 13 December 2011, the communicant informed the Committee that the German court's decision had been issued.

14. On 27 February 2012, the Party concerned provided the decision of the regional Higher Administrative Court, Oberverwaltungsgericht für das Land Nordrhein-Westfalen, of 1 December 2011, together with a summary, both in German. On 26 March 2012, the Party concerned provided an English translation of parts of the decision and informed the Committee that, while the regional government had opted not to appeal that decision, the energy supply company involved (Trianel), had challenged the regional government's decision not to appeal, and the case was thus considered still pending at the domestic level.

15. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee provisionally scheduled to discuss the communication at its thirty-seventh meeting (Geneva, 26–29 June 2012). It instructed the secretariat to seek the parties' views on the impact on the communication of Trianel's challenge of the regional government's decision.

16. The communicant and the Party concerned provided their views on 23 and 26 April 2012, respectively. After taking into account their views, the Committee using its electronic decision-making procedure decided to discuss the communication at its thirty-eighth meeting (Geneva, 25–28 September 2012).

17. The Party concerned submitted additional information to the Committee on 20 August and 11 September 2012.

18. The Committee discussed the communication at its thirty-eighth meeting, with the participation of representatives of both parties. It confirmed the admissibility of the communication and put questions to the communicant and the Party concerned, inviting them to respond in writing after the meeting.

19. The communicant and the Party concerned submitted their responses on 29 October and 5 November 2012, respectively.

20. In view of the entry into force of amendments to the German Environmental Appeals Act, at the Committee's request, additional information was submitted by the Party concerned and the communicant on 19 February and 22 February 2013, respectively.

21. The Committee completed its draft findings at its forty-second meeting (Geneva, 24–27 September 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded to the parties on 11 November 2013 for their comments by 9 December 2013.

22. The Party concerned and the communicant provided comments on 6 and 7 December 2013, respectively.

23. At its forty-third meeting (Geneva, 17–20 December 2013), the Committee finalized its findings in closed session, taking account of the comments received. The Committee adopted its findings and agreed that they should be published as a formal pre-session document for its forty-fifth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[3]

A. Legal framework

International treaties within the German legal order

24. When Germany becomes Party to an international treaty concerning matters regulated by federal legislation, the consent/participation of the federal legislature is required through the adoption of a law (Constitution (*Grundgesetz*), art. 59). The treaty is not directly applicable, unless it is deemed to be self-executing taking into account its wording, purpose and substance.

25. The Convention is not considered to be self-executing by the Party concerned and the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) (EAA) was adopted to implement article 9, paragraph 2.

26. However, after the preliminary CJEU ruling in the *Trianel* case, the Higher Administrative Court ruled that the provisions of article 9, paragraph 2, of the Convention have direct effect.

Standing of environmental NGOs in the review procedures relating to public participation under article 6 (art. 9, para. 2)

27. The rights of environmental NGOs to have access to review procedures relating to public participation under article 6 of the Convention are provided in the Rules on Administrative Court Procedures (*Verwaltungsgerichtsordnung*), section 42, complemented by the provisions of the EAA, sections 1–4.[4]

28. The Rules on Administrative Court Procedures, section 42, reads:

> (a) A claim can be made to request that an administrative act be quashed (*Anfechtungsklage*) or, where the administrative act had been refused or failed to be performed [by the public authority], that it be performed (*Verpflichtungsklage*).
>
> (b) Unless otherwise provided in other legislative provisions, a claim is only admissible where the claimant asserts that the administrative act, its refusal or omission has impaired the claimant's own rights.[5]

Criteria for NGO standing

29. The EAA[6] regulates the rights of associations[7] to have access to courts proceedings. It was amended in 2013, as a result, inter alia, of the preliminary CJEU ruling in the *Trianel* Case. According to section 2, paragraph 1, of the EAA, the association does not need to

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

[4] Law amending the provisions for environmental appeals in environmental matters, according to EC Directive 2003/35 (Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35) as published on 8 April 2013 and last amended on 7 August 2013.

[5] Translation based on translations provided by the parties.

[6] English translation of the EAA was provided by the Party concerned on 19 February 2013 and the citations are mainly based on that translation.

[7] The EAA refers to the rights of "associations" ("Vereinigungen"). In keeping with the Convention, the present findings use the term "NGOs", except when citing from translations provided by the parties.

claim that its rights have been impaired (as required by the Rules on Administrative Court Procedures, section 42), but may file an appeal against a decision or the failure to take a decision, as defined in EAA, section 1, paragraph 1, if the association:

(a) Asserts that the decision/omission violates legal provisions which protect the environment (*"dem Umweltschutz dienen"*) and could be of importance for the decision ("*für die Entscheidung von Bedeutung sein können*");

(b) Asserts that promotion of the objectives of environmental protection according to its field of activity, defined in its by-laws, is affected by the decision/omission;

(c) Was entitled to participate in the process which led to the decision/omission and did so, according to applicable law; or, contrary to applicable law, was refused the right to participate.

30. EAA section 2, paragraph 5, provides that a claim by an association is justified if the administrative decision/omission contradicts legal provisions which protect the environment (*"dem Umweltschutz dienen"*) and are of importance for the decision/ omission ("*für die Entscheidung von Bedeutung sind*") and the violation involves issues of environmental protection that are among the objectives proposed by the association according to its by-laws.

31. EAA section 3 provides additional requirements for the recognition of associations for the purpose of filing an appeal under the EAA, including, inter alia, that environmental protection is among the association's objectives as set out in its by-laws, requirements as to membership and the length of time it has been in existence.

Scope of review

32. The Administrative Procedures Act (*Verwaltungsverfahrensgesetz*) (APA) provides that "the setting aside of an administrative act which is not void pursuant to section 44 cannot be claimed simply on the basis that in the course of its adoption provisions on procedure … were infringed where it is evident that the infringement did not affect the substantive decision" (sect. 46).[8]

33. According to German case law, the provision does not apply in cases of "fundamental errors of procedure", i.e., errors which regardless of the outcome of the procedure are deemed to be substantial. Where there are fundamental errors of procedure, the decision in question may be reversed. In this regard, the Federal Administrative Court (*Bundesverwaltungsgericht*) has held that as a rule a procedural error would lead to the annulment of a decision or the repetition of the failed procedural step if "in the circumstances of the case there is a real possibility" that the error had a bearing on the outcome of the decision (see Federal Administrative Court, judgment of 20 May 1998, case No. 11 C 3/97)).[9]

34. EAA section 4, paragraph 1, provides that the reversal of a decision on the admissibility of a project can be requested if an environmental impact assessment (EIA) or a preliminary assessment of the individual case concerning the requirement for an EIA required by law was not carried out and was not carried out in a later stage.

[8] Translation provided by the Party concerned in its response of 25 July 2011, pp. 9–10.

[9] Ibid.

35. The issue of a fundamental error of procedure has recently been before CJEU in the *Altrip* case.[10]

Review procedures for contraventions of environmental law by authorities/private persons (art. 9, para. 3)

36. The German Constitution (art. 17) provides for a right of petition, whereby every person has the right to address written requests or complaints to competent authorities and the legislature.

37. The administrative law of the Party concerned allows any person whose rights have been infringed to challenge the decision of an authority or its omission to take certain measures, including measures against third parties that have infringed provisions of environmental law. The appeal is considered by a hierarchically higher body. In the context of German administrative law, this type of procedure primarily aims to ensure the protection of individual interests, either exclusively or at least in parallel to the pursuit of general interest ("impairment of rights" doctrine ("*Schutznormtheorie*")). For instance, under anti-pollution law, such an action may be brought by individuals whose health may be affected by the activity of an industrial plant. Associations, including NGOs, have the right to use this avenue in some cases, such as under the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) and the Environmental Damage Act (*Umweltschadensgetz*, which implements the European Union (EU) Environmental Liability Directive),[11] as required further to relevant EU legislation, and to pursue the enforcement of general environmental laws through collective action in these areas.

38. Moreover, civil law provides for the right to initiate court proceedings against a third party in order to obtain injunctive relief and damages when the third party infringes a fundamental right of an individual in contravention of environmental law; and criminal law provides for the prosecution of several acts and omissions in contravention of environmental law (damage caused to the environment — water, soil, air, fauna and flora).

B. Substantive issues

39. The communicant alleges that the conditions for access to justice for environmental NGOs[12] laid down by German legislation are of a very restrictive nature, effectively deterring most environmental NGOs from exercising their rights under article 9, paragraphs 2 and 3 of the Convention. The Party concerned refutes all the allegations made.

[10] Case C-72/12, *Gemeinde Altrip and Others v. Land Rheinland-Pfalz* [2013], OJ C 204/6. The Federal Administrative Court made a preliminary reference to CJEU concerning Germany's implementation of the provisions of the EIA Directive on access to justice. Specifically, the Court asked whether the obligation to carry out a substantive and procedural review of a decision would require that a decision based on an incorrect EIA can be challenged; and also if it is compliant with European Union law that an EIA decision can only be reversed if the error affects subjective rights of the applicant and if without the error the decision would have been different. CJEU delivered its judgment on 7 November 2013, ruling that it must be possible for members of the public to challenge a permit on the ground that the EIA was incorrect; and that national courts can refuse to reverse the decision if it is proven that the decision would not have been different if there was not the procedural error invoked by the applicant. However, the evidence in that respect must be brought by the developer or the authority, or it must be evident from the files; the burden of proof must not be on the applicant.

[11] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

[12] "Associations" under German legislation, encompassing NGOs, see footnote 7 above.

The allegations and the Party concerned's response are summarized in the following paragraphs.

Review procedures relating to public participation under article 6 (art. 9, para. 2, in conjunction with art. 2, para. 5): standing and scope of review

40. The communicant claims that the rights of environmental NGOs to request a review of a decision, act or omission subject to article 6 of the Convention are restricted because of standing requirements and the limited scope of review, which have a significant deterrent effect. In its communication, the communicant raises four aspects of concern[13] (see subsections (a)-(d) below) which, taken separately and in a cumulative manner, mean that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

41. The communicant also claims that, since the Party concerned does not have a common law system (for instance, the case law on "fundamental errors of procedure" is not absolutely binding on the courts), to ensure legal certainty it is important to transpose the Convention in a way that keeps national law close to the text of the Convention.

42. The Party concerned stresses that the purpose of the wording in article 9, paragraph 2, and the intention of the Parties, was to leave discretion to each Party to decide how to implement the provision "within the framework of its national legislation", without compromising the objective of the Convention. Therefore, in addressing the communicant's allegations, it is important to keep the right balance between the substantive elements of the Convention and the discretion left to the Party for implementation.

43. The Party concerned also argues that, while according to the Constitution judges are independent and subject only to legislation, for reasons of legal certainty there is some uniformity in court jurisprudence, especially when there is a higher court judgement on a specific issue.

(a) Requirement for an NGO applicant to assert that the challenged decision affects its objectives, as defined in its by-laws

44. According to the communicant, the requirement that an NGO applicant has to assert that the challenged decision, act or omission under article 6 affects the objectives of environmental protection as defined by its by-laws (EAA section 2, para. 1.2, and section 2, para. 5), creates an additional burden on NGOs to demonstrate that their interests are affected in a specific case, and therefore the Party concerned is not in compliance with article 9, paragraph 2, of the Convention. It may, for instance, be very difficult for an NGO specializing in transport and environmental matters, to argue that the development of a power plant affects its purposes as defined in its by-laws. The requirements for NGOs set in EAA section 3 (see para. 31 above) are sufficient for the purposes of article 2, paragraph 5, of the Convention.

45. In contrast, the Party concerned contends that the requirement in question is a "requirement under national law" according to article 2, paragraph 5, and within the spirit and purpose of that provision. The Party concerned explains that the general requirements

[13] The original communication included an additional allegation that NGOs could access review procedures under article 9, paragraph 2, of the Convention only if they could prove that an individual whose personal rights had been impaired could also bring that claim (EAA, before the April 2013 amendment, s. 2, para. 1.1 and s. 2, para. 5, in conjunction with Rules of Administrative Court Procedures, s. 42, para. 2). Further to the preliminary ruling of CJEU in C-115/09 and the amendment to the EAA (on 21 January 2013, in force since April 2013), the communicant agreed that this allegation was no longer relevant.

in EAA section 3 lay down a standard and objective recognition procedure for NGOs, while the assessment under EAA section 2, paragraph 1.2, is carried out by courts on a case-by-case basis and aims to ensure that the public interest is represented as competently as possible while minimizing the risk that the rights for filing an application are abused. For instance, an environmental NGO specializing in coastal conservation cannot be a competent representative of the public interest in a case concerning an inland disposal installation. All these requirements, according to the Party concerned, are in line with article 2, paragraph 5, which grants Parties the discretion to define requirements for NGOs to have access to a review procedure under article 9, paragraph 2.

(b) The Convention's requirement for the review of the "substantive and procedural legality of any decision" not transposed into German law

46. The communicant alleges that the Party concerned has not clearly transposed into national law the Convention's obligation that members of the public concerned have the possibility to request both the procedural and substantive review of decisions, acts and omissions subject to article 6. The communicant submits that, in such a situation, it is up to the Party to submit evidence that, nevertheless, its national administrative and judicial practice is in compliance with the Convention.

47. The Party concerned contends that the communicant's allegation is unfounded and flawed, because EAA section 2, paragraph 1, subjects decisions under article 6 of the Convention to a review procedure as a whole, including a review of procedural and substantive legality. The Party concerned adds that article 9, paragraph 2, of the Convention does not require Parties to ensure that every procedural error automatically results in the reversal of a decision subject to article 6 (see further below); moreover, in implementing the Convention Parties do not have to stick to its exact wording.

(c) Requirement to assert that the challenged decision violates legal provisions "serving the environment"

48. The communicant alleges that because a review may be requested only with respect to legal provisions which promote the protection of the environment (EAA sect. 2, para. 1.1, "*dem Umweltschutz dienen*"), the Party concerned, in implementing article 9, paragraph 2, applies a narrow approach and adds requirements that are not in compliance with that provision of the Convention.

49. The Party concerned contends that the communicant's argument is based on an incorrect understanding of the law. It explains that the EAA provision in question does not restrict the ambit of decisions under article 6 of the Convention which may be challenged and that legal provisions "serving the environment" (*"dem Umweltschutz dienen"*) are not limited to environmental legislation in a strict sense, but include all legislation relating to the environment. Moreover, there appears to be no case where an action brought by an environmental NGO was not admissible for that reason. In general, however, it is in line with the Convention if the applicant can only challenge the aspects of the decision which concern, directly or indirectly, environmental matters.

(d) Requirement to assert that the challenged decision violates legal provisions which could be of importance for the decision; and review of procedural errors

50. The communicant alleges that because of the requirement that a review may be requested only if the decision violates legal provisions that could be of importance for the decision ("*für die Entscheidung von Bedeutung sein können*", EAA sect. 2, para. 1.1), the Party concerned, in implementing article 9, paragraph 2, applies a narrow approach and adds requirements that are not in compliance with that provision of the Convention. This is important namely with respect to review of the procedural legality of decisions. According

to the jurisprudence of the Federal Administrative Court (see para. 33 above), in relation to projects subject to EIA, procedural errors are only relevant when there is a concrete possibility that the decision concerning the project would have been different if the procedural error had not occurred and the onus is on the applicant to prove that the decision would have been different without the procedural error. This means that if the permit for a project was issued without the EIA required by law, this procedural error is irrelevant unless the applicant NGO proves that the decision would have been different had an EIA been properly carried out. The communicant submits that EAA section 4, paragraph 1, only partly addresses the issue, because the burden of proof still rests with the applicant.

51. The Party concerned refutes the communicant's allegations. It explains that the principle in APA section 46 (see para. 32 above) is a measure of procedural economy to ensure that a decision is not reversed for a mere infringement of a formality as long as the outcome is correct. The principle does not apply to so-called "fundamental errors of procedure" (see para. 33). According to the Party concerned, a failure to comply with any of the public participation elements of article 6 of the Convention should be considered as a fundamental error of procedure that would lead to the annulment of the decision (see EAA sect. 4, which is a *lex specialis* against the general rule of APA sect. 46).[14] The Party claims that its approach is therefore in compliance with article 9, paragraph 2, of the Convention, which accords discretion to a Party in the framework of its national legislation to set certain conditions, such as the intensity of the judicial review and the consequences in the event of infringement. The Party concerned also, in this respect, refers to the CJEU judgment in the *Altrip* case (see footnote 10 above), which proves that the German law system is "in principle" in conformity with EU law transposing the Convention.

52. The Party concerned also argues that the objective of EAA section 2, paragraph 1.1, and section 2, paragraph 5.1 — i.e., the requirement for contravention of legal provisions that protect the environment ("*dem Umweltschutz dienen*") and that are of importance for the decision ("*für die Entscheidung von Bedeutung sind*") — is to exclude applications for infringement of provisions that are not relevant for the decision. This, according to the Party concerned, is within the limits of discretion for implementation granted by article 9, paragraph 2, of the Convention, and the communicant's allegation is therefore unfounded. The Party concerned also provides examples of recent court jurisprudence,[15] delivered after CJEU issued its preliminary ruling on the *Trianel* case, to show that both article 11 (former art. 10a) of the EIA Directive[16] and article 9, paragraph 2, of the Convention have direct effect in German law. The Party concerned contends that that means, inter alia, that the Convention supplements EAA section 2, paragraphs 1 and 5, and the applicant is entitled to assert a violation of any provision of German law related to the environment.

(e) EAA 2013 amendments

53. Subsequent to its original communication, the communicant alleges that the 2013 amendments to the EAA introduce new impediments for NGOs to get access to justice, such as a six-week limit for indicating the facts and evidence to justify their appeal and limitations to the scope of judicial review of the discretionary powers of administrative authorities in environmental matters.

[14] See also Higher Administrative Court of Rheinland-Pfalz judgment of 25 January 2005, case No. 7 B 12114/04.

[15] See letter of 5 November 2012.

[16] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended.

NGO standing to challenge acts and omissions of private persons and public authorities (art. 9, para. 3, in conjunction with para. 4)

54. The communicant alleges that, beyond the scope of article 9, paragraph 2, of the Convention, environmental NGOs cannot seek review of acts and omissions of private persons and public authorities that contravene German environmental laws unless the rights of the NGO itself have been impaired ("impairment of rights" doctrine ("*Schutznormtheorie*")). The Party concerned has not introduced any amendments to its legislation since the ratification of the Convention and the situation is not compatible with the general objective of the Convention to give the public, including environmental organizations, wide access to justice. In this context, the communicant refers also to the requirement in article 9, paragraph 4, of the Convention for procedures to be effective, fair, equitable, timely and not prohibitively expensive. In support of its allegations, the communicant presents recent case law to the effect that an NGO may not challenge a permit if no EIA is required by law, such as for the construction and operation of a windmill.[17]

55. The Party concerned contends that the communicant's allegation is unjustified and misinterprets the requirements of article 9, paragraph 3, of the Convention. It argues that German law ensures effective legal protection for the public in the field of environmental protection as required by article 9, paragraphs 3 and 4, and that rules set according to the impairment of rights theory, a well-enshrined theory in German legal tradition, are within the discretion conferred upon the Party to implement the Convention. This is clear from the language of the provision, i.e., "where they meet the criteria, if any, laid down in its national law" and that Parties "shall ensure", which means that if Parties have in place laws that already ensure the minimum standards to access to review procedures, there is no need for further amendment.

56. The Party concerned recalls that, unlike paragraph 2 of article 9, paragraph 3 refers to the "public" and not "the public concerned". Therefore, the privilege granted to environmental NGOs according to article 2, paragraph 5, does not apply. Moreover, under German law environmental NGOs have access to review procedures in the area of nature conservation[18] and environmental liability.[19]

57. The Party concerned also recalls that article 9, paragraph 3, provides for access to administrative "or" judicial procedures. Therefore, in assessing alleged non-compliance with this provision, the availability of administrative procedures may suffice. The Party concerned argues that it has a coherent and effective set of administrative, civil and criminal law rules that allow an individual or an association, including an NGO, to pursue the observance of environment-related provisions and to challenge any infringement of those provisions by an authority or private person.

58. In support of its argument, the Party concerned refers to decision II/2 of the Meeting of the Parties on promoting effective access to justice,[20] to previous jurisprudence of the Committee (e.g., the findings on communications ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2) and ACCC/C/2008/32 (EU) (Part I) (ECE/MP.PP/C.1/2011/4/Add.1)), and in particular to German case law showing that courts increasingly opt for a wide interpretation of the impairment of rights theory. For instance, in a 2009 case, the Federal Constitutional Court (*Bundesverfassunsgericht*)[21] ruled that the legal provisions concerning the issue of a permit for the transport of nuclear fuel intended

[17] Communicant's submissions of 22 February 2013.
[18] Federal Nature Conservation Act.
[19] Environmental Damage Act.
[20] ECE/MP.PP/2005/2/Add.3.
[21] Case No. 1 BvR 2524/06 of 29 January 2009.

to protect as "third parties" also those living close to the transport route. This overturned earlier jurisprudence relating to anti-pollution laws, which had defined as "third parties" only those exposed to a certain pollutant. In addition, CJEU, in a ruling on the preliminary reference by the Federal Administrative Court in the *Janecek* case,[22] confirmed the entitlement of an individual to require an air quality plan to be drawn up in the event that established thresholds were exceeded. The Party concerned referred to a decision of the Federal Administrative Court of 5 September 2013[23] to show that German law can be interpreted in compliance with the requirements of article 9, paragraph 3, of the Convention. In that decision the Court adopted a broad interpretation of the term "impairment of the subjective right" with respect to environmental NGOs, stating that NGOs will be affected in their subjective rights by the issuing of the air quality plans, as they have "the right to demand compliance with the imperative provisions of the law on ambient air quality".

59. For all the above reasons, the Party concerned contends that it does not fail to comply with article 9, paragraph 3.

60. With regard to article 9, paragraph 4, of the Convention, the Party concerned contends that its law satisfies all the requirements of that provision. It maintains that the Rules of Procedure of the Administrative Courts and the Rules of Procedure of Civil Courts (*Zivilprozessordnung*) ensure effective legal protection: if the appeal is well founded, then the authority will be required to reconsider the matter and court decisions are enforced by means of enforcement orders.

III. Consideration and evaluation by the Committee

61. Germany ratified the Convention on 15 January 2007. The Convention entered into force for Germany on 15 April 2007.

62. The communicant, in alleging deficiencies in the relevant legislation of the Party concerned with respect to the requirements of article 9, paragraphs 2, 3 and 4, of the Convention, stresses that these deficiencies, both separately and in their cumulative effect, form a sufficient basis to conclude that the Party concerned fails to comply with the Convention. This, according to the communicant, cannot be outweighed by possible different court interpretations of the provisions in question.

63. The general argument of the Party concerned is that all the provisions of its legislation contested by the communicant can be — and indeed are — interpreted and applied in compliance with the Convention in practice. The Party concerned considers it has provided the Committee with a number of court decisions supporting this argument and proving that German courts are ready to apply article 9 of the Convention directly if needed.

64. As already noted in its findings on previous communications, when evaluating compliance with article 9 of the Convention, the Committee pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in the preamble of the Convention 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 findings on communications ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4), para. 30, and ACCC/C/2011/58 (Bulgaria) (ECE/MP.PP/C.1/2013/4), para. 52). The "general picture" includes both the legislative

[22] Case C-237/07, *Dieter Janecek v. Freistaat Bayern* [2008] ECR I-6221.

[23] Case BVerwG 7 C 21.12.

framework of the Party concerned concerning access to justice in environmental matters, and its application in practice by the courts. Moreover, the fact that an international agreement may be applied directly and prior to national law should not be taken as an excuse by the Party concerned for not transposing the Convention through a clear, transparent and consistent framework (see findings on communication ACCC/C/2006/17 (EU) (ECE/MP.PP/C.1/2008/5/Add.10), para. 58).

65. Consequently, when assessing compliance with article 9 of the Convention, the Committee does not only examine whether the Party concerned has literally transposed the wording of the Convention into national legislation, but also considers practice, as shown through relevant case law. The mere hypothesis that courts could interpret the relevant national provisions contrary to the Convention's requirement is not sufficient to establish non-compliance by the Party concerned. If the relevant national provisions can be interpreted in compliance with the Convention's requirements, the Committee considers whether the evidence submitted to it demonstrates that the practice of the courts of the Party concerned indeed follows this approach. If it does not, the Committee may conclude that the Party concerned fails to comply with the Convention.

66. In this context, the Committee notes that EU legislation constitutes a part of the national law of EU member States (see findings on communication ACCC/C/2006/18 (Denmark), para. 27).

67. Where the wording of national legislation appears to contradict the requirements of the Convention, the Committee still considers the case law submitted to it in order to determine whether the line of interpretation by courts or other national authorities nevertheless meets the requirements of the Convention. Under such circumstances, the Committee may conclude that the Party concerned does not fail to comply with the Convention notwithstanding the wording of the national legislation.

68. Based on these general principles, the Committee considers the specific allegations raised by the communicant and the responses of the Party concerned. The Committee does not consider the allegation that in the context of article 9, paragraph 2, NGOs can request review only with respect to legal provisions that establish personal rights for individuals, since the communicant and the Party concerned have agreed that this issue has been resolved by the CJEU decision in *Trianel*, subsequently reflected in the case law of the German courts and by the 2013 amendment of the EAA. The Committee further decides not to deal with the allegations concerning the new requirements introduced by the 2013 EAA amendment with regard to judicial review in environmental matters. Without any practical examples of how these new EAA provisions are applied by the courts, the Committee is not in a position to examine their compliance with the Convention.

Standing of environmental NGOs in review procedures relating to public participation under article 6 (art. 9, para. 2)

69. As summarized above (paras. 40–53), the communicant alleges that a number of the standing conditions stipulated by the EAA for environmental NGOs to have access to review procedures to challenge decisions, acts and omissions subject to article 6 of the Convention do not comply with article 9, paragraph 2, of the Convention. The Committee evaluates the provisions contested by the communicant, one by one, on the basis of the general principles mentioned in paragraphs 64–67 above.

(a) Requirement for environmental NGOs to assert that the challenged decision affects their objectives, as defined in their by-laws

70. The communicant claims that the EAA condition that an environmental NGO must assert that promotion of the objectives of environmental protection in accordance with its

field of activity, as defined in its by-laws, is affected by the challenged decision is not in compliance with the Convention. According to the communicant, all environmental NGOs meeting the general conditions of EAA section 3 should have access to review procedures without further restrictions. The Party concerned claims that this condition does not infringe article 9, paragraph 2, of the Convention, because it constitutes a reasonable and legitimate "requirement under national law" according to article 2, paragraph 5, of the Convention.

71. It follows from article 2, paragraph 5, that NGOs "promoting environmental protection" shall be deemed to have an interest in environmental decision-making. According to article 9, paragraph 2, of the Convention, any NGO meeting the requirements referred to in article 2, paragraph 5, should be deemed to have sufficient interest and thus granted standing in the review procedure. Hence, a criterion in national law that NGOs, to have standing for judicial review, must promote the protection of the environment is not inconsistent with the Convention per se. However, in order to be in accordance with the spirit and principles of the Convention, such requirements should be decided and applied "with the objective of giving the public concerned wide access to justice" (see findings on communications ACCC/C/2006/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2), para. 27, and ACCC/C/2009/43 (Armenia) (ECE/MP.PP/2011/11/Add.1), para. 81). This means that any requirements introduced by a Party should be clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs.

72. The criterion in the law of the Party concerned that environmental NGOs must demonstrate that their objectives are affected by the challenged decision amounts to a "requirement under national law", as set out in article 2, paragraph 5, of the Convention. The criterion is sufficiently clear and does not seem to put an excessive burden on environmental NGOs, since this can be easily proven by the objectives stated in its by-laws. Moreover, NGOs have the possibility to (re-)formulate their objectives from time to time as they see fit. No information was submitted to the Committee to show that the authorities and courts of the Party concerned use this criterion in such a manner so as to effectively bar environmental NGOs from access to justice.

73. Since the application of this requirement by the Party concerned does not seem to contravene the objective of giving the public concerned wide access to justice, the Party concerned does not fail to comply with article 9, paragraph 2, of the Convention in this respect.

(b) Convention's requirement for the review of the "substantive and procedural legality of any decision" not transposed into German law

74. The communicant asserts that since there is no explicit transposition into German law of the Convention's requirement that members of the public concerned shall have the right to challenge both the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention, the Party concerned is in non-compliance with article 9, paragraph 2, of the Convention. The Party concerned argues that it is possible for members of the public concerned to challenge both the substantive and procedural legality of decisions under the EAA, and also that Parties are not obliged to transpose the exact wording of the Convention into national legislation.

75. The fact that the exact wording of any provision of the Convention has not been transposed into national legislation is in itself not sufficient to conclude that the Party concerned fails to comply with the Convention. The communicant's allegations concerning the impacts of the Party concerned not explicitly transposing the "substantive and procedural legality" requirement into German law have not been substantively corroborated by relevant practice. Therefore, the Committee does not conclude that the Party concerned fails to comply with article 9, paragraph 2, of the Convention in this respect.

(c) Requirement to assert that the challenged decision violates legal provisions "serving the environment"

76. The communicant argues that by limiting the scope of judicial review to alleged contraventions of statutory provisions "serving the environment" (*"dem Umweltschutz dienen"*), the EAA imposes a limitation not found in article 9, paragraph 2, of the Convention, thus narrowing the range of administrative decisions that can be challenged by members of the public concerned. The communicant adds that in many cases it may be questionable whether a provision "serves the environment" or not and this may lead to unacceptable uncertainty as to whether the conditions for standing are met. According to the Party concerned, the decisions subject to judicial review under the EAA are clearly defined in EAA section 1 and are not limited by the requirement in question. Moreover, the Party concerned asserts that restricting the scope of judicial review to alleged infringements of legal provisions "serving the environment" would be in compliance with the Convention in any event, taking into account the Convention's objective and focus on environmental decision-making. There is also no indication that this condition would in any way limit access to courts in practice.

77. As mentioned above, the Party concerned is not obliged to literally transpose the text of the Convention into its national legislation. However, when using its discretion in designing its national law, the Party concerned should not impose additional requirements that restrict the way the public may realize the rights awarded by the Convention, if there is no legal basis in the Convention for imposing such restrictions.

78. Article 9, paragraph 2, requires each Party to ensure access to review procedures in relation to any decision, act or omission subject to article 6 of the Convention. The range of subjects who can challenge such decisions may be defined (limited) by the Party in accordance with the provisions of article 2, paragraph 5, and article 9, paragraph 2 (a) and (b), of the Convention. However, the Party may not through its legislation or practice add further criteria that restrict access to the review procedure, for example by limiting the scope of arguments which the applicant can use to challenge the decision.[24] While the Convention relates to environmental matters, there may be legal provisions that do not promote protection of the environment, which can be violated when a decision under article 6 of the Convention is adopted, for instance, provisions concerning conditions for building and construction, economic aspects of investments, trade, finance, public procurement rules, etc. Therefore, review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law "serving the environment", "relating to the environment" or "promoting the protection of the environment", as there is no legal basis for such limitation in the Convention.

79. When there is a clear contradiction between the provisions of national law and the requirements of the Convention, as in the present case, it is for the Party concerned to bring evidence to show that its courts interpret those provisions in conformity with the Convention (see para. 67). However, this has not been shown by the Party concerned with respect to the requirement of "serving the environment". The Party concerned, in its comments on the draft findings, referred to a number of court decisions that it claimed showed that the term "serving the environment" is interpreted in a broad manner. These cases show that the courts include, for example, protection of human health or flood protection in their considerations. These issues are, however, within the scope of what

[24] Similarly CJEU in the *Altrip* case, para. 36, said: "In providing that the decisions, acts, or omissions referred to therein must be actionable before a court of law through a review procedure to challenge their substantive or procedural legality, the first paragraph of Article 10a of Directive 85/337 has in no way restricted the pleas that may be put forward in support of such an action."

relates to the environment. The Committee is thus not convinced that these cases show that issues other than those relating to environmental concerns can be successfully raised under the clause "serving the environment".

80. For these reasons, the Committee finds that by imposing a requirement that an environmental NGO to be able to file an appeal under the EAA must assert that the challenged decision contravenes a legal provision "serving the environment" (*dem Umweltschutz dienen*), the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

(d) Requirement to assert that the challenged decision violates legal provisions which could be of importance for the decision; and review of procedural errors

81. The communicant alleges that the EAA requirements that the environmental NGO must assert that the contested decision contravenes a legal provision which "could be of importance" for the decision ("*für die Entscheidung von Bedeutung sein können"*) and that the appeal can be justified only if the court finds that legal provisions contravened "are of importance" for the decision ("*für die Entscheidung von Bedeutung sind*"), imply a limitation which is contrary to article 9, paragraph 2, of the Convention. In particular, the communicant points out that the application of these requirements considerably limits the possibility for environmental NGOs to challenge the procedural legality of decisions issued under the EAA. The Party concerned argues that, in general, the fact that only alleged violations of provisions which could be relevant for the decision are considered by the courts is not contrary to the Convention. It argues that according to German law, the substantive legality of a decision by a public authority is subject to a complete review by the court, while procedural errors are of secondary importance. According to the Party concerned, the possibility for the court to assess whether a procedural error could influence the substantive legality of the decision, and to cancel the decision only if the answer is affirmative, is in compliance with the Convention. It also emphasizes that the alleged violations of essential procedural rights granted by article 6 of the Convention are considered by the German courts as "fundamental errors of procedure", with respect to which the possibility to review and cancel the decision is ensured.

82. The Committee recalls that article 9, paragraph 2, of the Convention is directly linked to article 6, which grants the rights of the public concerned to participate in permitting procedures for specific activities. The Parties must ensure that in such procedures, members of the public concerned can fully exercise their participatory procedural rights set out in article 6 of the Convention.

83. Article 9, paragraph 2, in conjunction with article 9, paragraph 4, of the Convention requires Parties to provide members of the public concerned with access to effective judicial protection should their procedural rights under article 6 be violated. Therefore, it would not be compatible with the Convention to allow members of the public to challenge the procedural legality of the decisions subject to article 6 of the Convention in theory, while such actions were systematically refused by the courts in practice, as either not admissible or not well founded, on the grounds that the alleged procedural errors were not of importance for the decisions (i.e., that the decision would not have been different, if the procedural error had not taken place).

84. On the basis of the above, the Committee examines the information provided by the communicant and the Party concerned as to whether the courts of the Party concerned systematically refuse review applications as non-admissible or ill-founded when the applicants allege that procedural rights under article 6 of the Convention have been infringed.

85. EAA section 2 does not establish any criteria for determining when a contravention of a legal provision could be "of importance" for a challenged decision. EAA section 4 specifies that the reversal of a decision can be requested if (a) an EIA, or (b) a preliminary assessment of a project concerning the requirement for an EIA, required in accordance with the EIA Act, was not carried out. The Committee notes that there is disagreement between the communicant and the Party concerned as to whether the errors listed in EAA section 4 "can" lead to reversal of the challenged decision, as the communicant asserts, or "must" have this effect, which is the position of the Party concerned.

86. Based on the information provided to it, the Committee understands that for its appeal to be admissible, an NGO must assert that the allegedly violated provision "could be" of importance for the contested decision, while to find an appeal justified, the court must conclude that the violated provisions "are" of importance for the decision.

87. The possibility for national courts to evaluate whether the allegedly infringed provisions could be of any importance for the merits of the case, is not, in general, contrary to the requirements of article 9, paragraph 2, and to the objectives of the Convention.[25] This possibility, as such, would not prevent environmental NGOs from challenging both substantive and procedural legality of the decisions.

88. The information provided by the communicant and the Party concerned relating to the scope of judicial review for alleged procedural errors raises doubts as to whether the legal system of the Party concerned ensures adequate access for environmental NGOs to review the procedural legality of the decisions subject to article 6 of the Convention. This is so namely because the question of the possible "importance of the provision for the contested decision" is, according to section 2, paragraph 1, of the EAA, considered by the court already when deliberating on the admissibility of the case, i.e., not in the full judicial review procedure.

89. The Party concerned has submitted relevant recent case law showing that German courts consider violations of procedural rights granted under article 6 of the Convention as fundamental errors of procedure that would require review and eventually annulment of the decision, and that courts are ready to apply the Convention directly in that respect ("direct effect of article 9, paragraph 2, of the Convention supplements the provisions of section 2, paragraphs 1 and 5, of the EAA").[26] The request for a preliminary ruling made by the Federal Administrative Court to CJEU in the *Altrip* case (see para 35 above) indicates that there may be uncertainty as to how German courts should deal with procedural errors concerning decisions subject to article 6 of the Convention. The communicant has not, however, sufficiently substantiated, e.g., by reference to recent case law, that the courts when applying the EAA in practice refuse to deal with appeals and/or arguments of environmental NGOs concerning alleged procedural errors with respect to decisions subject to article 6 of the Convention. Moreover, it follows from the CJEU ruling in *Altrip* that the German courts should take procedural errors into account in environmental cases. Therefore, the Committee does not conclude that the Party concerned fails to comply with article 9, paragraph 2, of the Convention with respect to the scope of judicial review regarding the procedural legality of decisions subject to article 6 of the Convention.

90. The Committee nevertheless raises a concern about the lack of clarity of the legal system of Party concerned as to whether a violation of the procedural rights prescribed under article 6 would be considered as a fundamental error of procedure to allow for fulfilment of the rights prescribed under article 9, paragraph 2, of the Convention. The

[25] CJEU comes to similar conclusions in the *Altrip* case, para. 57.

[26] Federal Administrative Court, Case No. 4 C 9/06, judgment of 13 December 2007.

Committee emphasizes that if German courts in practice were to deny review of the appeals and/or arguments of members of the public concerned, including environmental NGOs, regarding the procedural legality of decisions subject to article 6, this would amount to non-compliance with article 9, paragraph 2.

NGO standing to challenge acts and omissions of private persons and public authorities (art. 9, para. 3, in conjunction with para. 4)

91. The communicant alleges that, beyond the scope of the EAA, standing to challenge acts and omissions of private persons and public authorities which contravene provisions of environmental law is granted only to persons who claim that their own personal rights are injured. This applies also to environmental NGOs. Such a situation is, according to the communicant, not in compliance with the requirements of article 9, paragraph 3, in conjunction with paragraph 4, of the Convention. The Party concerned contends that the requirement in its legislation that a person has to claim that his or her own rights have been infringed when lodging an administrative appeal constitutes a legitimate criterion in line with article 9, paragraph 3, of the Convention. In addition, the Party concerned emphasizes that under its national law environmental NGOs have access to review procedures beyond the scope of the EAA, without having to assert an infringement of their own rights, in the areas of nature conservation. It also refers to the jurisprudence of national courts interpreting the "impairment of right" condition in a broad manner, namely, the recent judgment of the Federal Administrative Court of 5 September 2013,[27] which interpreted the term "impairment of the subjective right" broadly with regard to the possibility for environmental NGOs to challenge air quality plans (see para. 58 above).

92. Unlike article 9, paragraphs 1 and 2, article 9, paragraph 3, of the Convention applies to a broad range of acts or omissions and also confers greater discretion on Parties when implementing it. Yet, the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective of the Convention to ensure wide access to justice. The Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws to 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 such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should be the presumption, not the exception, as 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" (findings on communications ACCC/C/2005/11 (Belgium), paras. 34–36; ACCC/C/2006/18 (Denmark), paras. 29-30; and ACCC/C/2010/48 (Austria) (ECE/MP.PP/C.1/2012/4), paras. 68–70).

93. The Committee, when evaluating the compliance of the Party concerned with article 9, paragraph 3, of the Convention, considers the "general picture" described by the communicant and the Party concerned, i.e., both the relevant legislative framework and its application in practice (see para. 64 above). Therefore, the Committee takes into account whether national law effectively blocks access to justice for members of the public, including environmental NGOs, and considers if there are remedies available for them to actually challenge the act or omission in question.

[27] Case BVerwG 7 C 21.12.

94. Article 9, paragraph 3, does not distinguish between public or private interests or objective or subjective rights, and it is not limited to any such categories. Rather, article 9, paragraph 3, applies to contraventions of any provision of national law relating to the environment. While what is considered a public or private interest or an objective or subjective right may vary among Parties and jurisdictions, access to a review procedure must be provided for all contraventions of national law relating to the environment.

95. The Party concerned has adopted environmental laws at the federal level, and the *Länder* (states) have competence to implement and enforce that legislation. Access to justice in environmental matters is primarily regulated at the federal level. According to the well-enshrined principle in German procedural law derived from the "impairment of rights" doctrine ("*Schutznormtheorie*"), access to justice is granted on the basis of whether the applicant claims infringement of his/her subjective rights. A strict application of this principle in matters of access to justice under the Convention would imply non-compliance with article 9, paragraph 3, of the Convention, since many contraventions by public authorities and private persons would not be challengeable unless it could be proven that the contravention infringes a subjective right. The requirement of infringement of subjective rights would in many cases rule out the opportunity for environmental NGOs to access review procedures, since they engage in public interest litigation.

96. The Party concerned and the communicant agree that, apart from the rights of access to justice provided for in the EAA, which implements article 9, paragraph 2, of the Convention, the only other explicit legislative provisions which provide legal standing to environmental NGOs, are proceedings issued under the Federal Nature Conservation Act or the Environmental Damage Act. It follows that, apart from the rights on access to justice provided in the EAA, the Federal Nature Conservation Act and the Environmental Damage Act, there is no apparent basis in the legislation for access to review procedures for environmental NGOs.

97. The communicant provided examples of recent judgements where it claimed standing was denied to environmental NGOs.[28] The Party concerned disputed these examples, alleging that the lawsuits of the NGOs were admissible, but refused on the basis of not being well-founded. The Party concerned also presented the judgment of the Federal Administrative Court of 5 September 2013, in which legal standing was granted to an NGO, in the area of air protection, beyond the scope of the EAA, the Federal Nature Conservation Act and the Environmental Damage Act, with reference to article 9, paragraph 3, of the Aarhus Convention and relevant CJEU jurisprudence.

98. In its judgment of 5 September 2013, following the CJEU judgment in the "Slovak Brown Bear" case,[29] the Federal Administrative Court broadened the interpretation of the criterion of "impairment of a right". This, however, was done in order to ensure the correct implementation of the relevant EU legislation (see paras. 20–26 and 46 of the judgement of the Federal Administrative Court) and does not imply that the same interpretation will be applied by the courts to those areas of national law relevant to the Aarhus Convention but not covered by EU law. Nor does it guarantee that this interpretation will be widely followed in future decisions. The Federal Administrative Court itself has indicated that for Germany to be fully in compliance with the requirements of article 9, paragraph 3, of the Convention, changes in the legislation would be needed (see para. 32 of its judgement).

99. If the broad interpretation of the term "impairment of subjective rights" reflected in the judgment of the Federal Administrative Court of 5 September 2013 was to become a

[28] Oberverwaltungsgericht Nordrhiein-Westfalen (case 2 B 940/12, decision of 29 August 2012); Verwaltungsgericht Kassel (case 4 L 81/12 ks, decision of 2 August 2012); Bayerische Verwaltungsgerichtshof (case 8 CS 12847, decision of 21 August 2012).

[29] Case C-240/09 *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255.

general practice of German courts in all areas of national law relevant to the Convention, this could amount to compliance with article 9, paragraph 3. However, in the absence of legislative guarantees for members of the public, including environmental NGOs, to have access to review procedures to challenge acts and omissions of private persons and public authorities in areas of national environmental law beyond the scope of the EAA, the Federal Nature Conservation Act and the Environmental Damage Act, the Committee concludes that the conditions laid down by the Party concerned do not ensure standing to environmental NGOs to challenge acts or omissions that contravene national laws relating to the environment.

100. For these reasons, the Committee finds that, by not ensuring standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention.

IV. Conclusions and recommendations

101. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

102. The Committee finds that:

(a) By imposing a requirement that an environmental NGO, to be able to file an appeal under the EAA, must assert that the challenged decision contravenes a legal provision "serving the environment", the Party concerned fails to comply with article 9, paragraph 2, of the Convention in this respect (para. 80).

(b) By not ensuring the standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention (para. 100).

B. Recommendations

103. The Committee, pursuant to paragraph 35 of the annex to decision I/7 recommends the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, to recommend to the Party concerned that it take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that:

(a) NGOs promoting environmental protection can challenge both the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention, without having to assert that the challenged decision contravenes a legal provision "serving the environment";

(b) Criteria for the standing of NGOs promoting environmental protection to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention are revised and specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the EAA, the Federal Nature Conservation Act and the Environmental Damage Act.

United Nations ECE/MP.PP/C.1/2011/4/Add.1

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Thirty-second meeting
Geneva, 11–14 April 2011

Report of the Compliance Committee

Addendum

Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union[1]

Adopted on 14 April 2011

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[1] The present communication was originally submitted by the communicant concerning non-compliance by the European Community. As of 1 December 2009, the European Union (EU) succeeded the European Community in its obligations arising from the Convention (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community). The present findings will systematically refer to EU law and EU institutions and bodies, even if they refer to the status before the entry into force of the Lisbon Treaty.

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I. Background

1. On 1 December 2008, the non-governmental organization (NGO) ClientEarth (hereinafter the communicant), supported by a number entities and a private individual,[2] submitted a communication to the Committee alleging a failure by the European Union (EU) to comply with its obligations under article 3, paragraph 1, and article 9, paragraphs 2, 3, 4 and 5, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication alleges that by applying the "individual concern" standing criterion for private individuals and NGOs that challenge decisions of EU institutions before the Court of Justice of the European Union (the European Court of Justice (hereinafter the ECJ) and the General Court or Court of First Instance (CFI))[3] (hereinafter, collectively, the EU Courts), the EU fails to comply with article 9, paragraphs 2–5, of the Convention. The communication further alleges that the law adopted by the EU in the form of a regulation in order to comply with the provisions of the Convention[4] (hereinafter the Aarhus Regulation), fails to grant to individuals or entities, other than NGOs, such as regional and municipal authorities, access to internal review; and that the scope of this internal review procedure is limited to appeals against administrative acts of an individual nature. As a result, the EU fails to comply with article 3, paragraph 1, and article 9, paragraph 2, of the Convention. Finally, the communication alleges that by charging the applicants before the EU Courts with expenses of an uncertain and possibly prohibitive nature in the event of the loss of their case, the EU fails to comply with article 9, paragraph 4, of the Convention. Additionally, the communication alleges also a breach of article 6 by not providing for public participation, and related access to justice, in decision-making related to certain decisions taken by EU institutions.

3. Overall, the communicant alleges a general failure by the EU to comply with the provisions of the Convention on access to justice in environmental matters. This allegation is supported by references to a number of decisions by the EU Courts, including *WWF-UK v. Council of European Union* (*WWF* Case);[5] *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission of the European Communities* (*EEB* Cases);[6] *Região autónoma dos Açores v Council* (*Azores* Case);[7] and *Stichting Natuur en Milieu and*

[2] The communicant submitted a list that includes: Ludwig Krämer, *Asociación para la Justicia Ambiental*, Bond Beter Leefmilieu (BBL), CEE Bankwatch Network (Bankwatch), *Ecologistas en Acción*, *France Nature Environnement* (FNE), Friends of the Irish Environment, Greenpeace International, International Fund for Animal Welfare (IFAW), *Instituto Internacional de Derecho y Medio Ambiente* (IIDMA), *Naturschutzbund Deutschland e.V. — NABU*, Oceana, *Oekobuero* and *SOS Grand Bleu*.

[3] From its inception on 1 January 1989 to 30 November 2009, the General Court was known as the Court of First Instance (CFI). In the present findings, the term CFI will be used where the earlier case law of the General Court is being discussed or cited.

[4] Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264 of 25.09.2006, p.13.

[5] *WWF-UK Ltd v. Council of the European Union*, T-91/07, 2 June 2008; and *WWF-UK Ltd v. Council of the European Union and the Commission of the European Communities*, C-355/08, 5 May 2009.

[6] *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission*, joined cases T-236/04 and T-241/04, 28 November 2005.

[7] *Região autónoma dos Açores v Council*, T-37/04, 1 July 2008 and C-444/08, 26 November 2009.

Pesticides Action Network Europe v. Commission (*Stichting Milieu* Case).[8] In the *EEB* cases, the CFI dismissed the actions, and that decision was not appealed. The *Azores* case and the *WWF-UK* case were dismissed on appeal to the ECJ. The *Stichting Milieu* case was pending before the EU Courts when these findings were adopted by the Committee.

4. At its twenty-second meeting (17–19 December 2008), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties, the communication was forwarded to the Party concerned on 24 December 2008. On 19 January 2009 the Committee wrote a letter to the Party concerned and the communicant along with a number of questions soliciting additional information from both parties on the applicable legal framework, the nature of the allegations and the facts presented in the communication. The communicant sent its response to the questions raised by the Committee on 25 May 2009. The Party concerned sent its comment to the communication and its response to the questions of the Committee on 11 June 2009.

6. On 24 June 2009, the Committee received information in the form of an amicus curiae memorandum from the NGO WWF-UK.[9] The amicus memorandum alleged that the rejection of the WWF-UK application to the CFI to review the quotas for cod fishing set by Council Regulation No. 41/2006[10] constituted a failure by the Party concerned to comply with the requirements of article 9, paragraphs 2 and 3, of the Aarhus Convention. The appellate decision confirmed the CFI ruling. This case was submitted in support of the allegation of the communicant that the Party concerned is in non-compliance with article 9, paragraphs 2 and 3, concerning access to a review procedure for members of the public concerned and review procedures concerning substantive legality of decisions, acts or omissions subject to article 6 of the Convention.

7. In subsequent correspondence dated 2 July 2009, the Party concerned requested the Committee to postpone examining the communication until the release of the final court decision, on the basis of paragraph 21 of the annex to decision I/7, as some of the issues raised in the communication and concerning the *Stichting Milieu* case were sub judice before the CFI. The Committee examined the request from the Party concerned at its twenty-fourth meeting (30 June–3 July 2009) and sought the views of the communicant. Having taken note of the reply of the communicant and the amicus dated 10 August 2009 and 23 August 2009, respectively, and also of its earlier decision to defer consideration of communication ACCC/C/2008/31 (Germany), the Committee, using its electronic decision-making procedure decided to discuss the substance of at least part of the communication at its twenty-fifth meeting (22–25 September 2009). At the time, the Committee also decided to defer consideration of those elements for which it made sense to await the outcome of the *Stichting Milieu* case.

8. The Committee discussed the communication at its twenty-fifth meeting, with the participation of representatives of the communicant, the amicus and the Party concerned, the latter represented by the European Commission. At the same meeting, the Committee confirmed the admissibility of the communication. After the discussion, the Committee

[8] *Stichting Natuur en Milieu and Pesticides Action Network Europe v. Commission*, T-338/08, action brought on 11 August 2008.

[9] WWF-UK is the United Kingdom arm of the World Wildlife Fund Network.

[10] Council Regulation (EC) No. 41/2006 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, OJ L 15 of 20.1.2007, pp. 1–213.

agreed to defer its decision on whether draft findings would be prepared immediately thereafter or at a later stage following the judgement in the *Stichting Milieu* case.

9. By letter of 21 January 2010, the Committee invited the parties and the amicus to submit their views on how the changes introduced by the entry into force of the Lisbon Treaty on 1 December 2009 (such as the new article 263 replacing article 230, new provisions on democratic principles and the entry into force of the EU Charter of Fundamental Rights) might impact on the merits of the communication. The Party concerned and the communicant replied on 26 February and 1 March 2010, respectively, and the amicus on 19 February 2010.

10. The Committee prepared draft findings at its thirty-first meeting (22–25 February 2011), focusing on the main allegation of the communicant by examining the jurisprudence of the EU Courts on access to justice in environmental matters generally. In doing so, the Committee considered whether in the *WWF-UK* case the EU Courts had accounted for the fact that the Aarhus Convention had entered into force for the Party concerned, but decided not to make specific findings on whether the case in itself amounted to non-compliance with the Convention. In addition, while awaiting the outcome of the *Stichting Milieu* case, which was still pending before the EU Courts, the Committee refrained from examining whether the Aarhus Regulation or any other relevant internal administrative review procedure of the EU met the requirements on access to justice in the Convention.

11. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 15 March 2011. Both were invited to provide comments by 12 April 2011.

12. The Party concerned and the communicant provided comments on 12 and 11 April 2011, respectively.

13. At its thirty-second meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, legal framework and issues[11]

A. Legal framework and relevant jurisprudence

Aarhus Convention and the European Union legal framework

14. According to article 17 of the Aarhus Convention it was open for signature by, inter alia, “regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters”. In accordance with article 19, a regional economic integration organization may ratify, accede to or approve the Convention. As set out in article 2 paragraph 2 (d), of the Convention, an institution of a regional economic integration organization shall also be considered as a “public authority” under the Convention.

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

15. Agreements concluded by the Party concerned are binding upon the EU institutions and its members States (art. 216, para. 2, of the Treaty on the Functioning of the European Union (TFEU), previously art. 300, para. 7, of the Treaty establishing the European Community (TEC)).

Procedures and remedies for natural and legal persons bringing a case before European Union Courts

16. There are, in principle, four types of procedure for individuals and entities to bring a case before the EU Courts:

(a) Action for annulment under TFEU article 263, paragraph 4 (ex TEC art. 230, para. 4);

(b) Preliminary reference under TFEU article 267 (ex TEC art. 234);

(c) Action for failure to act under TFEU article 265, paragraph 3 (ex TEC art. 232 para. 3); and

(d) Action for damages under TFEU article 268 (ex TEC art. 235).

For the purposes of the present findings, the two first remedies will be described in the following paragraphs, namely, action for annulment and preliminary reference. This examination includes an analysis of the jurisprudence of the EU Courts. For the reasons stated in paragraph 10 above the Aarhus Regulation is not described in the following paragraphs.

Action for annulment under TFEU article 263 paragraph 4 (ex TEC art. 230, para. 4)

17. Prior to 1 December 2009, article 230, paragraph 4 (ex art.173 para. 4, before the Treaty of Amsterdam) of the TEC provided that: "[a]ny natural or legal person may […] institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former". The ECJ has developed jurisprudence on the interpretation and implementation of this provision, as outlined in the following paragraphs, both in general terms as well as in the interpretation of environmental matters. Of particular relevance is the interpretation of what it means for a decision to be of "individual concern".

18. Article 263, paragraph 4, of the TFEU (in force since 1 December 2009) reads: "[a]ny natural or legal person may […] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures." No relevant ECJ jurisprudence exists yet with respect to this provision.

Preliminary reference under TFEU article 267 (ex TEC art. 234)

19. Natural and legal persons may access the EU Courts through the preliminary reference procedure of TFEU article 267. In this case, the court of an EU member State submits to the ECJ for resolution a question on the interpretation of EU law. The request (reference) put to the Court is not of a general nature and is accompanied by the specific facts and circumstances that triggered it. According to TFEU, article 267:

> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

Summary of relevant decisions by the European Union Courts on actions of annulment

The Plaumann case

20. In 1963, the ECJ interpreted for the first time the criterion of "individual concern" in the *Plaumann* case.[12] In that case, Plaumann & Co, a German corporation, sought the annulment of a decision of the European Commission that had refused to authorize the Federal Republic of Germany to suspend, in part, customs duties applicable to fresh mandarins and clementines imported from third countries. The Court 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". Following this reasoning, the ECJ found that the corporation was not individually concerned. The criteria for standing established in this decision have since then been referred to as the "Plaumann test".

The Greenpeace case and the Danielsson case

21. The ECJ used for the first time the Plaumann test in environmental matters in the *Greenpeace* case.[13] Greenpeace International and local associations and residents of Gran Canaria (Spain) sought the annulment of a decision adopted by the Commission to provide financial assistance from the European Regional Development Fund for the construction of two power stations on the Canary Islands, without requiring an environmental impact assessment (EIA) to be conducted. The CFI asserted that the Plaumann test was applicable to environmental matters and refused standing to the applicants. The ECJ confirmed the CFI decision and also added that remedies were available in the national courts, based on article 234 of the TEC (art. 267 of the TFEU) concerning preliminary rulings. The Court affirmed its interpretation in later cases, and in the *Danielsson* case[14] the Court clarified that such an individual concern could not be established even if the applicants suffered harm.

The UPA case

22. In 1999, the Court in the *Union de Pequeños Agricultores* (UPA) case[15] did not grant standing to the trade association UPA, representing and acting on behalf of small Spanish agricultural businesses, which sought the annulment of a Council regulation reforming the common organization of the olive oil market. The CFI confirmed the Plaumann test and denied standing to the UPA, even if some of its members would have to cease their economic activity because of the contested regulation. On appeal in 2002, the ECJ confirmed the CFI decision and ruled that under the current TEC provisions, member States were responsible for the establishment of a system of legal remedies and procedures ensuring respect of the right to effective judicial protection. In this case, the opinion delivered by Advocate General Jacobs, which was ultimately not followed by the Court,

[12] *Plaumann & Co v. Commission*, Case 25/62, 15 July 1963.

[13] *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission*, T-585/93, 9 August 1995; and *Stichting Greenpeace Council and Others v. the Commission*, C-321/95 P, 2 April 1998.

[14] *Marie-Thérèse Danielsson, Pierre Largenteau, Ewin Haoa v. Commission of the European Communities*, T-219/95 R, 22 December 1995.

[15] *Unión de Pequeños Agricultores v. Commission*, Case T-173/98, 23 November 1999; and *Unión de Pequeños Agricultores v. Council*, Case C-50/00 P, 25 July 2002.

suggested that article 230, paragraph 4, of the TEC should be interpreted so as to recognize that "an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interest".

The Jégo-Quéré case

23. In 2002, the CFI reversed the Plaumann test in the *Jégo-Quéré* case,[16] in which the CFI interpreted article 230, paragraph 4, of the TEC in a manner that granted access to the applicant Jégo-Quéré and argued that there was no need to amend the TEC to that effect. Specifically, the Court ruled that "there [was] no compelling reason to read into the notion of individual concern a requirement that an individual applicant seeking to challenge a general measure [had to] be differentiated from all others affected by it in the same way as an addressee";[17] and that "a natural or legal person [was] to be regarded as individually concerned by a Community measure of general application that [concerned] him directly if the measure in question [affected] his legal position, in a manner which is both definite and immediate by restricting his rights or by imposing obligations on him. The number and position of other persons who [were] likewise affected by the measure, or who [might] be so [affected], [were] of no relevance in that regard".[18] In 2004, on appeal, the ECJ reversed the CFI ruling and reaffirmed its Plaumann test.[19]

The EEB cases

24. In 2005, the CFI confirmed the Plaumann jurisprudence in the *EEB* cases.[20] The actions were submitted before the entry into force of the Convention (on 9 and 11 June 2004), but the ruling was rendered after the entry into force of the Convention, but before the Aarhus Regulation came into effect (on 28 November 2005). In these cases two environmental NGOs were denied standing before the EU Courts to challenge some provisions of two decisions of the European Commission, which allowed the member States to maintain in force authorizations for the use of two herbicide products with potential negative effects on the environment and human health — atrazine and simazine. The CFI found that neither the statutory aim of the applicant to protect the environment nor its special consultative status with the European institutions established its "individual concern". The CFI also ruled that the proposal for the Aarhus Regulation did not grant standing to environmental NGOs unless the latter met the "individual concern" criterion stipulated in article 230, paragraph 4, of the TEC. This case was not appealed to the ECJ.

The Açores case

25. In 2008, the CFI applied the Plaumann test in the *Açores* case,[21] where the autonomous region of Azores (Portugal) sought the annulment in part of a regulation on the management of fishing areas and resources in the European Community (EC). The action for this case was submitted to the CFI on 2 February 2004, before the entry into force of the Convention, but the CFI ruling was rendered on 1 July 2008, after its entry into force.

26. The CFI argued that the Aarhus Convention had not been approved by the EC when the action was brought before it. It recalled that, in any event, article 9, paragraph 3, of the

[16] *Jégo-Quéré et Cie SA v. Commission*, T-177/01, 3 May 2002.
[17] Ibid. para. 49, which refers to the Opinion of Advocate General Jacobs delivered on 21 March 2002 in *UPA* case C-50/00 P, para. 59.
[18] Ibid., para. 51.
[19] *Commission v. Jégo-Quéré et Cie SA*, C-263/02P, 1 April 2004.
[20] See footnote 6 above.
[21] See footnote 7 above.

Convention referred to the criteria laid down in the national law, and in EU law such criteria were set by article 230, paragraph 4, of the TEC and the related jurisprudence. It further stated that the autonomous region of Azores was not an NGO, and the requirements of article 12 of the Aarhus Regulation were not fulfilled. The decision of the CFI was appealed to the ECJ on 8 October 2008. By order of 26 November 2009, the ECJ dismissed the appeal.

The WWF-UK case

27. The action for the *WWF-UK* case was submitted on 19 March 2007, after the entry into force of the Convention for the EU, but before the Aarhus Regulation became effective (on 17 July 2007). The CFI ruling (2 June 2008), the appeal application (30 July 2008) and the dismissal of the appeal application (5 May 2009) took place after the Aarhus Regulation became effective.

28. In this case,[22] WWF-UK sought the partial annulment before the CFI of Council Regulation No. 41/2006 of 21 December 2006 fixing the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in community waters for 2007 in respect of cod in the zones covered by Council Regulation No. 423/2004 establishing measures for the recovery of cod stocks.[23]

29. Regulation 41/2006 finds its origin in Council Regulation No. 2371/2002.[24] The latter requires the Council of the European Union to fix the quantities of fish and species of fish that may be fished (Total Allowable Catches or TACs), the geographical areas where these species can be fished, quotas per member State, and the specific conditions (conservation measures) under which Community vessels are authorized to catch and land fish. The Council annually decides on these matters in the form of a Regulation, such as Regulation No. 41/2006, which sets the fishing conservation measures for the following year. In its decision-making procedure, the Council takes into account the advice provided by the International Council for the Exploration of the Sea (ICES) for areas within its remit, the Scientific, Technical and Economic Committee for Fisheries (STECF) and the Regional Advisory Councils (RAC), in which stakeholders participate. For the North Sea the relevant RAC is the North Sea RAC, a council that advises the Commission on matters of fisheries in respect of fishing zones located in the North Sea. WWF-UK is a member of the North Sea RAC. Regulation 41/2006 is binding upon the member States, which distribute the quota allocated to them among their fishing vessels by issuing individual fishing permits. For the 2007 TACs, the North Sea RAC submitted its advice to the Council and the Commission, which took that advice into account in the adoption of Regulation No. 41/2006. The North Sea RAC report records the minority opinion of environmental NGOs, including WWF-UK. In this minority opinion WWF-UK and three other environmental NGOs disputed the TAC adopted for cod (30,000 tons) in the light of the advice submitted by ICES and the measures for the recovery of cod stocks established by Council Regulation (EC) No. 423/2004 of 26 February 2004.

30. The CFI denied standing to the applicant. The CFI held that neither the statutory aim of the applicant to protect the environment nor its consultative status in the decision-making process, as a member of the North Sea RAC, for the contested regulation established its

[22] See footnote 5 above.

[23] Council Regulation (EC) No. 423/2004 of 26 February 2004 establishing measures for the recovery of cod stocks, OJ L 70 of 9.3.2004, p. 8.

[24] Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358 of 31.12.2002, p. 59.

"individual concern". It also stated that "any entitlements which the applicant may derive from the Aarhus Convention and from [the Aarhus Regulation] [were] granted to it in its capacity as a member of the public. Such entitlements [could] not therefore be such as to differentiate the applicant from all other persons with the meaning of the [Plaumann test]".[25] On appeal the CFI order was reaffirmed.

The Stichting Milieu case

31. The applicants in the *Stichting Milieu* case[26] requested the Commission to review Regulation No. 149/2008[27] in accordance with Title IV of the Aarhus Regulation on internal review and access to justice. In its request to the Commission, Stichting Natuur en Milieu argued that the said Regulation amending the maximum residue levels for food products, although it might have the form of a general measure, should be seen as a compilation of individual decisions concerning the residues of all the individual products and substances. Thus, because of its individual scope, the Regulation is an administrative act meeting the criteria of article 2 (1) (g) of the Aarhus Regulation and/or an administrative act of a public authority, under article 9, paragraph 3, of the Aarhus Convention. The Commission, by letters of 1 July 2008, declared the request inadmissible on the ground that the contested regulation could not be regarded as an act or as a bundle of decisions of individual scope. The applicants submitted that the contested Regulation No. 149/2008 consists of a bundle of decisions and contended that it applied to a definitely defined and previously determined group of products and active substances. In this respect, the applicants also invoked Regulation No. 396/2005,[28] which in its article 6 provides that a separate application for modification may be submitted for each maximum residue level established by civil society organizations, among others, with an interest in health, such as the applicants. In the view of the applicants, a decision on such an application, in the context of Regulation No. 396, must be a decision which specifically relates to a particular product or a particular active substance, and the same reasoning ought to be followed in respect of maximum residue levels established by Regulation No. 149. Alternatively, the applicants argued that Regulation No. 149 concerns a decision which falls under the scope of article 6, paragraph 1, of the Aarhus Convention, in that it relates to a decision which is of direct and individual concern to the applicants in a manner which satisfies the requirements of TEC article 230, paragraph 4 (now TFEU article 263, paragraph 4).[29] As mentioned above (see paras. 3 and 10), this case was pending before the EU Courts when the findings were adopted by the Committee.

Costs

32. According to the rules of procedure of the Court of Justice,[30] in principle, the proceedings before the Court are free of charge, with some exceptions, such as when a party has caused the Court to incur avoidable costs or where copying or translation work had to be carried out. As for the parties' costs, the unsuccessful party is ordered to pay the costs if they have been applied for in the successful party's pleadings; if costs are not

[25] *WWF UK* case, T-91/07, para. 84.

[26] See footnote 8 above.

[27] Commission Regulation (EC) No. 149/2008 of 29 January 2008 amending Regulation (EC) No. 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto, OJ L 58 of 1.3.2008, p. 1.

[28] Regulation (EC) No. 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC, OJ L 70 of 23.2.2005, p. 1.

[29] See OJ C 301 of 22.11.2008, p.40.

[30] See OJ C 177/21 of 2.7.2010, p. 20–21.

claimed, each party bears its own costs. Member States and institutions that intervene have to bear their own costs. Usually, the Court orders interveners, other than member States and institutions, to bear their own costs. The rules of procedure provide for a legal aid procedure, when a party is either wholly or partly unable to meet the costs of the proceedings.

B. Substantive issues and arguments of the parties

33. The communicant brings forward a number of allegations concerning the general failure of the EU to comply with its obligations under the Convention. The allegations of the communicant and the response of the Party concerned are summarized in the following paragraphs. For the reasons stated in paragraph 10 above, allegations and arguments relating to the Aarhus Regulation are not summarized below.

Standing

34. The communicant alleges that the "individual concern" standing criterion for individuals and NGOs to challenge decisions of EU institutions and bodies, as established in TEC article 230, paragraph 4, (now TFEU article 263, paragraph 4,) and interpreted in the jurisprudence of the EU Courts (Plaumann test), restricts the access to justice rights of individuals and NGOs. The communicant notes that public interests are by definition diffuse and collective, and that as a result individuals and NGOs that seek to challenge decisions regarding environmental matters issued by EU institutions or bodies are not granted standing before the EU Courts. Such an interpretation, according to the communicant, does not fulfil the objective of the Convention to give the public concerned wide access to justice; it does not provide members of the public access to judicial procedures to challenge acts or omissions in environmental matters; it prevents the EU Courts from providing adequate and effective remedies and constitutes a barrier to access to justice; and for all these reasons it is not in compliance with article 9, paragraphs 2–5, of the Convention.

35. In this regard, the communicant brings to the attention of the Committee a number of cases adjudicated by the ECJ.[31] In its view, the jurisprudence regarding TEC article 230, paragraph 4, established before the entry into force of the Convention remains relevant, as the ECJ continues to rely on this jurisprudence after the entry into force of the Convention for the Party concerned.

36. The communicant also alleges that the established ECJ jurisprudence on the interpretation of TEC article 230, paragraph 4, is more favourable towards corporations and other entities with economic objectives, than towards NGOs and private individuals with environmental objectives. Furthermore, the communicant alleges that the fact that the ECJ has over the years developed a flexible interpretation of the "individual concern" criterion in article 230, paragraph 4, and has granted locus standi to entities in the field of competition, state aid and intellectual property,[32] demonstrates that a more flexible interpretation of article 230, paragraph 4, is possible also in environmental matters.

[31] Appendix 1 to the communication.

[32] The communicant cites a number of rulings in the documents it submitted, among them *Comité Central d'Entreprise de la Société Anonyme Vittel and Comité d'Etablissement de Pierval and Federation Générale Agroalimentaire v Commission*, T-12/93, 27 April 1995; *Metropole Télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v. Commission*, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, 11 July 1996; *Extramet*

37. The communicant stresses that such a more flexible interpretation has not been applied in environmental matters; WWF-UK, for instance, was not considered as individually concerned and was not granted locus standi, even though the decision challenged was taken pursuant to a Council Regulation that granted it the procedural rights in the decision-making process as a member of the North Sea RAC.

38. In addition, the communicant maintains that the ECJ has developed flexible and liberal interpretations of the first two paragraphs of TEC article 230 so as not to undermine the rule of law and the institutional balance (known as "purposive interpretation"). In its view, this lends support to the argument that there is a margin of flexibility in the way the ECJ construes this article. Hence, according to the communicant, the ECJ should apply its "purposive interpretation" with regard to paragraph 4 of the same article, so as not to undermine the provisions of the Convention on access to justice.[33]

39. The Party concerned does not agree with the allegations submitted by the communicant. In general, the Party concerned submits that access to justice is sufficiently assured at the EU level by means of combined application of TEC articles 230 and 234, while Title IV of the Aarhus Regulation provides for additional remedies in environmental matters.

40. First, the Party concerned draws the attention of the Committee to the institutional features peculiar to the EU legal order. The Party concerned stresses that legal acts adopted by EU institutions, so-called "secondary legislation", must be in accordance with the EU Treaty law (TEC, now TFEU), i.e., the "primary legislation", and may not add to the rules already laid down by the Treaty. In the present case, the restrictive interpretation of the applicable rules on legal standing for natural and legal persons stems from the primary legislation itself: the locus standi criteria are set in TEC article 230, paragraph 4 (now TFEU art. 263, para. 4) and these can change when all member States agree to do so (according to art. 48 of the Treaty establishing the European Union). In addition, the Party concerned points out that EU Courts may determine in full independence from the other EU institutions the correct interpretation of the Treaty provisions.

41. Also, as a general matter, the Party concerned mentions that the Commission has amended its Rules of Procedure to ensure the smooth application of the Aarhus Regulation by its departments.[34]

42. The Party concerned disagrees with the assessment rendered by the communicant on the jurisprudence developed by the EU Courts on article 230, paragraph 4, in that standing has been provided to entities representing economic interests, but not to public interest organizations. It stresses the non-discriminatory nature of the case law and that the Plaumann test has been applied and adapted to particular legal or factual circumstances, irrespective of the nature of the would-be applicant as an economic operator or as a public

Industry SA v. Council, C-358/89, 11 June 1992; and *Codorníu SA v. Council*, C-309/89, 18 May 1994.

[33] The communicant cites the following rulings *Commission v. Council (European Agreement on Road Transport)*, C-22/70, 31 March 1971; *Parti écologiste "les Verts" v. European Parliament*, C-294/83, 23 April 1986; *European Parliament v. Council*, C-70/88, 22 May 1990; *Hellenic Republic v. Council*, C-62/88, 29 March 1990.

[34] Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No. 1367/2006 to Community institutions and bodies.

interest entity. In support of its arguments, the Party concerned provides a list of cases where economic operators were denied locus standi.[35]

43. The Party concerned also maintains that article 234 of the TEC is in full compliance with the Convention, since applicants have the right to dispute the legality of a administrative measure of a member State based on an EU act (including a Regulation) before national courts, request its suspension and also that the national court request a preliminary ruling from the ECJ. Naturally, the success of their request will also depend on the validity of their arguments. In the event of dismissal of its arguments, the applicant may appeal the domestic court's decision.

44. The Party concerned made the following additional comments, that:

> Community acts that are directly applicable — such as Regulations — normally still require the adoption of administrative implementing measures, typically in the form of decisions addressed to the economic operator(s) concerned, by national authorities.
>
> That clarification made, it may indeed not be totally excluded that in exceptional cases a Community measure is both directly applicable [and] deploys its full effect without requiring any further administrative implementing act to be adopted at Member State level.
>
> The Commission would like to point out in this connection that the mere fact that a Community act, such as a Regulation, applies directly, without intervention by the national authorities, does not necessarily mean that a party who is directly concerned by it can only contest the validity of that Regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure (in particular an administrative decision, either explicit or implicit) which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by a Community Regulation may seek from the national authorities a measure under that Regulation which may be contested before the national court, enabling the operator to challenge the Regulation indirectly."[36]

Decisions by European Union institutions and bodies on specific activities under article 6

45. The communicant alleges that the EU institutions and bodies take measures that are decisions subject to article 6, paragraph 1 (b), of the Convention. The communicant specifically mentions in this context a number of decisions of a varying legal nature taken by different EU institutions, including financing decisions or decisions related to placing products or substances on the market. According to the communicant, such decisions relate to activities "not listed in annex I which may have a significant effect on the environment" and therefore meet the criteria in article 6 paragraph, 1 (b), which is drafted in a sufficiently broad way to include various types of decisions. The main argument of the communicant is that article 6, paragraph 1 (b), does not relate solely to decisions of a permitting nature, as is the case in article 6, paragraph 1 (a).

[35] See appendix to para. 35 of the submissions of the European Commission on behalf of the Party concerned dated 11 June 2009.

[36] See paras. 74–76 of the submissions of the European Commission on behalf of the Party concerned dated 11 June 2009.

46. The Party concerned submits that the EU institutions and bodies do not adopt decisions or acts subject to article 6 of the Convention. The EU acts commonly require administrative implementing measures by the national authorities and only in exceptional cases is a Community measure directly applicable and deploys its full effect without requiring any further administrative measures.

Application of article 9, paragraph 2, to plans and programmes

47. The communicant alleges that decisions within the meaning of article 7 of the Convention are subject to review procedures available under article 9, paragraph 2, of the Convention, by virtue of the fact that article 9, paragraph 2, applies to "any decision, act and omission subject to the provisions of article 6" of the Convention in conjunction with the fact that under article 7 the Parties are bound to apply article 6, paragraphs 3, 4 and 8.

48. In this regard, the communicant maintains that if the Committee considers that the decisions issued by EU institutions and bodies are not decisions in the sense of article 6 of the Convention, but decisions in the sense of article 7 of the Convention, article 9, paragraph 2, applies anyway. For instance, even if the Regulation on TACs challenged in the WWF-UK case is a decision in the sense of article 7 of the Convention, the remedies under article 9, paragraph 2, of the Convention, should be available to the public.

49. The Party concerned denies the allegation of non-compliance with article 9, paragraph 2, because EU institutions and bodies do not adopt decisions or acts subject to article 6 of the Convention and because the application of article 9, paragraph 2, does not apply to decisions subject to articles 7 and 8 of the Convention. In the example brought forward by the communicant, the Party submits that since Regulation No. 41/2006 was not a decision within the scope of article 6 of the Convention, the review procedures under article 9, paragraph 2, are not available.

50. In the view of the Party concerned, article 9, paragraph 2, of the Convention leaves it to the discretion of the Parties to extend its application to provisions of the Convention other than decisions within the scope of article 6, and the EU, in exercising this discretion, does not extend the application of article 9, paragraph 2, of the Convention to plans and programmes relating to the environment.

Acts and omissions under article 9, paragraph 3

51. The communicant alleges that remedies under article 9, paragraph 3, of the Convention are available in a wider range of situations, because the broad scope of this provision allows challenges to any acts and omissions by private persons and public authorities. This provision also provides the right to contest the lack of or the improper organization of public participation in the adoption of decisions under article 7 of the Convention.

52. In the example of the *WWF-UK* case, the communicant alleges that if the Committee does not consider that the remedies of article 9, paragraph 2, apply, in any case, the remedies of article 9, paragraph 3, of the Convention apply. Thus, in the view of the communicant, by not ensuring that WWF-UK has access to administrative or judicial procedures to challenge acts and omissions by public authorities, the Party concerned failed to comply with article 9, paragraph 3, of the Convention.

53. The Party concerned submits that article 9, paragraph 3, allows the Parties a wide margin of discretion in defining, among other things, which environmental organizations have access to justice and denies any allegation by the communicant of non-compliance with article 9, paragraph 3, of the Convention. In the view of the Party concerned, articles 230 and 234 of the TEC establish a complete system of remedies and procedures to ensure control of the lawfulness of the acts of the EU institutions and bodies. These remedies are

entrusted to the EU Courts that act in cooperation with national courts, where appropriate.[37] The Party concerned submits that the European Court of Human Rights has acknowledged that the protection of fundamental rights by EU law, as regards both the substantive guarantees offered and the mechanisms controlling their observance, can be considered to be "equivalent" to that of the European Convention on Human Rights.[38] The Party concerned provides relevant jurisprudence that shows that, where EU law confers procedural guarantees on certain persons entitling them to request the Commission to initiate a specific decision-making process, those persons should be able to institute proceedings to protect their legitimate interests insofar as the decision to be made by the Commission must take into account the information supplied by those persons.[39]

Costs

54. The communicant alleges that the costs that a losing party of a case before the EU Courts may have to pay are uncertain and may be prohibitively expensive, and thus that the Party concerned is not in compliance with article 9, paragraph 4, of the Convention.

55. The Party concerned argues that the communicant's allegations on the prohibitively expensive costs remain hypothetical, since the communicant has not established any case where costs were indeed prohibitively expensive. The Party concerned also submits that proceedings before the EU Courts are free of charge (with a few exceptions); that the costs of the losing party are nominal, unless the Commission hires an external lawyer; and that legal aid may be available.

C. Use of domestic remedies

56. When this case was submitted to the Committee, the *WWF-UK* case was still pending before the ECJ. As pointed out above, the *WWF-UK* case was later decided by the ECJ. The communicant has not invoked any procedures before the courts of the EU member States to address the issues in the *WWF-UK* case or other relevant matters. Moreover, some of the issues raised in the present communication are currently sub judice before the General Court in the context of the *Stichting Milieu* case.

III. Consideration and evaluation by the Committee

A. Legal basis and scope of considerations of the Committee

57. The EU signed the Aarhus Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005.[40] The EU has been a Party to the

[37] In support of its argument, the EC provides relevant excerpts from EC jurisprudence, such as the *UPA* case C-50/00 P (paras. 37–41); *Commission v. Jégo-Quéré et Cie SA*, C-263/02P, 1 April 2004 (paras. 31–32); *Fost Plus VZW v. Commission*, T-142/03, 16 February 2005 (para. 75); *Açores* case T-37/04, 1 July 2008 (para. 92).

[38] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], No. 45036/98, para. 155, ECHR 2005-VI.

[39] The Party concerned refers to a number of cases, among them *Compagnie française de l'azote (Cofaz) SA* and *others v. Commission*, 169/84, 28 January 1986; *Timex v. Council and Commission*, 264/82, 20 March 1985; *Fediol v. Commission*, 191/82, 4 October 1983; *Commission v Aktionsgemeinschaft Recht und Eigentum eV*, C-78/03P, 13 December 2005; and *Comité Central d'Entreprise de la Société Générale des Grandes Sources a.o. v. Commission*, T-96/92, 15 December 1992.

[40] OJ L 124 of 17.5.2005, pp. 1–3.

Convention since 17 May 2005. Upon signature, the EU acknowledged the importance of covering the EU institutions, alongside national public authorities, but declared that EU institutions would apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of EU law in the field covered by the Convention.

58. Upon approving the Convention, the EU confirmed its declaration made upon signature. It also declared that the legal instruments that it had already enacted to implement the Convention did not fully cover the implementation of the obligations resulting from article 9, paragraph 3, of the Convention, to the extent that it did not relate to acts and omissions of EU institutions under article 2, paragraph 2 (d); thus member States would be responsible for the performance of these obligations until the EU in the exercise of its powers under the TEC adopted provisions of EU law covering their implementation. The Aarhus Regulation came into effect on 28 June 2007.

59. The main allegation of the communication is that the Party concerned, through the consistent jurisprudence of the EU Courts on standing for members of the public, fails to ensure access to justice with regard to decisions, acts and omissions by EU institutions and bodies, and the communicant has referred to a number of court decisions in order to show this. Several of these cases were decided before the entry into force of the Convention for the Party concerned. The *EEB* cases and the *Açores* case, while finally decided by the EU Courts in 2005 and 2009, respectively, were also initiated before the entry into force of the Convention for the Party concerned. The *WWF-UK* case was initiated after the entry into force of the Convention for the Party concerned, but before the Aarhus Regulation became effective. At the date of the action of the *Stichting Milieu* case, the Convention was in force and the Aarhus Regulation was effective. That case is still pending before the General Court and will possibly be appealed to the ECJ.

60. The allegations of the communicant cover a broad spectrum of decision-making by the EU Commission, the EU Council, including a decision by the Commission on the funding of a specific project as well as the adoption by the Council of a regulation. The decisions of the EU Courts referred to also concern different forms of decision-making by the EU institutions. Whereas the EU Courts have consistently dismissed these cases on the basis of lack of standing, regardless of the issue at stake, whether the Party concerned fails to comply with the Convention in a specific case depends, inter alia, on the kind of decision-making challenged before the EU Courts.

61. As set out in article 2, paragraph 2, of the Convention, the EU institutions do not act as public authorities when they perform in their legislative capacity, with the effect that these forms of decision-making are not covered by article 9 of the Convention. Thus, in order to establish non-compliance in a specific case, the Committee will have to consider the form of decision-making challenged before the EU Courts.

62. The Committee does not rule out that some decisions, acts and omissions by the EU institutions may amount to decision-making under articles 6–8 of the Convention, challengeable under article 9 of the Convention. As held below, the Committee is convinced that some other acts and omissions by the EU may be challengeable under article 9 of the Convention.

63. Rather than assessing in detail each and every possible form of challengeable decision-making by the EU institutions or each decision by the EU Court referred to in order to determine whether the EU institution acted in a legislative capacity, the Committee will concentrate on the main allegation of the communicant, and examine the jurisprudence of the EU Courts on access to justice in environmental matters generally. In doing so, the Committee will only consider whether in the *WWF-UK* case the EU Courts accounted for the fact that the Convention had now entered into force for the Party concerned, but not

make a specific finding on whether the *WWF-UK* case in itself amounts to non-compliance with the Convention. This also implies that the Committee does not examine whether the contested EU regulation on fishery in the *WWF-UK* case is as such a challengeable act under article 9 of the Convention.

64. The Committee will thus consider and evaluate the established court practice of the EU Courts in light of the principles on access to justice in the Convention. In this way, the findings of the Committee will reveal whether the general jurisprudence of the EU Courts is in line with the Convention. As mentioned, however, several of these cases were initiated before the entry into force of the Convention for the Party concerned. While these cases reveal the strict and consistent jurisprudence of the EU Courts, they do not show that the jurisprudence remains the same after the entry into force. For the given reasons, even if the Committee will find that the court practice reflected in the cases initiated before the entry into force of the Convention is not consistent with the Convention, this will not in itself lead to the conclusion that the Party concerned is in a state of non-compliance with the Convention (cf. ACCC/C/2005/11 (Belgium), ECE/ MP.PP/C.1/2006/4/Add.2, paras. 22–23). Rather, it may reveal whether the Party concerned will be in compliance with the Convention if relevant jurisprudence remains the same.

65. Taking into account the particular features of the EU as a regional economic integration organization, the Committee will also consider whether the possibility for national courts of the member States to request a preliminary ruling is sufficient for the Party concerned to meet the requirements on access to justice in the Convention. For the reasons stated in paragraph 10, the Committee does not consider the review procedure under the Aarhus Regulation or any other internal, administrative review procedure of the EU.

66. The Committee notes that the EU legal framework changed on 1 December 2009 by the entry into force of the TFEU. While the Committee will examine the present communication within the legal framework of the TEC, which was applicable at the time the communication was submitted, it will also comment on the new legal framework.

B. Admissibility and exhaustion of domestic remedies

67. The Committee determined that the communication was preliminarily admissible at its twenty-second meeting and confirmed its admissibility at its twenty-sixth meeting.

68. The communication essentially concerns the general jurisprudence on standing established by the EU Courts, and the communicant has referred to efforts to use the remedies under EU law. In its response, the Party concerned has referred to the possibilities for members of the public to challenge decisions by the EU institutions in domestic courts, through requests to the ECJ for a preliminary ruling. Regardless of whether such recourse to national courts in the member States meets the criteria of the Convention, it is not relevant for the question of admissibility of the present case.

C. Substantive issues

Application of article 9 to acts and omissions by European Union institutions and bodies

69. The Communicant alleges that the Party concerned fails to comply with article 9, paragraphs 2–5, of the Convention. In order to determine whether the Party concerned fails to comply with article 9, paragraphs 2–5, it must be considered whether the challenged decisions, acts and omissions by the EU institutions or bodies are such as to be covered by

the Convention, as under article 2, paragraph 2 (a) to (d), or whether they are made by the EU institutions or bodies when acting in a legislative capacity.

70. As mentioned, the Convention imposes an obligation on the Parties to ensure access to review procedures with respect to various decisions, acts and omissions by public authorities, but not with respect to decisions, acts and omissions by bodies or institutions which act in a legislative capacity.

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 in 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.

75. On the basis of this conclusion, the Committee will first examine the criteria for access to review procedures directly before the EU Courts, and then consider the review procedure before the EU Courts through national courts in the member States.

Jurisprudence on direct access to the European Union Courts until the entry into force of the Convention

76. Article 9, paragraph 3, of the Convention refers to review procedures relating to acts or omissions of public authorities which contravene national law relating to the environment. This provision is intended to provide members of the public access to remedies against such acts and omissions, and with the means to have existing environmental laws enforced and made effective. In this context, when applied to the EU, the reference to "national law" should be interpreted as referring to the domestic law of the EU (cf. ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para. 27).

77. As the Committee has pointed out in its findings with regard to communication ACCC/C/2005/11 (Belgium) (paras. 29-37) and communication ACCC/C/2006/18 (Denmark) (paras. 29–31), while article 9, paragraph 3, refers to "the criteria, if any, laid down in national law", the Convention does not set these criteria nor criteria to be avoided. Rather, the Convention allows a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a

system of popular action (*actio popularis*) in their domestic 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 such strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national law relating to the environment.

78. In communication ACCC/C/2005/11, the Committee further observed that "the criteria, if any, laid down in national law" should be such so that access to a review procedure is the presumption and not the exception, and suggested that one way for the Parties to avoid *actio popularis* in these cases is to employ some sort of criteria (e.g., of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision (para. 36). However, this presupposes that such criteria do not bar effective remedies for members of the public.

79. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e., to what extent the domestic law of the party concerned effectively has such blocking consequences for members of the public in general, including environmental organizations, 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 to 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 ACCC/C/2005/11, para. 34; and ACCC/C/2006/18, para. 30).

80. The Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a "direct or individual concern", provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to domestic environmental laws (see ACCC/C/2006/18, para. 31).

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".[41]

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."[42]

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

[41] *Greenpeace*, CFI Order of 9 August 1995 T-585/93, para. 54.

[42] See footnote 14 above at para. 71.

before the entry into force of the Convention and 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.

Review procedures before the European Union Courts through national courts of member States

89. The Party concerned has referred to the possibility for members of the public to request national courts to ask for a preliminary ruling of the ECJ on the basis of TEC article 234. Under EU law, while it is not possible to contest directly an EU act before the courts of the member States, individuals and NGOs may in some States be able to challenge an implementing measure, and thus pursue the annulment by asking the national court to request a preliminary ruling of the ECJ. Yet, such a procedure requires that the NGO is granted standing in the EU member State concerned. It also requires that the national court decides to bring the case to the ECJ under the conditions set out in TEC article 234.

90. While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies; nor does the system of preliminary review amount to an appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts, examined in paragraphs 76–88 above.

Review procedures before the European Union Courts under the Treaty on the Functioning of the European Union

91. The jurisprudence examined was not actually implied by the TEC, but rather a result of the strict interpretation by the EU Courts. While this jurisprudence was built by the EU Courts on the basis of the old text in TEC, article 230, paragraph 4, the wording of TFEU article 263, paragraph 4, based on the Lisbon Treaty, is different. The Committee notes the debate on whether this difference in itself provides for a possible change of the jurisprudence so as to enable members of the public to have standing before the EU Courts, and considers this a possible means for ensuring compliance with article 9 of the Convention. Yet, the Committee refrains from any speculation on whether and how the EU Courts will consider the jurisprudence on access to justice in environmental matters on the basis of the TFEU.

Adequate and effective remedies (art. 9, para. 4)

92. The Committee has concluded in paragraph 87 that the established jurisprudence of the EU Courts prevents access to judicial review procedures of acts and omissions by EU institutions, when acting as public authorities. This jurisprudence also implies that there is no effective remedy when such acts and omissions are challenged. Thus, the Committee is convinced that if the jurisprudence of the EU Courts examined in paragraphs 76–88 were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would also fail to comply with article 9, paragraph 4, of the Convention (cf. ACCC/C/2005/11, para. 40).

Costs (art. 9, paras. 4 and 5)

93. The Communicant alleges that the costs incurred for the losing party before the EU Courts are uncertain and may be prohibitively expensive. The Party concerned disagrees with the communicant because the Court in principle does not charge any fees, and the costs of the losing party are nominal, unless the Commission hires an external lawyer. Based on the fact that the communicant did not present any case where the EU Courts have decided to allocate the costs on applicants in a way that would make the procedure prohibitively expensive, and having examined the applicable rules of procedure on costs and legal aid, the Committee finds that the allegations concerning costs were not sufficiently substantiated by the communicant.

IV. Conclusions and recommendations

A. Main findings with regard to non-compliance

94. With regard to access to justice by members of the public, the Committee is convinced that if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention.

95. Given the timing of the cases referred to above and the decision of the Committee to examine the jurisprudence on access to justice in general (see paras. 10 and 64 above), the Committee considers that the Party concerned is not in non-compliance with the Convention. (see paras. 87 and 90 above). However, without examining whether the challenged EU regulation in the *WWK-UK* case was as such challengeable under article 9 of the Convention, 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 (see para. 87 above).

96. The Committee finds that the allegations of non-compliance with paragraphs 4 and 5 of article 9 of the Convention, with respect to costs, were not sufficiently substantiated by the communicant (see para. 93).

B. Recommendations

97. While the Committee is not convinced that the Party concerned fails to comply with the Convention, given the evidence before it, it considers that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention.

98. Therefore, the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, recommends the Party concerned that all relevant EU institutions within their competences take the steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters.

United Nations ECE/MP.PP/C.1/2010/6/Add.3

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-ninth meeting
Geneva, 21–24 September 2010

Report of the Compliance Committee on its Twenty-Ninth meeting

Addendum

Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 24 September 2010

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I. Background

1. On 2 December 2008, ClientEarth, the Marine Conservation Society and Mr. Robert Latimer (hereinafter collectively "the communicants") submitted a communication to the Compliance Committee, alleging non-compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under article 9, paragraphs 2, 3, 4 and 5 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter "the Aarhus Convention" or "the Convention").

2. ClientEarth is a non-profit environmental law, science and policy group working in the European Union (EU) and beyond. It is registered as a company limited by guarantee in England and Wales and a registered charity in England and Wales. The Marine Conservation Society (MCS) is a charity dedicated to the protection of United Kingdom seas, shores and marine wildlife. It is registered as a company limited by guarantee in England and Wales, and a registered charity in England, Wales and Scotland. Robert Latimer is a private citizen.

3. The communicants allege that the Party concerned, in respect of the law of England and Wales, has failed to comply with article 9 of the Convention both generally and in relation to a specific case. The general allegations of non-compliance relate to the lack of substantive review in procedures for judicial review, the prohibitively expensive costs of judicial review proceedings, the lack of rights of action against private individuals for breaches of environmental laws and the restrictive time limits for judicial review. The allegation of non-compliance in the specific case relates to the alleged failure of the Party concerned to provide access to justice to challenge a Government licence issued to the Port of Tyne in northern England that allows for the disposal and protective capping of highly contaminated port dredge materials at an existing marine disposal site called "Souter Point", approximately four miles off the coast.

4. Following a preliminary determination that it was admissible by the Committee at its twenty-second meeting (17–19 December 2008), the communication was forwarded to the Party concerned on 24 December 2008.

5. On 16 January 2009, the Committee wrote to each of the parties with questions seeking clarification on certain issues.

6. By letter dated 12 May 2009, the Party concerned sought an extension of the usual five-month time frame for its response for an additional two months, until 24 July 2009. By letter dated 21 May 2009, the communicants indicated that they did not oppose the two-month extension sought by the Party concerned for filing its response to the communication. The communicants asked if they could have a similar two-month extension in which to respond to the Committee's questions of 16 January 2009.

7. On 22 May 2009, the Committee received written submissions in respect of three communications concerning the United Kingdom — ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 — from an observer, the Coalition for Access to Justice for the Environment (CAJE), a coalition of six environmental non-governmental organizations from the United Kingdom.[1]

[1] Friends of the Earth, WWF-UK, Greenpeace, the Royal Society for the Protection of Birds, Capacity Global and the Environmental Law Foundation.

8. By letter dated 27 May 2009, the communicants asked that the costs-related aspects of its communication, in particular, paragraphs 32–36 and paragraphs 92–149 and annexes III, IV and V of the communication, be considered as additional background by the Committee when considering two other current communications against the Party concerned (ACCC/C/2008/23 and ACCC/C/2008/27).

9. By letter dated 27 May 2009, the parties were informed that the hearing of the communication would be held at the Committee's twenty-fifth meeting on 22–25 September 2009.

10. By letter dated 9 June 2009, the communicants responded to the questions raised by the Committee on 16 January 2009.

11. By letter dated 16 July 2009, CAJE wrote to the Committee enclosing the recent judgement of the European Court of Justice in Case C–427/07, *Commission v. Ireland*.

12. By letter dated 28 July 2009, the Party concerned provided written submissions responding to the communication and to the correspondence from the communicants dated 9 June 2009. On 19 August 2009, the Party concerned provided an annex of highlighted excerpts of court judgements in support of its position.

13. On 9 September 2009, the communicants provided additional written submissions for consideration by the Committee seeking to clarify certain aspects of the Party concerned's response of 28 July 2009.

14. The Committee discussed the communication at its twenty-fifth meeting, with participation of representatives of both the Party concerned and the communicants, who answered questions, clarified issues and presented new information. Observers were also given the opportunity to speak.

15. By letter of 20 January 2010, CAJE wrote to the Committee providing its comments on the final report by Lord Justice Jackson entitled "Review of Civil Litigation Costs", published in January 2010, and the Report of the Scottish Civil Courts Review by the Right Honourable Lord Gill, published in September 2009. On 29 January 2010, the communicants wrote to the Committee providing their comments on the final report by Lord Justice Jackson.

16. By letter of 18 March 2010, CAJE wrote to the Committee enclosing a press release issued that day by the European Commission indicating that it had issued the United Kingdom with a Reasoned Opinion due to its concerns that legal proceedings in the United Kingdom were too costly and that the potential financial consequences of losing challenges was preventing non-governmental organizations (NGOs) and individuals from bringing cases against public bodies.

17. On 20 May 2010, CAJE wrote to the Committee to inform it of some recently released judgements relevant to the issue of the cost of access to justice for members of the public in the Party concerned. On the same day, the Environmental Law Foundation, one of the six NGO members of CAJE, wrote to inform the Committee of a recent report it had published entitled "Costs Barriers to Environmental Justice", which included examples of cases of environmental litigation that had not proceeded because of prohibitive costs. On 2 June 2010, the communicants provided their comments on the judgements provided by CAJE on 20 May 2010.

18. During the proceedings, the Party concerned alleged that a member of the Committee had a conflict of interest with respect to two other communications then ongoing regarding the United Kingdom, ACCC/C/2008/23 and ACCC/C/2008/27. The Committee member concerned did not participate in the deliberations on the findings in those cases, nor in the deliberations on the findings in the present communication. Further

details are set out in paragraphs 6–11 of the report of the twenty-fifth meeting of the Committee (ECE/MP.PP/C.1/2009/6).

19. The Committee began to prepare draft findings at its twenty-fifth meeting and completed the preparation of draft findings following its twenty-eighth meeting (15–18 June 2010). In accordance with paragraph 34 of the annex to decision 1/7 of the Meeting of the Parties to the Convention, the draft findings were then forwarded for comments to the Party concerned and to the communicants on 25 August 2010. Both were invited to provide any comments by 22 September 2010.

20. By letter of 14 September 2010, CAJE forwarded an August 2010 update of the May 2008 report "Ensuring Access to Environmental Justice in England and Wales" (the Sullivan Report) together with its comments on the draft findings.

21. The communicants and the Party concerned both provided their comments on the draft findings on 22 September 2010.

22. At its twenty-ninth meeting (21–24 September 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[2]

23. The communication alleges non-compliance by the Party concerned, in respect of the law of England and Wales, with its obligations under article 9, paragraphs 2, 3, 4 and 5, of the Convention. The communication concerns four submissions. These are (1) that in practice, courts in England and Wales do not allow judicial review regarding the substantive legality of decisions, acts or omissions within the scope of the Convention; (2) that access to justice is prohibitively expensive, in particular with regard to the costs awarded against losing claimants and the requirement for claimants to undertake to cover defendants' losses to qualify for injunctive relief; (3) the lack of rights of action against private individuals for breaches of environmental laws; and (4) the time limits for bringing an application for judicial review, which the communicants submit are uncertain, unfair and overly restrictive. All submissions are raised in general and submissions (1), (2) and (4) are also raised in relation to the Port of Tyne situation.

A. Review of substantive legality in judicial review proceedings — article 9, paragraphs 2 and 3

24. The communicants submit that in England and Wales the courts apply very restrictive rules regarding judicial review, allowing judicial review of public authority acts and decisions only in cases of procedural impropriety, illegality or irrationality. The communicants allege that the Party concerned, therefore, does not properly comply with article 9, paragraph 2, of the Convention, which requires members of the public to have access to a review procedure to challenge the substantive legality of any decision subject to the provisions of article 6 of the Convention. They also allege that the Party concerned fails to properly comply with the general right set out in article 9, paragraph 3, of the

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

Convention for members of the public to challenge acts and omissions of public authorities which contravene national environmental law.

25. The communicants submit that while, in theory, the courts in England and Wales enjoy a broad discretion to allow appropriate review actions in relation to reviewing the substantive legality, including the material facts, of a public authority act or decision, this broad discretion is exercised in very limited circumstances and not generally in environmental cases. For example, the communicants note that there are judicial review cases before the courts where it has been held acceptable to review the facts of a case where the public authority has reached a decision on a "material error of fact".[3] Moreover, human rights law, through the European Convention on Human Rights and Fundamental Freedoms 1950 and the United Kingdom Human Rights Act 1998, as well as EU law in general, have introduced the principle of proportionality into English law. The communicants note that the principle of proportionality is now an established ground for judicial review in relation to human rights and EU law cases, and permits an appropriate review of the substance of the case. The communicants submit, however, that these broad principles are not generally applied by the courts and not in environmental cases in which judicial review is sought. Rather, the courts' jurisprudence applies very restrictive rules and only allows judicial review of public authority acts and decisions in cases of procedural impropriety, illegality or irrationality.

26. The communicants allege that the Port of Tyne case provides an example of the above-mentioned allegations. The communicants submit that in this case there would be no opportunity to challenge various aspects relating to the substantive merits of the case, including the lack of a full environmental impact assessment throughout; the failure to observe a precautionary approach; the failure to provide evidence to support the elected disposal method as following best available techniques or best environmental practice; the failure to provide evidence which properly discounts the practical availability of alternative methods; the potentially misleading statements made in relation to the physical nature of the disposal site and frequency of additional capping actions and capping materials; and the consequent danger posed to the marine environment, should contaminated material escape from the site and affect the marine environment surrounding the site (including potentially valuable habitats protected by Biodiversity Action Plans).

27. The communicants submit that the most obvious way to make the law compliant with article 9, paragraphs 2 and 3, of the Convention would be to apply the existing more flexible approaches in relation to material mistake of fact and the use of the proportionality principle as in cases concerning human rights and EU law. The communicants suggest that cases that fall within the Convention be added to human rights cases, providing a separate ground for judicial review and the general law on judicial review would remain unchanged. Alternatively, communicants suggest that a new enactment, an "Aarhus Act", akin to the Human Rights Act 1998, could be passed to clearly enshrine in legislation the specific rights of the public under the Convention and reinforce environmental cases that fall within the Convention as a separate ground for judicial review.

[3] The communicants refer to the following judicial decisions and authorities: Judgement of Lord Slynn of Hadley in *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at 52–54, citing his own judgement in *R v. Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, at 344, as well as *Secretary of State for Education and Science v. Tameside Metropolitan Borough* Council [1977] AC 1014, at 1030, and Wade & Forsyth *Administrative Law*, 7th ed. (1994), pp. 316–318 (discussing "mere factual mistake" as a ground for judicial review) and de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed. (1995), p. 288 (discussing judicial review where mistaken facts have been taken into account).

28. The Party concerned submits that the plain wording of article 9, paragraphs 2 and 3, of the Convention does not suggest that a full merits review is required. Nor does the *Aarhus Convention Implementation Guide* suggest that a full merits review is required. The Party concerned points to page 128 of the *Implementation Guide* (2000 edition) which, with respect to article 9, paragraph 2, states:[4] "The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions *if the substance of the law* has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality)..." (emphasis added by Party concerned).

29. Regarding article 9, paragraph 2, of the Convention, the Party concerned submits that a right to challenge the "substantive and procedural legality" of a decision appears precisely to reflect the scope of judicial review in the law of England and Wales. The Party concerned submits that it is elementary that judicial review in England and Wales encompass substantive legality. Thus, if a decision-making body has acted beyond its powers, or taken an irrelevant matter into consideration, or acted irrationally, then that decision is susceptible to challenge by judicial review. The Party concerned furthermore points out that more recently a ground for judicial review of "material error of fact" has emerged, which concerns matters of substantive legality.

30. The Party concerned distinguishes between the rights provided under article 9, paragraph 2, and article 9, paragraph 3, of the Convention. It submits that article 9, paragraph 2, of the Convention envisages a specific right to challenge (a) decisions subject to article 6 of the Convention; and (b) other relevant provisions of the Convention "where so provided for under national law". Only in respect of decisions under article 9, paragraph 2, is there a specific right to challenge "the substantive and procedural legality of any decision".

31. In contrast, article 9, paragraph 3, of the Convention, according to the Party concerned, envisages a much more general right. Inter alia, it is a right to have access to procedures, which may or may not be judicial (by contrast with article 9, paragraph 2, of the Convention, which requires a right of access specifically to a court or equivalent independent body); it does not necessarily require a direct right to challenge the legality of an act or omission: instead, it requires a right of access to procedures to challenge acts or omissions. Moreover, article 9, paragraph 3, of the Convention does not necessarily or expressly include any right to challenge the substantive legality of an act or omission.

32. Regarding the Port of Tyne case, the Party concerned submits that the communicants' complaints (summarized in para. 26 above) can be grouped into two categories:

(a) Complaints that would be capable of founding a claim for judicial review, if valid. Thus, for example, if a full environmental impact assessment was required by law, yet not performed, there is no reason why that could not constitute a proper ground for initiating judicial review. Similarly, if the decision maker failed to adopt an approach which it was required to adopt (e.g., the precautionary approach) that would constitute a proper ground for instituting judicial review; and

(b) Complaints relating to failures in the provision of information (both in the original communication and in paras. 26 to 28 of the communicants' further response of 9 June 2009) in respect of which there are established mechanisms in domestic law to address such failures. The Party concerned notes that the communication does not include a complaint that such mechanisms are ineffective or inadequate.

[4] *The Aarhus Convention: An Implementation Guide* (United Nations publication, Sales No. E.00.II.E.3). Available from http://www.unece.org/env/pp/acig.pdf.

33. Moreover, the Party concerned submits that the communicants have not demonstrated, or even sought to demonstrate, that the Port of Tyne case falls within the scope of article 9, paragraph 2, of the Convention as they have failed to identify any "decision, act or omission subject to the provisions of Article 6", as would be necessary to invoke article 9, paragraph 2, in this case.

B. Costs prohibitively expensive — article 9, paragraphs 4 and 5

General rule "Costs follow the event"

34. The communicants submit that the two single biggest cost problems that parties face in England and Wales arise out of:

(a) The rule set out in rule 44.3 (2) of the Civil Procedure Rules (CPR) that "costs follow the event"; and

(b) The fact that claimants are at risk of having to compensate defendants for any damage they suffer through the granting of interim relief, should the defendant succeed at trial (see para. 68 below).

35. The communicants submit that, as a result of these problems, the Party concerned has failed to meet its obligations under article 9, paragraph 4, of the Convention to ensure that access to justice procedures provide adequate and effective remedies, including injunctive relief as appropriate, and are fair, equitable, timely and not prohibitively expensive. They also claim that the Party concerned has failed to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice, as required under article 9, paragraph 5.

36. The communicants submit that the Port of Tyne situation is illustrative of the above-mentioned problems regarding the law of England and Wales. They submit that the MSC and the individual claimant in this case could not have afforded the costs of the defendant, had they lost the case, and most likely would have had to rely on pro bono legal representation. Moreover, the MSC and the individual claimant could not have provided a cross-undertaking in damages, which would probably have been required in that case.

37. The Party concerned contends that the presently operated costs regime is compliant with the Convention. It contends that compliance is achieved through a variety of measures, the most important of which are:

(a) Legal aid — i.e., public funding by the Legal Services Commission;

(b) Conditional fee agreements (CFAs);

(c) Protective costs orders (PCOs);

(d) Judicial discretion.

The Party concerned notes that it is not contended that each measure, individually, would necessarily be adequate to achieve compliance with article 9, paragraph 4, but rather that, together, they prevent costs from being prohibitively expensive.

38. The Party concerned submits that the "loser pays" principle is not inherently objectionable under the Convention. It suggests that this is clear from both the terms of article 3, paragraph 8, of the Convention, as well as the use of the word "prohibitively" in article 9, paragraph 4, of the Convention. It furthermore contends that, provided that the costs to the losing party are not prohibitively expensive, the "loser pays" principle does not lead to an infringement of the Convention.

39. The Party concerned notes that there is no definition of "prohibitively expensive" in the Convention, and it is apparent that Parties are afforded a wide degree of latitude in the manner in which compliance with article 9, paragraph 4, may be achieved. The Party concerned submits that it is clear from both the terms of article 3, paragraph 8, as well as the use of the word "prohibitively" in article 9, paragraph 4, that it is not inherently objectionable that a losing party should be required to pay the winning party's costs. Furthermore, costs that are merely "expensive" are permissible; providing the costs to the losing party are not *prohibitively* expensive, they do not lead to infringement of the Convention. Moreover, what is "prohibitive" will vary widely between prospective claimants and claims. Any system which imposes rigid criteria (such as a rule setting a cap at a standard level as to the liability for the costs of the opposing party of a claimant in an environmental challenge) is liable to risk prohibiting some claims. It is inherently desirable that there should be discretion to form a judgement on a case-by-case basis in the operation of measures to avoid prohibitively expensive costs.

40. The Party concerned submits that it is important to recognize that the provision of a fair and just system of law involves treating all parties to litigation fairly. The resources applied by public authorities in defending judicial review proceedings stem ultimately from the taxpayer, and it is therefore proper that the cost implications for both parties in an individual case should be taken into account. The Party concerned further submits that the Convention's provisions in relation to court proceedings must be considered in the context of the system of environmental law, and access to it, as a whole. This is because redress through the courts is only one of the many routes open to the public in their search for environmental justice.

41. The Party concerned submits that it is not apparent that the potential costs in the Port of Tyne situation would have been prohibitively expensive and suggests that a PCO might have been granted in this case if a meritorious claim had been presented to the court.

42. CAJE, in its amicus curiae brief, which is confined to submissions on the issue of prohibitive expense in the public law context, submits that the "costs follow the event" rule is the most significant obstacle to access to justice in environmental matters under the law of England and Wales because, although a claimant in an environmental case can control its own legal costs, it has no control over the costs of the other parties. As such, its liability is potentially open ended.

43. CAJE submits that the effect of the costs regime is that even the largest environmental NGOs are reluctant to take legal action against the Party concerned, and it is thus extremely rare for small environmental NGOs (such as the co-communicant, MCS) to take such action. CAJE points to the case of *R (Buglife) v. Thurrock Gateway Development Corp and another*, [5] in which the claimant was granted a PCO[6] limiting its liability for the costs of the other side to £10,000, but in which the costs recoverable by Buglife from the local authority were capped at the same level, both by the High Court and the Court of Appeal. CAJE notes that the 2008 Sullivan Report pointed out that an arrangement of this type (referred to as reciprocal costs capping) does little to encourage lawyers to represent individuals or organizations in environmental cases.[7]

[5] R (on the application of Buglife — the Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd [2008] EWCA Civ 1209.

[6] See paragraphs 99–103 below for an overview of the law in England and Wales relating to PCOs.

[7] "Ensuring access to environmental justice in England and Wales", Report of the Working Group on Access to Environmental Justice (chaired by Sullivan, J.), May 2009 (hereafter the "Sullivan Report"), appendix 3, p. 41, para. 7.

Legal aid

44. The communicants submit that legal aid is only available to a limited number of persons because of its stringent economic means test. Moreover, it is only available to individuals, whereas most environmental cases are brought by community groups or NGOs which cannot qualify for aid. In addition, although it is now theoretically available in public interest cases, it is difficult to obtain in such cases, because funding will be refused "if there are other persons or bodies who might benefit from the proceedings who can reasonably be expected to bring or fund the case".[8] Parties applying for funding in such circumstances have to "provide an explanation for why the proceedings cannot be funded privately by other means".[9] This means that in examining what alternative funding may be available, the Legal Services Commission "will need to consider whether any funding should be provided by those members of the public who stand to benefit from the outcome of the case, for example by all those affected getting together a fighting fund to finance the litigation".[10]

45. The Party concerned emphasizes a number of points regarding its legal aid regime. It submits that the scheme is one of the most comprehensive and expensive schemes in the world and, for an eligible applicant, it provides access to justice at little or no cost to that person even if he/she loses the case. The Legal Services Commission Funding Code Decision-making Guidance[11] allows funding in litigation cases which have only a "borderline" chance of success but which have a "significant wider public interest".[12] In practice, this has led to public funding of a significant number of environmental challenges. In many cases, a claimant eligible for legal aid can be identified to bring a claim. For example, in *Edwards v. Environment Agency* (No. 1)[13] the Court accepted an eligible claimant who was put up to act as a representative of a community group, others of whom were ineligible for legal aid. The Legal Services Commission has made explicit reference to the requirements of the Aarhus Convention in its Funding Code Guidance, recognizing the various combinations of funding that may be possible within an individual case (e.g., a partnership approach between legally aided and non-governmental organizations).[14] The Funding Code Guidance also states that environmental cases may be less likely to require significant private contributions.[15] The Party concerned states that the Funding Code Guidance provides that in all cases the contribution will be fixed so as not to be prohibitively expensive.

46. CAJE observes that the financial limits for legal aid eligibility are extremely low. In respect of the suggestion by the Party concerned that potential claimants should find a person who qualifies for legal aid to act as the representative claimant for the wider group, and its citation of *Edwards v. Environment Agency* in this regard, CAJE notes that in that case, due to health reasons, Mr. Edwards, the legally aided person, withdrew his instructions on the final day of the subsequent appeal before the Court of Appeal and a non-legally aided person, a Mrs. Pallikaropoulos, took over. Following unsuccessful appeals before the Court of Appeal and House of Lords, Mrs. Pallikaropoulos is currently seeking

[8] Sullivan Report, appendix 2, p. 38, para. 5.5 (1).
[9] Ibid.
[10] Ibid, para. 5.5 (5).
[11] Legal Services Commission Funding Code Decision-Making Guidance, http://www.legalservices.gov.uk/docs/cls_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples(Sections1-14)Sept07.pdf.
[12] Ibid, part C, sect. 5.1, para. 4.
[13] Edwards v. Environment Agency (No. 1) [2004] EWHC 736; [2004] 3 All ER 21.
[14] Legal Services Commission Funding Code Decision-Making Guidance, part C, sect. 5.5.
[15] Ibid, part C, sect. 5.5, para. 5 (e).

to challenge a claim by the Environment Agency and other respondents for £88,000 costs.[16] CAJE also comments on the reference by the Party concerned to the suggestion in the Legal Services Commission Funding Code Guidance that a legally aided person and an NGO act as co-claimants. CAJE points out that, if the claimants lose at trial, the court is likely to make them jointly liable for the defendant's costs and, given the legally aided person's modest circumstances, the NGO may be left to carry the full sum of the defendant's costs after all.

47. The Party concerned recognizes that, notwithstanding the substantial contribution of the legal aid system towards achieving compliance with article 9, paragraph 4, of the Convention, on its own, the system might not be sufficient to achieve complete compliance with this article of the Convention. It submits, however, that the legal aid system is to be assessed together with CFAs, PCOs and judicial discretion, discussed below.

Conditional fee agreements

48. The communicants allege that a CFA[17] is of limited value in judicial review proceedings because damages are not awarded in judicial review cases, meaning that, contrary to private nuisance cases where damages may be awarded, lawyers' costs cannot be paid out of such damages. Lawyers' costs in judicial review proceedings thus can only be paid if the defendant is ordered to pay the claimant's costs. With reference to the Sullivan Report and Lord Justice Jackson's preliminary report,[18] the communicants allege that a CFA thus is not viable if a PCO is in place which caps the costs of both parties, which is what courts usually do, courts being reluctant to cap only the defendant's costs. The communicants further allege, with reference to Lord Justice Jackson's preliminary report,[19] that after-the-event (ATE) insurance does not provide a solution because it either is not available in environmental judicial review cases or is "expensive, complex and potentially unfair".

49. The Party concerned accepts that there are potential limitations in the use of CFAs in environmental cases (as, for example, recognized in Lord Justice Jackson's preliminary report, chapter 36), which prevent them from constituting a complete solution to the

[16] R (Edwards and Pallikaropoulos) v. Environment Agency [2006] EWCA Civ 1138. The Court of Appeal dismissed the appeal. Due to the limited nature of her involvement, Mrs. Pallikaropoulos was ordered to pay £2,000 costs. She appealed the Court of Appeal's judicial review decision to the House of Lords and sought a PCO in respect of her appeal. In making the application she did not provide detailed evidence of her means, taking the view that it should be sufficient to "give a broad indication as to means". Her application for a PCO was refused, with the Appeals Committee stating that "information about the applicant's means, about the identity and means of any who she represents" was relevant and that the Appeals Committee "do not consider the suggested protective costs orders regarding costs appear proportionate on the information which is before them and in the light of the nature of the issues involved; and they do not consider that any case has been made for saying that the proposed appeal would be 'prohibitively expensive' or that Directive 2003/35/EC would be breached without a special order" (Letter of Judicial Office dated 22 March 2007, cited in the Respondents' Grounds of Application for a Cost Assessment, 11 February 2010, paras. 12–13). Mrs. Pallikaropoulos ultimately lost the judicial review appeal in the House of Lords. R (Edwards and Pallikaropoulos) v. Environment Agency [2008] UKHL 22. She is currently seeking to challenge £88,000 costs claimed by the Environment Agency and other respondents.

[17] See paragraph 98 below for an overview of CFAs in the law of England and Wales.

[18] *Review of Civil Litigation Costs*, Preliminary Report by Lord Justice Jackson, May 2009 (hereafter the Jackson preliminary report), part 7, chapter 36, p. 336, para. 4.5, which refers to chapter 10 of the Sullivan Report.

[19] Jackson preliminary report, part 7, chapter 36, p. 336, para 4.4 and (on private nuisance cases) p. 333 paras. 3.2–3.8.

problem of costs. The Party concerned contends that nevertheless, in a range of cases, they facilitate access to justice. It submits that a good example was *Morgan v. Hinton Organics*,[20] which was put before the Committee in communication ACCC/2008/C/23. In that litigation, the claimants had entered into a CFA with their solicitors, with the protection of ATE insurance to meet any liability for the defendants' costs arising from the litigation.

Protective costs orders

50. The communicants and CAJE submit that PCOs[21] represent a significant development and, if sufficiently modified, would be capable of forming the basis of a costs system which would comply with the Convention. In theory, they submit, a PCO can provide early certainty on the limits of a claimant's costs liability and, by controlling the level involved, ensure that costs exposure will not be prohibitively expensive in line with the Convention. However, as the law currently stands they consider that PCOs do not sufficiently support access to justice to ensure that the Party concerned is in compliance with article 9, paragraph 4, of the Convention.

51. The communicants furthermore submit that the costs of an application for a PCO can themselves be prohibitive for many organizations.

52. CAJE submits that the Convention recognizes the existence of a general public importance in allowing members of the public to vindicate the rule of law in environmental matters and that PCOs should (subject to issues of fairness/equity) be available in all environmental cases at a level that is capable of ensuring that access to justice is not prohibitively expensive. It furthermore submits that any concern that, if PCOs were to become more readily available, it might "open the floodgates" is unwarranted, because in judicial review proceedings it is necessary to obtain the court's permission to bring a case and the court will not grant permission if a case is frivolous or vexatious or is not properly arguable or unmeritorious.

53. CAJE also submits that the inclusion of pro bono representation as a factor in whether to grant a PCO is of concern. CAJE does not consider it appropriate that in litigation expressly recognized by the courts to be of public importance, NGOs (and their lawyers) are expected to work for free.

54. CAJE also submits that in the rare cases in which a PCO is granted, the level of costs imposed on the claimant is too high. For example, in *R (on the application of the British Union for the Abolition of Vivisection) v. Secretary of State for the Home Office*,[22] the Court capped the claimant's liability at £40,000 (as opposed to the £20,000 it had asked for) on the basis of the financial resources of the parties and the likely costs involved in the case. CAJE also refers to the costs cap of £20,000 in *Buglife*, referred to above in paragraph 43, which represented nearly 5 per cent of the charity's income for the previous year.

55. In addition, CAJE submits that the courts' decisions to impose cross-caps on defendants' costs liability make litigation even more difficult for NGOs, particularly when their solicitors are working on a CFA (see para. 48 above).

56. CAJE submits that the rules concerning individual liability mean that community groups are often obliged to incorporate themselves (i.e., become a limited company) in order to limit the personal liability of their members for legal costs, a process that involves additional time, bureaucracy and expense.

[20] R (Francis Morgan) v. Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107.

[21] See paras. 99–104 below for an overview of the law in England and Wales relating to PCOs.

[22] R (on the application of the British Union for the Abolition of Vivisection) v. Secretary of State for the Home Office [2005] EWHC 530 (Admin).

57. CAJE notes that even with the relaxation of the *Corner House*[23] criteria, they remain those that must be satisfied before the court *may* grant a PCO. They do not determine whether a court *should* make such an order. The latter remains a discretionary matter for the judge.

58. The Party concerned points to the relatively recent development of PCOs, and to the evolution of practice regarding PCOs since *Corner House*. With reference to decisions in *R (Compton) v. Wiltshire Primary Care Trust*[24] and *Buglife*[25], the Party concerned submits that the *Corner House* criteria are applied in a flexible manner; that "exceptionality" is a criterion that need not be met before granting a PCO; that a narrow public interest is sufficient to grant a PCO; that reciprocal cost caps do not need to be of the same amount; and that the requirement that there be no private interest is not strictly applied. It furthermore points out that the pro bono factor is merely a favourable indicator, not a requirement for obtaining a PCO.

59. The Party concerned submits that PCOs offer certainty from an early stage, and the level of the cap, and any cap on the claimants' entitlement to recovery, may be tailored appropriately so as to avoid any meritorious claim being stifled.

60. The Party concerned furthermore submits that although PCOs are subject to the public interest requirement, this requirement is apt to embrace environmental cases and that claimants in environmental cases have increasingly availed themselves of PCOs.

Judicial discretion

61. The communicants and CAJE submit that by relying on judicial discretion to determine cost issues, the Party concerned fails to comply with its obligation to ensure that access to justice is not prohibitively expensive for claimants in accordance with article 9, paragraph 4, of the Convention. CAJE submits that no matter how widespread a discretionary practice may be, there is always risk and lack of certainty unless there are binding rules to ensure that claimants' costs in environmental cases are not prohibitively expensive.

62. The communicants and CAJE contend that the ruling by the Court of Appeal in *Morgan v. Hinton Organics*[26] illustrates that courts enjoy considerable discretion in the application of the Convention. In *Morgan*, the Court of Appeal held that the principles of the Convention are "at most" a factor which it "may" (not must) take into account, "along with a number of other factors, such as fairness to the defendant". In the view of the communicants and CAJE, the critical point is that there is no rule of court or practice in the law of England and Wales which says the courts must ensure compliance with the Convention, it at best being one of many factors that must be taken into account, a position reiterated in *Wiltshire v. Swindon Borough Council*.[27] CAJE also refers to the decision of the Court of Appeal in *Littlewood v. Bassetlaw District Council*.[28] In that case, the Court of Appeal, when considering expenses, looked at the defendant's position, including the expense it had been put to. CAJE submits that this is not what the Convention means. What these cases illustrate, according to the communicants and CAJE, is that while it is evident

[23] R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600.

[24] R (Compton) v. Wiltshire Primary Care Trust [2008] EWCA Civ 749.

[25] R (on the application of Buglife — the Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd [2008] EWCA Civ 1209.

[26] R (Francis Morgan) v. Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107.

[27] R (on the Application of Wiltshire Branch of the Campaign to Protect Rural England, Geoff Yates) v. Swindon Borough Council [2009] EWHC 1586.

[28] R (on the Application of Littlewood) v. Bassetlaw District Council [2008] EWHC 1812 (Admin).

that the Convention is a matter which may be taken into account, it is one of a number of factors, and is not mandatory. CAJE contends that such discretion is insufficient to ensure compliance with the Convention.

63. CAJE accepts the Party concerned's submission that there needs to be some discretion when dealing with costs in litigation. It accepts that there may, for example, need to be some discretion in evaluating what in a particular case would be prohibitive expense. It submits, however, that absolute and total discretion, as recognized by the House of Lords in *Bolton*[29] ("the fundamental rule is that there are no rules") is not acceptable.

64. CAJE contends that the Party concerned (and indeed the Court of Appeal in *Morgan* and *Littlewood*) suggests that "prohibitive expense" somehow includes a notion of fairness to the defendant. CAJE contends that this is a misreading of article 9, paragraph 4, of the Convention and submits that the word "fairness" in article 9, paragraph 4, of the Convention refers to prohibitive expense to the claimant.

65. In this regard, CAJE refers to the July 2009 decision by the European Court of Justice (ECJ) in *EC v. Ireland*[30] holding that, in the absence of a binding legal provision requiring procedures not to be prohibitively expensive, discretionary practice on the part of the courts does not adequately implement the equivalent provision to article 9, paragraph 4, of the Convention contained in Directive 2003/35/EC on Access to Justice.[31]

66. The Party concerned contends that the discretion the judiciary has in determining costs issues is a further factor in ensuring that costs are not prohibitively expensive in accordance with article 9, paragraph 4, of the Convention. The Party concerned also contends that as a matter of law, the courts are required to take into account the obligations under the Convention in exercising their discretion as to costs.

67. The Party concerned distinguishes reliance on judicial discretion in the United Kingdom from the judicial discretion at stake in the judgement of the ECJ in *EC v. Ireland.*[32] It submits that the test applied by the ECJ for the adequacy of transposition of a Directive is not that which the Committee should apply in assessing a Party's compliance with the Convention. The Party concerned furthermore points out that:

> [i]t would be wholly inappropriate, and beyond the jurisdiction of this Committee, to seek to decide or to give an opinion on questions of EU law — including specifically, the question whether as a matter of EU law the Convention has become directly effective in [United Kingdom] law. In any event, even to the extent that the Convention has become part of EU law, EU law cannot affect the approach that

[29] Bolton MDC v. Secretary of State for the Environment [1995] 1 WLR 1176, 1178.

[30] Commission of the European Communities v. Ireland (Case C-427/07), Judgement of the Court (Second Chamber) of 16 July 2009, para. 94.

[31] CAJE informed the Committee that in 2005 it had submitted a complaint to the European Commission regarding the United Kingdom's compliance with the Environmental Impact Assessment Directive and the Integrated Pollution Prevention and Control Directive (which apply the "not prohibitively expensive" requirement in article 9, paragraph 4, of the Convention to legal review procedures in respect of environmental impact assessment and integrated pollution prevention and control). On 18 March 2010, the European Commission issued the United Kingdom a Reasoned Opinion in respect of CAJE's complaint.

[32] Commission of the European Communities v. Ireland (Case C-427/07), para. 94.

Committee should take in its consideration of compliance of an international treaty (many of whose signatories are of course not even members of the EU).[33]

68. In its submissions dated 28 July 2009, the Party concerned submitted that the communicants had not brought before the Committee any recent environmental cases in which a PCO has been refused, in breach of article 9, paragraph 4, involving a claimant who was not otherwise eligible for legal aid or a CFA. Subsequently, by letter of 20 May 2010, CAJE informed the Committee of recent developments in *R (Edwards and Pallikaropoulos) v. Environment Agency* whereby Mrs. Pallikaropoulos, who had sought a PCO in respect of her appeal to the House of Lords but had been refused, was currently seeking to challenge £88,000 costs claimed by the Environment Agency and other respondents.[34]

Cross-undertakings for damages regarding interim injunctions

69. The communicants contend that courts in England and Wales generally require claimants seeking an interim injunction to protect the relevant environmental interest pending the substantive trial to provide a "cross-undertaking" in damages before an injunction will be granted. The communicants and CAJE submit that the potential requirement to give a cross-undertaking for damages means that injunctive relief may not be available without risking prohibitive expense to claimants as required under article 9, paragraph 4, of the Convention.

70. The Party concerned submits that the manner in which its courts approach the granting of interim relief does not give rise to non-compliance with article 9, paragraph 4, of the Convention. It submits that there are very good reasons why, in general, a cross-undertaking in damages is required. It points to the fact that granting interim relief can have severely adverse consequences for individuals and other private parties who have the benefit of the measure under challenge. Moreover, it points out that there is no set rule requiring a cross-undertaking and that its courts have wide discretion to adopt the course which seems most likely to minimize the risk of an unjust result. The courts have jurisdiction to, and do, grant interim relief despite the absence of a cross-undertaking in damages, having regard to the public importance of the issues raised.

71. The Party concerned also submits that in the typical case of a challenge to a planning permission, the mere bringing of proceedings (even without seeking interim relief) in the majority of cases acts as a stay on the proposed development. This is because if the developer builds in the face of a challenge to his permit, he does so at his own risk of having to later remove it.

C. Challenging acts of private individuals that breach environmental law — article 9, paragraph 3

72. The communicants claim that the Party concerned fails to provide sufficient access for members of the public to administrative or judicial procedures to challenge acts and omissions by private persons which contravene provisions of national law relating to the environment, as required by article 9, paragraph 3, of the Convention.

[33] See oral submissions by the Party concerned on 24 September 2009, available at: http://www.unece.org/env/pp/compliance/C200833/correspondence/FrUKReC33openingpresentationhearing.doc.

[34] See footnote 16 above.

73. The communicants note that it is possible under the law of the Party concerned to bring a private criminal prosecution. They submit, however, that there are limitations on the use and the usefulness of this right. First, not all breaches of environmental laws amount to a criminal offence. Second, the State prosecutor can take over the private prosecution and then subsequently decide to drop the case. Third, in some cases consent to proceed with a criminal prosecution must be obtained. Fourth, for a private person or organization to prepare a criminal prosecution is not easy, among other reasons, because private individuals and organizations lack the powers to gather evidence which public prosecutors and State authorities have. Finally, the burden of proof in criminal prosecutions is high (proof beyond reasonable doubt, rather than on the balance of probability). As a result of these factors, the communicants submit, private criminal prosecutions are not very common.

74. The communicants point out that in many cases a breach of an environmental law is not a criminal offence; rather it leads to further administrative processes, such as enforcement notices. Failure to comply with such notices may eventually lead to a criminal offence being committed, but if the relevant authority does not issue such notices, there is generally no mechanism by which a member of the public can bring any kind of action directly against the perpetrator of the breach.

75. The communicants refer to *The Handbook on Access to Justice under the Aarhus Convention*, which states that article 9, paragraph 3: "does not state that members of the public can file lawsuits if permitted by national law. Instead, it grants the right to sue or complain and then permits parties to lay down 'criteria' if they wish to do so. If specific criteria are not laid down in national law, the logical interpretation would be that members of the public should be deemed to have the right to go to court or to an administrative body." [35] The communicants submit, given that no specific "criteria" have been laid down by the Party concerned, according to the *Handbook*, the public should be deemed to have a right to go to court or to an administrative body.

76. The communicants, with reference to *The Aarhus Convention: An Implementation Guide*[36] and the *Simplified Guide to the Aarhus Convention*,[37] note that the rights of action against private individuals under article 9, paragraph 3, of the Convention may be administrative or judicial procedures, i.e., they do not necessarily have to be a court process and can be in the form of direct or indirect enforcement. However, "for indirect enforcement to satisfy this provision of the Convention, it must provide for clear administrative or judicial procedures in which the particular member of the public has official status. Otherwise it could not be said that the member of the public has access to such procedures."[38]

77. The communicants submit that in other EU member States it is quite common to allow the acts and omissions of private persons to be challenged. For example, in France, registered environmental organizations may act as plaintiffs in criminal proceedings and also bring civil claims against private persons where environmental laws have been violated, on the condition that the action brought is to protect collective interests which are

[35] Stephen Stec, ed., *The Handbook on Access to Justice under the Aarhus Convention*, the Regional Environmental Center for Central and Eastern Europe (Hungary: March 2003). Available at http://www.unece.org/env/pp/a.to.j/handbook.final.pdf.

[36] See footnote 4.

[37] *Your Right to a Healthy Environment: A Simplified Guide to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (United Nations publication, Sales No. Sales No. E.06.II.E.9). Available at http://www.unece.org/env/documents/2006/pp/ece%20mp%20pp%205_E.pdf.

[38] *The Aarhus Convention: An Implementation Guide*, p. 130.

protected in the organization's statutory objectives.[39] The communicants submit that the Party concerned should follow this approach and that this could be done by amending the law on judicial review or by extending the new Regulatory Enforcement and Sanctions Act 2008 to include NGO rights of enforcement in public interest cases.

78. The Party concerned submits that article 9, paragraph 3, of the Convention does not require Parties to provide individuals with an unqualified right to bring a claim against a private person for breach of environmental law, but rather recognizes that national law may provide for criteria which need to be satisfied for such claims to be brought. The Aarhus Convention *Implementation Guide* also recognizes that while standing should be provided for certain members of the public to enforce environmental law, such enforcement can be "direct or indirect".

79. The Party concerned points to the availability of various administrative and judicial procedures. These include reporting potential breaches of environmental legislation to the appropriate authorities, submitting a complaint to the Parliamentary Commissioner for Administration (Parliamentary Ombudsman), criminal proceedings under section 82 of the Environmental Protection Act, pressing relevant authorities to initiate criminal proceedings under various environmental acts, bringing a claim in the civil courts for private or public nuisance, under the rule in *Rylands v. Fletcher*,[40] for breach of specific statutory provisions, or a claim for negligence.

D. Rules on timing in judicial review procedures — article 9, paragraph 4

80. The communicants claim that the requirement in CPR 54.5 to file an application for judicial review "promptly and in any event no later than three months" does not meet the obligation under article 9, paragraph 4, of the Convention to ensure that all access to justice procedures which fall within the Convention are fair, equitable and timely and to provide adequate and effective remedies.

81. The communicants claim that the current time limits set by the CPRs in England and Wales are overly restrictive. Firstly, three months is a very short time within which to apply for judicial review (compared, for example, with one year in human rights cases). Secondly, the rules are unfair in imposing an almost arbitrary requirement for "promptness", which could mean almost anything, and which a claimant has no way of actually knowing and planning for before he/she makes the application, by which time it could be too late. Thirdly, the time limit starts running from the time of the act or decision that the complaint is made against, not from the time of the subjective knowledge of the complainant of that act or decision.

82. The communicants submit that CPR 54.5 should be changed to allow for longer, fairer and more equitable time limits by introducing a right to bring an action for judicial review by the end of a longer, clearly specified time period during which the potential claimant should reasonably have found out about the act or omission giving rise to the action. The communicants suggest that the timing rules of the Human Rights Act 1998 could be followed, and a general time limit of one year for bringing environmental review actions could be introduced, with a shorter time limit of, say, six months for matters which are predominantly of a planning nature and need to be dealt with more quickly in the public interest. However, as in the Human Rights Act 1998, in both cases there should be judicial discretion to extend the time limit if that is equitable having regard to all the circumstances.

[39] Case of the Court Cass., SCI Les Chênes, 26 September 2007.

[40] Rylands v. Fletcher (1865–1866) L.R. 1 Ex. 265.

Time limits for judicial review claims should allow for claimants to first follow rules on the exhaustion of all other remedies or to comply with necessary pre-action protocols. The communicants furthermore submit that if an Aarhus Act was introduced, then that act could codify the timing rules in the same way as it would codify extended grounds for judicial review and different costs rules.

83. The communicants submit that the Port of Tyne case illustrates that the time limits applicable in the law of England and Wales are unfair. It is now too late to bring an action for judicial review in that case even though the communicants were in constant contact with the relevant authorities with regard to the licence issued in 2004, the deposit of dredged material and capping layers placed in 2005 and the sand and silt deposited in 2006; nevertheless, for practical and evidential reasons they were unable to bring a claim within the time limits stipulated for judicial review actions.

84. The Party concerned does not accept that the requirement for bringing a judicial review claim "promptly" causes uncertainty or unfairness for a claimant. It submits that the rule is well understood in practice and points to the public interest, which requires speed and certainty regarding the outcome of judicial review applications, particularly where third parties may be affected. It submits that the timing rules strike a reasonable balance between administrative expediency and fairness to litigants. It furthermore points out that the rules on timing are not applied inflexibly — time limits may be extended if there is good reason for the delay. The Party concerned notes that CPR 54.5 (1) was considered by the European Court of Human Rights in *Lam v. United Kingdom*, and the United Kingdom was not held to be in breach of article 6 of the European Convention on Human Rights and Fundamental Freedoms.[41]

85. The Party concerned submits that the Port of Tyne situation does not provide any indication that the rules on timing are unfair. It also submits that if there is ongoing illegality on the part of a public body, such illegality would be subject to judicial review. Moreover, it submits that it is not inherently unfair not to allow a challenge now to a decision taken in 2004.

III. National legal framework

A. Review of substantive legality in judicial review proceedings — article 9, paragraphs 2 and 3

86. In England and Wales, the standard of review applicable in judicial review procedures is largely governed by common law. Three grounds are generally recognized as providing the standards for judicial review: illegality, irrationality (*Wednesbury* test)[42] and procedural impropriety.[43] These grounds are neither exhaustive not mutually exclusive.[44]

[41] Chung Tak Lam v. United Kingdom, Application No. 41671/98, Decision of Fourth Chamber, 5 July 2001.

[42] Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B. 223.

[43] Council of Civil Services Unions v. Minister for Civil Services [1985] AC 374.

[44] Wheeler v. Leicester City Council [1985] AC 1054, 1078 B-C.

87. What requires consideration in the present communication is if and to what extent the courts will consider substantive legality, "material errors of fact" having been recognized as a ground for judicial review by the courts of England and Wales.[45]

88. The *Judicial Review Handbook*[46] specifies a number of grounds for review falling under the two "substantive" heads of illegality and irrationality, including for error of law,[47] for regard to irrelevant considerations and failure to have regard to relevant considerations,[48] for jurisdictional error[49] and so on.

89. In respect of substantive legality, the so-called *Wednesbury* test and subsequent developments regarding that test are relevant. The *Wednesbury* test entails that the courts examine whether public authorities "have taken into account matters which they ought not to have taken into account or conversely have refused [...] or neglected to take into account matters which they ought to have taken into account" while thereafter "it may still be possible to say that [...] they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case I think the court can interfere."[50]

90. The *Wednesbury* test has been criticized, including by the House of Lords, then the United Kingdom's highest court,[51] for providing too limited a standard of review in judicial review cases.[52] It was also criticized by the European Court of Human Rights in *Smith and Grady v. the United Kingdom*[53] because:

> [T]he threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention.

91. Since the adoption of the Human Rights Act 1998, it has been suggested that, at least for cases involving fundamental human rights, the proportionality test might be the proper test to apply. This approach was advocated, among others, by Lord Steyn in *R v. Secretary of State for the Home Department, Ex Parte Daly*.[54]

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[45] A leading case is E v. Home Secretary [2004] QB 1044, in which the Court of Appeal in paragraph 66 held: "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result."

[46] Michael Fordham, *Judicial Review Handbook* (5th edition, 2008).

[47] R v. Hull University Visitor, ex p Page [1993] AC 682.

[48] Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] AC 1014.

[49] Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147.

[50] Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B. 223.

[51] Since 1 October 2009, the Supreme Court is the Party concerned's highest court.

[52] For example, Lord Cooke in R v. Secretary of State for the Home Department, ex parte Daly [2001] UKHL 26, [2001] 2 AC 532 held: "And I think that the day will come when it will be more widely recognised that [Wednesbury] was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation." (para. 32)

[53] Smith and Grady v. United Kingdom (1999) 29 EHRR 493, para. 138.

[54] R v Secretary of State for the Home Department, Ex Parte Daly [2001] UKHL 26, para. 27.

B. Costs prohibitively expensive — article 9, paragraphs 4 and 5

92. In England and Wales, the general rule applicable to the allocation of costs, including in judicial review proceedings, is the "costs follow the event" rule. It entails that the losing party pay both its own costs as well as those of the successful party. Several measures, however, are in place to soften the effects of this rule. These include a system of legal aid, conditional fee arrangements, PCOs and judicial discretion. These four measures, as well as cross-undertakings in damages, will be addressed below.

General rule "costs follow the event"

93. The general rule that "costs follow the event" is contained in CPR rule 44.3, which states:

> 1. The court has discretion as to —
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> 2. If the court decides to make an order about costs —
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.

Legal aid

94. Part C.5 of the Legal Services Commission Funding Code Decision-making Guidance[55] provides guidance regarding the availability of legal aid for cases involving the public interest. Applicants in such cases must still satisfy the financial eligibility test, which examines an applicant's income and capital. Provided the financial eligibility test is met, the Funding Code Guidance advises that:

> Different types of case may exhibit a public interest in different ways. For the purpose of the Funding Code, an important distinction must be made between two separate forms of public interest case:
>
> (a) there are certain types of case which by their nature always exhibit a degree of public interest. For example, this could be said of all applications for judicial review because it is in the general public interest for public authorities to act lawfully […];
>
> (b) there are also individual cases which, on their own particular facts, can be said to bring benefits to a section of the public, i.e. persons other than the individual bringing the proceedings.[56]

95. In respect of judicial review cases, the Funding Code Guidance states that such cases are "treated as priority areas in the Code. Therefore, the Criteria for judicial review cases

[55] Legal Services Commission, *Funding Code: Decision Making Guidance*, http://www.legalservices.gov.uk/docs/cls_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples(Sections1-14)Sept07.pdf

[56] Ibid, Part C.5.1.2.

and claims against public authorities are less stringent in some respects than the Criteria in the General Funding Code."[57]

96. In respect of other types of public interest case, the Funding Code Guidance states that funding may be available for individuals who satisfy the financial eligibility test provided the case has a "significant wider public interest". A case with a significant wider public interest may be funded even if prospects of success are in the borderline merits category or if the individual case in question would not, by itself, be cost effective.[58] "Wider public interest" is defined as "the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question)."[59] Public interest carries with it a sense that large numbers of people must be affected. The Funding Code Guidance states that, as a general guideline, even where the benefits to others are substantial, it would be unusual to regard a case as having a significant wider public interest if fewer than 100 people would benefit from its outcome.[60]

97. The Public Interest Advisory Panel of the Legal Services Commission, composed mainly of independent members with a strong interest in public interest litigation, interprets and applies the Funding Code Guidance and provides advice to the Legal Services Commission on which cases are eligible for judicial aid.[61]

Conditional fee agreements

98. Under the law of England and Wales, all legal proceedings (apart from family and criminal proceedings) can potentially be funded by a CFA.[62] CFAs take the form of an agreement between the solicitor and his or her client, under which the solicitor agrees to take the case on the basis that if the case is lost he/she will not charge or only charge a lower rate for the work carried out. However, if the case is successful, the solicitor can charge a success fee on top of his/her normal fee to compensate for the risk of losing the case and not being paid. The success fee can be added to the quantum of costs to be paid by the losing party, i.e., they are not deducted from any damages that may be awarded. It is open to a party to take out insurance against the possibility of being ordered to pay the other party's costs and the success fee.

Protective cost orders

99. A PCO is an order of the court by which the potential costs liability of one or more parties in the event that they lose the case is fixed in advance of the hearing. Such costs can be fixed at any level and may be eliminated entirely — i.e., so there is no liability for costs at all. PCOs are judge-made law, created using the broad control over matters of costs that is conferred on the judges by section 51 of the Supreme Court Act 1981.[63]

[57] Ibid, Part C.5.1.3.
[58] Ibid, Part C.5.1.4.
[59] Ibid, Part C.5.2.1.
[60] Ibid, Part C.5.3.2.
[61] Milieu Ltd., *Measures on access to justice in environmental matters (Article 9 (3)): Country report for United Kingdom,* April 2007, p. 17.
[62] Response to the communication by the Party concerned, 30 July 2009.
[63] As noted by the Court of Appeal in R (Compton) v. Wiltshire Primary Care Trust, [2008] EWCA Civ 749.

100. The leading case on PCOs is *R (Corner House Research) v. Secretary of State for Trade and Industry.*[64] In that case, the Court of Appeal set out the following principles for PCOs:

> (a) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> (i) the issues raised are of general public importance;
>
> (ii) the public interest requires that those issues should be resolved;
>
> (iii) the applicant has no private interest in the outcome of the case;
>
> (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
>
> (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (b) If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO.
>
> (c) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.[65]

101. The Court in *Corner House* held that a PCO should only be granted in the most exceptional circumstances.[66] It also held that "[t]he purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor, the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest."[67]

102. The criteria set out in *Corner House* have been further defined in subsequent case law and commented on in relation to environmental cases. These developments include the finding that environmental cases do not require special treatment under the *Corner House* criteria, regardless of the Convention.[68]

103. The criteria, especially the criteria cited in paragraph 100 (a) (i)–(iii) above and the "exceptional circumstances" criterion noted in paragraph 101, have been commented on by judges in both the case law[69] and in reports[70] as being problematic, also in the light of the Convention. Moreover, both in the case law and the reports, judges have urged the Civil Procedure Rules Committee to codify the procedure, also in the light of the Convention.

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[64] R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600.

[65] Ibid, para. 74.

[66] Ibid, para. 72.

[67] Ibid, para. 76 (ii).

[68] R (Compton) v. Wiltshire Primary Care Trust, [2008] EWCA Civ 749, para 24.

[69] E.g., in R (Compton) v. Wiltshire Primary Care Trust para 43, R (Francis Morgan) v. Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107, paras. 29 and 36, R (Derek England) v. LB Tower Hamlets and others [2006] EWCA Civ 1742, para. 14.

[70] E.g., the Sullivan report, the Jackson Report and the Report of the Working Group on Facilitating Public Interest Litigation chaired by Lord Justice Kay, "Litigating the Public Interest",July 2006 (hereafter the Kay Report).

104. The judiciary has advocated the adoption of a flexible approach to the *Corner House* criteria in the meantime,[71] an approach that met with the approval of the Master of the Rolls in *Buglife*[72]and by the Court of Appeal in *Hinton Organics*.[73] This includes a flexible approach to the issuing of cross-caps. In *Buglife*, the Court of Appeal, referring to the Sullivan Report,[74] held:

> We would certainly accept that there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases in which it would be unjust to do so. However, in *Corner House* this court laid down guidance which, subject to the facts of a particular case and unless and until there is a rule which has statutory force to the contrary, we must follow, albeit in a flexible way. That was the unanimous view of the court in *Compton*. It follows that, as the court put it in *Corner House*, the costs should in general be reasonably modest and the claimant should expect the costs to be capped as set out in [76 (ii) and (iii)] of the judgement in that case.[75]

The judiciary, however, has also referred to the limits of this flexible approach, indicating that "further development or refinement is a matter for legislation or the Rules Committee".[76]

105. The Sullivan Report also points to the possible chilling effect that the cost of seeking a PCO (in the order of £2,500–£7,500 plus VAT) may have on claimants, given the risk that the PCO may be refused.[77] It questions whether such costs are compatible with the Convention.[78] The Sullivan Report moreover suggests that "a mechanism is required for claimants who could not face such a level of costs exposure to seek a preliminary PCO right at the beginning of the proceedings, limiting its costs exposure of applying for a PCO to an affordable figure (possibly zero). It would then have an opportunity to withdraw (if a PCO is refused) before it becomes exposed to costs."[79]

Judicial discretion

106. In *Morgan v. Hinton Organics*, the Court of Appeal considered the role of judicial discretion in relation to costs, commenting on the judgement given by the Master of the Rolls in *Buglife*:

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[71] E.g., R (Compton) v. Wiltshire Primary Care Trust, para. 23, and R (Derek England) v. LB Tower Hamlets and others [2006] EWCA Civ 1742, paras. 14–15.

[72] R (on the application of Buglife — the Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd [2008] EWCA Civ 1209, para. 17. The Master of the Rolls is the presiding officer of the Civil Division of the Court of Appeal and the second most senior judge in England and Wales.

[73] R (Francis Morgan) v. Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107.

[74] Sullivan Report, appendix 3, paras. 4 and 5.

[75] R (on the application of Buglife — the Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd [2008] EWCA Civ 1209, paras. 24 and 25. R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600, in paragraph 76 (ii), held that the claimant should expect "the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest" and in paragraph 76 (iii), "[t]he beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly".

[76] E.g., the Court of Appeal in R (Francis Morgan) v. Hinton Organics (Wessex) Ltd, [2009] EWCA Civ 107, para. 47 (iv).

[77] Sullivan Report, appendix 3, paras. 11–14.

[78] Ibid., para 14.

[79] Ibid.

> He also indicated that the principles stated in *Corner House* were to be regarded as binding on the court, and were to be applied "as explained by Waller LJ and Smith LJ" (para. 19). We take the last words to be a reference to the comments of Waller and Smith LJJ respectively that the *Corner House* guidelines were "not … to be read as statutory provisions, nor to be read in an over-restrictive way" (*Compton* para. 23); and were "not part of the statute and … should not be read as if they were" (para. 74). These comments reflect the familiar principle that: "As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule." (per Lord Lloyd of Berwick, *Bolton MDC v. Secretary of State for the Environment* [1995] 1 WLR 1176, 1178; cited in *Corner House* at para. 27)."[80]

107. The Court of Appeal in *Compton* noted that while PCOs were a discretionary order, it was unlikely that an applicant that fulfilled all the requirements would be refused.[81]

Cross-undertaking as to damages regarding interim injunctions

108. The general rule that the giving of a cross-undertaking for damages by the claimant is a prerequisite for the grant of an interim injunction was noted by the House of Lords in the 1975 decision of *American Cyanamid Co v. Ethicon Ltd*.[82] The House of Lords recognized, however, that when deciding whether to grant an interim injunction in an individual case, there may be special factors that should be taken into account.[83]

109. Courts in England and Wales have granted interim injunctions without a cross-undertaking for damages having been given;[84] there have also been cases in which the injunctive relief was refused due to the fact that the claimant was not in a position to provide a cross-undertaking in damages.[85] Judges enjoy a considerable amount of discretion as to whether a cross-undertaking for damages is required for the grant of an interim injunction.

C. Challenging acts of private individuals that breach environmental law — article 9, paragraph 3

110. On the basis of the information put before it by the communicants and the Party concerned, the Committee understands that the ways in which a member of the public in England and Wales can challenge acts and omissions by private persons which contravene national environmental law include:

(a) Members of the public can report potential or alleged breaches of environmental legislation to the appropriate regulator. For example, in England and Wales, the Environment Agency will consider whether there is a need to investigate or take

[80] *R (Francis Morgan) v. Hinton Organics (Wessex) Ltd,* [2009] EWCA Civ 107, para. 33.

[81] *R (Compton) v. Wiltshire Primary Care Trust* [2008] EWCA Civ 749, para. 70.

[82] *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396.

[83] Ibid, judgement of Lord Diplock.

[84] *R v. London Borough of Lambeth, ex p Sybyll Walter*, 2 February 1989 unrep. Other cases put before the Committee in which the United Kingdom courts granted an interim injunction without a cross-undertaking as to damages include: *R v. Durham CC, ex p Huddleston* [2000] Env LR D21, *R v. Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 1 WLR 570, *R v. Secretary of State for the Environment, ex p Rose Theatre Trust Company* (1990) COD 47.

[85] *R v. Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds (1997)* Env. L.R. 431, *R v. Inspectorate of Pollution, Ex p Greenpeace Ltd* [1994] 1 WLR 570.

enforcement action against any person not found to be complying with legislation. There is no charge for this, but the member of the public cannot force the regulator to take action. Examples of this option include:

(i) Section 80 of the Environmental Protection Act 1990 enables the local authority to serve an abatement notice where it is satisfied that a statutory nuisance exists or is likely to occur or recur. If a person on whom an abatement notice is served, without reasonable excuse, contravenes or fails to comply with any requirement or prohibition imposed by the notice, they commit a criminal offence;

(ii) A member of the public can complain to the local authority and informally request criminal proceedings to be brought under the Clean Air Act 1993[86] or the Noise Act 1996;[87]

(b) Under section 82 of the Environmental Protection Act, a person aggrieved by a statutory nuisance can themselves bring proceedings in the magistrates' court against the person alleged to be responsible;

(c) A claim may be brought in the civil courts for either public or private nuisance. Public nuisance is a criminal offence, but it can be an actionable civil matter where the claimant has suffered particular or special damage over and above the general inconvenience suffered by the public. A claim in private nuisance may be brought where there has been an interference with the claimant's enjoyment of their land, including damage or encroachment on their land;

(d) A claim may be brought under the rule in *Rylands v. Fletcher*,[88] in which the court stated: "we think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape";

(e) A claim for negligence exists (i.e., a breach of duty which has caused some reasonably foreseeable harm) if it can be established that the member of the public was owed a duty of care by the third party contravening environmental law;

(f) Citizens may bring a private prosecution when a criminal offence has been committed. Examples of environmental criminal offences include breaches of water discharge permits or waste licences, or intentionally or recklessly killing or disturbing protected animals (see for example *R v. Anglian Water Services Ltd*).[89] Not all environmental laws amount to a criminal offence if they are broken, however. Moreover, the burden of proof in criminal prosecutions is a high one (proof beyond reasonable doubt, rather than on the balance of probability), and public authorities have powers to gather evidence that private individuals do not have;

(g) In addition, a member of the public may bring a claim for damages for breach of certain specific statutory provisions. Examples include: sections 153 and 154 of the Merchant Shipping Act 1995 and section 73 of the Environmental Protection Act 1990;

(h) Besides bringing a claim directly against a private party, a member of the public may also take action against a public authority who failed to act to stop a third party contravening national environmental law. Possible actions include:

[86] Clean Air Act 1993, section 55(2).
[87] Noises Act 1996, article 2(4).
[88] Rylands v. Fletcher (1865-1866) L.R. 1 Ex. 265.
[89] R v Anglian Water Services Ltd [2003]EWCA Crim 2243

(i) An action against the public authority under article 7 of the Human Rights Act alleging that the authority has breached article 8 of the Convention by failing to respect private and family life;

(ii) An application for judicial review of the authority's decision not to take action (e.g. *Lam v. United Kingdom*);[90]

(iii) A complaint to the Parliamentary Commissioner for Administration (also known as the Parliamentary Ombudsman) who investigates complaints that injustice has been caused by maladministration on the part of Government departments or other public bodies. Cases concerning enforcement in relation to environmental requirements have been dealt with by the Parliamentary Ombudsman, including where a member of the public has complained that no enforcement action has been taken. The Parliamentary Ombudsman's decisions have persuasive force, but it would be extremely unusual for a public authority not to comply. Alternatively, a complaint could be made to the local authority ombudsman.

D. Rules on timing in judicial review procedures — article 9, paragraph 4

111. The procedural rules regarding timing in case of judicial review are set out in CPR Rule 54.[91] CPR 54.5 (1) states that an application for judicial review must be filed: "(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose".[92]

112. CPR 54.5 (3) states that this rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review. For example, under sections 13 and 118 of the Planning Act 2008, applications for judicial review of decisions within the purview of that Act are to be made within six weeks of the decision.

113. An application for judicial review filed under CPR 54.5 may be refused even if filed within three months if the Court determines that in view of all the circumstances it was not made "promptly". In *Andrew Finn–Kelcey v. Milton Keynes Council and Others*, the applicant had filed his application for judicial review four days prior to the end of the three month period. In its October 2008 judgement, the Court of Appeal upheld the lower court's finding that the claim had not been lodged promptly and so did not comply with CPR 54.5.[93] The Court of Appeal in *Finn-Kelcey* held:

> As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in paragraph (a) and (b) of that rule [CPR 54.5] are separate and independent of each other, and it is not to be assumed that filing within

[90] Chung Tak Lam and Others v. United Kingdom, Application No. 41671/98, Decision of Fourth Chamber, 5 July 2001.

[91] Civil Procedure Rules, Part 54, http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part54.htm#IDAFFQZ.

[92] The House of Lords, in Caswell v. Dairy Produce Quota Tribunal for England and Wales [1990] 2 AC 738 held that, where the application for permission to seek judicial review is not made in compliance with CPR 54.5 (1), the delay is to be regarded as "undue delay" within section 31 (6) of the Supreme Court Act 1981. Under section 31 (6) of the Supreme Court Act 1981, where the Court considers that there has been undue delay in making an application for judicial review, it may refuse to grant permission for the making of the application or any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. (Supreme Court Act, 1981 http://www.opsi.gov.uk/Acts/acts1981/PDF/ukpga_19810054_en.pdf)

[93] Andrew Finn-Kelcey v. Milton Keynes Council and Another [2008] EWCA Civ 1067, para. 29.

> three months necessarily amounts to filing promptly…. The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker.[94]

114. When considering whether planning decisions not covered by the Planning Act or other similar legislation statutorily imposing a six-week limit for judicial review should nevertheless be held to a similar time limit, the Court of Appeal in the same case stated: "while there is no 'six weeks rule' in judicial review challenges to planning permissions, the existence of that statutory limit is not to be seen as necessarily wholly irrelevant to the decision as to what is 'prompt' in an individual case. It emphasises the need for swiftness of action."[95]

115. The Court of Appeal concluded that the High Court:

> … was correct in finding that this claim had not been lodged promptly and so did not comply with CPR 54.5. That, of course, is not necessarily the end of the matter. There may be considerations which mean that it is in the public interest that the claim should be allowed to proceed, despite the delay and the absence of any explanation for that delay. If there is a strong case for saying that the permission was ultra vires, then this court might in the circumstances be willing to grant permission to proceed. But, given the delay, it requires a much clearer-cut case than would otherwise have been necessary. I turn therefore to consider the substantive merits of the claim, which asserts a breach of both domestic and European law. [96]

116. After considering the substantive merits of the claim, the Court of Appeal concluded: "Even had there been the necessary promptness in lodging this claim for judicial review, I would not have granted permission to proceed on the substantive merits of the claim. It follows from that that the Appellant falls far short of establishing the sort of clear-cut case which would be necessary to persuade the court to override the breach of CPR 54.5 (1), given that this was a claim not filed promptly."[97]

117. CPR 54.5 (1) was considered by the European Court of Human Rights in *Lam v. United Kingdom*.[98] Mr. and Mrs. Lam had sought leave to make an application for judicial review of a decision by the local authority not to take enforcement action against noises and smells from a neighbouring warehouse. The Lams had applied for judicial review four days less than three months after the decision and fifteen days after receiving official notice of the decision. In that case, the European Human Rights Court was asked to determine whether the fact that the Lams had been denied leave for judicial review on the grounds of delay despite applying within three months denied them legal certainty and was a breach of article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms. The Court held:

> In so far as the applicants impugn the strict application of the promptness requirement in that it restricted their right of access to a court, the Court observes that the requirement was a proportionate measure taken in pursuit of a legitimate aim. The applicants were not denied access to a court *ab initio*. They failed to satisfy a strict procedural requirement which served a public interest purpose, namely the

[94] Ibid, para. 21.
[95] Ibid, para 24.
[96] Ibid, para 29.
[97] Ibid. para 47.
[98] Chung Tak Lam and Others v. United Kingdom, Application No. 41671/98, Decision of Fourth Chamber, 5 July 2001.

need to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions."

IV. Consideration and evaluation by the Compliance Committee

A. Legal basis and scope of considerations by the Compliance Committee

118. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

B. Admissibility and exhaustion of local remedies

119. The Committee finds the communication to be admissible.

120. With respect to those aspects of the communicants' submissions which relate to the legal system in England and Wales in general, the Committee finds that the general nature of those submissions means that considerations regarding the exhaustion of local remedies are not material.

121. The Committee notes the submissions made by the communicants with respect to the Port of Tyne situation. However, given the wide-ranging and systemic issues raised by the other more general aspects of the communication, the Committee decides to address its findings to the communicant's submissions which relate to the legal system in England and Wales in general. The Committee accordingly decides not to develop findings in respect of the Port of Tyne case.

C. Substantive issues

122. The Committee is tasked with examining whether the Party concerned meets its obligations as a Party to the Convention. The Committee accordingly does not address the point raised by the communicants as to whether the Convention is directly applicable in the law of England and Wales by virtue of EU law and the ratification by the EU of the Convention (see annex I to the communication).[99] The Party concerned is bound through its own ratification of the Convention to ensure full compliance of its legal system with the Convention's provisions, even if, as noted by the Committee, applicable EU law relating to the environment should be considered to be part of the domestic, national law of a member State (ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para. 27).

1. Review of substantive legality in judicial review proceedings — article 9, paragraphs 2 and 3

123. Article 9, paragraph 2, of the Convention addresses both substantive and procedural legality. Hence, the Party concerned has to ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases.

[99] Since the Treaty of Lisbon entered into force on 1 December 2009, the EU has superseded the European Community as Party to the Aarhus Convention.

124. Article 9, paragraph 3, of the Convention, as opposed to article 9, paragraph 2, of the Convention, does not explicitly refer to either substantive or procedural legality. Instead it refers to "acts or omissions […] which contravene its national law relating to the environment". Clearly, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision — be it substantive or procedural — in national law relating to the environment.

125. The Committee finds that the Party concerned allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraphs 2 and 3, of the Convention, including, inter alia, for material error of fact; error of law; regard to irrelevant considerations and failure to have regard to relevant considerations; jurisdictional error; and on the grounds of *Wednesbury* unreasonableness (see paras. 87–89 above). The Committee, however, is not convinced that the Party concerned, despite the above-mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords,[100] and the European Court of Human Rights,[101] of the very high threshold for review imposed by the *Wednesbury* test.

126. The Committee considers that the application of a "proportionality principle" by the courts in England and Wales could provide an adequate standard of review in cases within the scope of the Aarhus Convention. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. While a proportionality principle in cases within the scope of the Aarhus Convention may go a long way towards providing for a review of substantive and procedural legality, the Party concerned must make sure that such a principle does not generally or prima facie exclude any issue of substantive legality from a review.

127. Given its findings in paragraphs 125 and 126 above, the Committee expresses concern regarding the availability of appropriate judicial or administrative procedures, as required by article 9, paragraphs 2 and 3, of the Convention, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review under the law of England and Wales. However, based on the information before it in the context of the current communication, the Committee does not go so far as to find the Party concerned to be in non-compliance with article 9, paragraphs 2 or 3, of the Convention.

2. Costs prohibitively expensive — article 9, paragraphs 4 and 5

128. When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner.

129. The Committee considers that the "costs follow the event rule", contained in CPR rule 44.3 (2), is not inherently objectionable under the Convention, although the compatibility of this rule with the Convention depends on the outcome in each specific case and the existence of a clear rule that prevents prohibitively expensive procedures. In this context, the Committee considers whether the effects of "costs follow the event rule" can be softened by legal aid, CFAs and PCOs, as well as by the considerable discretionary powers

[100] For example, Lord Cooke in *R v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 para. 32.

[101] *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493, para. 138.

that the courts have in interpreting and applying the relevant law. At this stage, however, at least four potential problems emerge with regard to the legal system of England and Wales. First, the "general public importance", "no private interest" and "in exceptional circumstances" criteria applied when considering the granting of PCOs. Second, the limiting effects of (i) the costs for a claimant if a PCO is applied for and not granted and (ii) PCOs that cap the costs of both parties. Third, the potential effect of cross-undertakings in damages on the costs incurred by a claimant. Fourth, the fact that in determining the allocation of costs in a given case, the public interest nature of the environmental claims under consideration is not in and of itself given sufficient consideration.

130. While the courts in England and Wales have applied a flexible approach to *Corner House* criteria when considering the granting of PCOs, including the "general public importance", "no private interest" and "exceptional circumstances" criteria, they have also indicated that, given the ruling in *Corner House*, there are limits to this flexible approach. The Committee notes the numerous calls by judges suggesting that the Civil Procedure Rules Committee take legislative action in respect of PCOs, also in view of the Convention (see para. 102 above). These calls have to date not resulted in amendment of the Civil Procedure Rules so as to ensure that all cases within the scope of article 9 of the Aarhus Convention are accorded the standards set by the Convention. The Convention, among other things, requires its Parties to "provide adequate and effective remedies" which shall be "fair, equitable [...] and not prohibitively expensive". The Committee endorses the calls by the judiciary and suggests that the Party concerned amend the Civil Procedure Rules in the light of the standards set by the Convention.

131. Within such considerations the Committee finds that the Party concerned should also consider the cost that may be incurred by a claimant in those cases where a PCO is applied for but not granted, as suggested in appendix 3 to the Sullivan Report.[102] The Committee endorses this recommendation.

132. The Committee also notes the limiting effect of reciprocal cost caps which, as noted in *Corner House*, in practice entail that "when their lawyers are not willing to act pro bono" successful claimants are entitled to recover only solicitor's fees and fees for one junior counsel "that are no more than modest".[103] The Committee in this respect finds that it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on pro bono or junior legal counsel.

133. A particular issue before the Committee are the costs associated with requests for injunctive relief. Under the law of England and Wales, courts may, and usually do, require claimants to give cross-undertakings in damages. As shown, for example, by the Sullivan Report, this may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds.[104] This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4.

134. Moreover, in accordance with its findings in ACCC/C/2008/23 (United Kingdom) and ACCC/C/2008/27 (United Kingdom), the Committee considers that in legal proceedings within the scope of article 9 of the Convention the public interest nature of the

[102] Sullivan Report, appendix 3, para. 14.

[103] R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600,para. 76 (ii) and (iii).

[104] Sullivan Report, para. 73.

environmental claims under consideration does not seem to be given sufficient consideration in the apportioning of costs by the courts.

135. The Committee concludes that, despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention. At this stage, the Committee considers that the considerable discretion of the courts of England and Wales in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest. The Committee also notes the Court of Appeal's judgement in *Morgan v. Hinton Organics*, which held that the principles of the Convention are "at most" a factor which it "may" (not must) "have regard to in exercising its discretion",[105] "along with a number of other factors, such as fairness to the defendant".[106] The Committee in this respect notes that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.

136. In the light of the above, the Committee concludes that the Party concerned has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as "to remove or reduce financial […] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider.

3. Challenging acts of private persons that breach environmental law — article 9, paragraph 3

137. The Committee finds that, within the context of the present communication, it has not been sufficiently substantiated that within the legal system of England and Wales insufficient procedures are available to challenge acts of private individuals that breach the rights enshrined in the Convention. The Committee thus finds that, in the context of the present proceedings, the Party concerned is not in non-compliance with article 9, paragraph 3, of the Convention.

4. Rules on timing in judicial review procedures — article 9, paragraph 4

138. The Committee finds that the three-month requirement specified in CPR rule 54.5 (1) is not as such problematic under the Convention, also in comparison with the time limits applicable in other Parties to the Convention. However, the Committee considers that the courts in England and Wales have considerable discretion in reducing the time limits by interpreting the requirement under the same provision that an application for a judicial review be filed "promptly" (see paras. 113–116). This may result in a claim for judicial review not being lodged promptly even if brought within the three-month period. The Committee also considers that the courts in England and Wales, in exercising their judicial discretion, apply various moments at which a time may start to run, depending on the circumstances of the case (see para. 117). The justification for discretion regarding time limits for judicial review, the Party concerned submits, is constituted by the public interest considerations which generally are at stake in such cases. While the Committee accepts that a balance needs to be assured between the interests at stake, it also considers that this approach entails significant uncertainty for the claimant. The Committee finds that in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit

[105] Para. 47 (iv).
[106] Para. 44.

within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.

139. As was pointed out with regard to the costs of procedures (see para. 134 above), the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4. On the contrary, reliance on such discretion has resulted in inadequate implementation of article 9, paragraph 4. The Committee finds that by failing to establish clear time limits within which claims may be brought and to set a clear and consistent point at which time starts to run, i.e., the date on which a claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable.

5. Clear, transparent and consistent legal framework — article 3, paragraph 1

140. Having concluded that the Party concerned fails to comply with article 9, paragraph 4, with respect to costs as well as time limits by essentially relying on the discretion of the judiciary, the Committee also concludes that the Party concerned fails to comply with article 3, paragraph 1, by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement the provisions of the Convention.

V. Conclusion

A. Main findings with regard to non-compliance

141. The Committee finds that by failing to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention (see paras. 128–135).

142. The Committee also finds that the system as a whole is not such as "to remove or reduce financial […] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider (see para. 136).

143. In addition, the Committee finds that by not ensuring clear time limits for the filing of an application for judicial review and by not ensuring a clear date from when the time limit starts to run, the Party concerned fails to comply with article 9, paragraph 4 (see para/ 139).

144. Finally, by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4 of the Convention, the Party concerned also fails to comply with article 3, paragraph 1 (see para. 140).

B. Recommendations

145. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the meeting of the Parties to the Convention, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned:

(a) Review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 128–136 above to ensure that such procedures:

(i) Are fair and equitable and not prohibitively expensive; and

(ii) Provide a clear and transparent framework;

(b) Review its rules regarding the time frame for the bringing of applications for judicial review identified in paragraph 139 above to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-eighth meeting
Geneva, 15–18 June 2010

Report of the Compliance Committee on its Twenty-eighth meeting

Addendum

Findings and recommendations with regard to Communication ACCC/C/2008/35 concerning compliance by Georgia

Adopted by the Compliance Committee on 18 June 2010

I. Introduction

1. On 16 December 2008, the Caucasus Environmental NGO Network (hereinafter the communicant or CENN) submitted a communication to the Committee alleging a failure by Georgia to comply with its obligations under article 6, paragraphs 2 and 4, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication alleged that by failing to inform the public concerned in a timely, adequate and effective manner about possibilities for public participation in decision-making on issuing licences for long-term forest use, the Party concerned was not in compliance with article 6, paragraph 2, of the Convention. The communication further alleged that by failing to provide for early public participation in the issuance of special licences for long-term forest use, the Party concerned was not in compliance with article 6, paragraph 4, of the Convention.

3. At its twenty-second meeting (17–19 December 2008), the Committee took note of the communication, but was not able to consider its preliminary admissibility, since the

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communication had been submitted only several days prior to its meeting. However, the Committee sought more detailed information from the communicant with regard to the allegations. On 2 March 2009, the communicant submitted a new version of the communication with clarification on the issues raised by the Committee of non-compliance and the use of domestic remedies.

4. At its twenty-third meeting (31 March–3 April 2009), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Aarhus Convention, the communication was forwarded to the Party concerned on 13 May 2009 along with a number of questions put forward by the Committee soliciting additional information from the Party concerned on matters relating, inter alia, to the facts mentioned in the communication and the relevant Georgian legislation. Also on 13 May 2009, the secretariat forwarded to the communicant a number of questions put forward by the Committee soliciting additional clarification.

6. At its twenty-fourth meeting (30 June–3 July 2009), the Committee agreed to discuss the content of the communication at its twenty-sixth meeting.

7. On 23 September 2009, the communicant responded to the questions raised by the Committee clarifying several points of its communication. On 8 October 2009 and 19 November 2009, the Party concerned addressed the questions raised by the Committee and responded to the allegations made in the communication.

8. The Committee discussed the communication at its twenty-sixth meeting (15–18 December 2009), with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. The Committee prepared draft findings at its twenty-seventh meeting (16–19 March 2010), completing the draft through its electronic decision-making process. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 12 May 2010. Both were invited to provide comments by 9 June 2010.

9. The Party concerned provided comments on 1 June 2010.

10. At its twenty-eighth meeting (15–18 June 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report of the meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

National legal framework

11. The Georgian General Administrative Code of 25 June 1999 requires that the administration ensure stakeholder participation in administrative proceedings in the cases defined by law (art. 95).

12. The Forest Code of Georgia of 22 June 1999 (hereinafter the Forest Code; annex 1 to the communication — English translation provided by the communicant) regulates the protection, use and management of all forests, including their resources, in the territory of

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

the country (arts. 1 and 5). Forest use and management works are permitted only with prior forest management planning, as detailed in the Law of Georgia on Environmental Permit of 15 October 1996 (hereinafter the Environmental Permit Law; annex 2 to the communication — English translation provided by the communicant), or in case of emergency (art. 27, paras. 4 and 6 of the Forest Code).

13. The Forest Code also provides for the participation of public interest organizations in the governance of State-owned forests, including the resources therein ("State Forest Fund") (arts. 35–36). Accordingly, citizens and representatives of public interest organizations are entitled to receive full, reliable and timely information on the state of the State Forest Fund and to participate in forest management planning. Also, the Code requires that prior to any decision by the relevant authorities on the use of State Forest Fund, the following information has to be published: the forest management plan; the categories established for the State-owned forests; the protection regime established; and the allocation of areas for forest use for a period of five years or longer.

14. The Environmental Permit Law (subsequently abolished, see below) also established the legal basis for requiring information to be made available to the public and for public participation in the processing of permits for activities relating to the protection of water, wood, land, subsoil and other natural resources (preamble and art. 3). Whether or not the permit process was required depended on the nature of the activity, its size and effect. Permits for long-term forest use and timber activities were subject to this law. The process for a forest use permit involved the carrying out of an environmental impact assessment (EIA) and of a State ecological examination (called a State ecological expertise), and in general a decision-making process, including public participation (art. 4). Public participation was required to permit timber activities as well.

15. The Law on Permits for Impact on the Environment of 14 December 2007, regulating the issuance of permits for activities that may impact the environment, which came into force on 1 January 2008, explicitly abolished the Environmental Permit Law. The new law abandons the approach of considering categories of activities on the basis of their impact on the environment. The new law still requires the carrying out of an EIA for a number of activities, but not for forest use and management. Also, the public participation process has changed: environmental permits were previously issued through a detailed public administrative procedure, whereas under the new legislation permits are issued through the regular public administrative procedure. Finally, the carrying out of State ecological expertise, which had previously been regulated by the Law on State Ecological Expertise, has been replaced by the new Law on Ecological Expertise of 1 January 2008.

16. Meanwhile, the Law on Licences and Permits of 24 June 2005 had come into force. This law defines the list of categories of licences and permits and sets up the rules for the issuance, amendment and abolishment of licences and permits. In addition, Resolution No. 132 on approval of the provisions on the rules and conditions for issuance of licences on forest use of 11 August 2005 (hereinafter Resolution No. 132) was enacted to allow for the issuance of long-term licences on forest resource use. According to that resolution, information regarding auctions for the award of forest use licences should be announced in the press one month before the auction date.

Facts

17. On 1 May 2007 and on 7 and 8 October 2008, the Government carried out auctions for the award of long-term forest use licences.

18. According to the communication, the Ministry of Environmental Protection and Nature Resources publicly announced the auction of 1 May 2007 one month in advance. At this auction, licences for long-term use of forest areas in the regions of Kakheti, Samegrelo-

Zemo Svaneti and Samtskhe-Javakheti were auctioned. The Ministry of Economic Development publicly announced the auction of 7–8 October 2008 on 5 and 10 September 2008 in the newspaper "24 Saati" ("24 Hours") and also on the Ministry's website. At this auction round, licences for long-term use of forest areas in the regions of Kakheti and Mtskheta-Tianeti, Shida-Kartli, Samtskhe-Havakheti, Guria, Samegrelo-Zemo Svaneti and Imereti were auctioned.

19. As a result of these auctions, licences were issued to companies for forest harvesting activities, which, according to the communicant, started immediately after the award of the licences (annex 4 to the communication lists the developers that were awarded licences, and the Party concerned also provided a list in its response dated 19 November 2009).

20. Another auction was initially scheduled to take place on 11 December 2008, but was cancelled further to protests from the affected population, who claimed that there would be an irreversible impact on the environment if the auctions went ahead.

21. The communicant also reports that, in 2008, a team of technical experts conducted field visits to evaluate the situation in the forest sites for which forest use licences had already been awarded in 2007 and in those sites for which an auction was scheduled in 2008. In the view of that team, the public authorities had failed to diligently monitor the activities for which the licences had been awarded and the areas were socially and economically affected.

Substantive issues

22. The communicant alleges that the long-term forest licences issued after the auctions in May 2007 and October 2008 are permits within the ambit of article 6, paragraph 1 (b), of the Convention, since the Party concerned has already decided to subject the activities for which the licences are awarded to public participation provisions, due to their size, location and effects (para. 14 above).

23. According to the communicant, the public concerned, including local citizens who were directly affected by the activities for which the licences were awarded, was not informed about the decision-making in an adequate, timely and effective manner, because the local population has no or very limited access to national mass media and the Internet, where the auctions were announced, and hence the Party concerned failed to comply with article 6, paragraph 2, of the Convention.

24. The communicant argues that the auction of 1 May 2007 was subject to the Environmental Permit Law and the auction of 7–8 October 2008 was subject to the Law on Permits for Impact on the Environment. The latter, in the view of the communicant, has weakened the public participation component of the decision-making process; it does not require the conduct of an EIA or of a State ecological expertise for forest use and management activities. According to the communicant, by failing to provide the opportunity for effective public participation, when all options were open, the Party concerned failed to comply with article 6, paragraph 4, of the Convention.

25. Moreover, the communicant argues that Resolution No. 132, together with Order No. 1–1/480 of the Minister of Economic Development of 4 April 2008 on the "Rules of Conduct of Auctions for the Purpose of Issuance of a Licence on Use, Establishment of the Initial Price of the Licence on the Use and Payment Method"[2], do not ensure public participation in administrative procedures, including in auctions for the award of long-term forest use licences. The communicant alleges that by failing to provide for the obligation of

[2] Title of the order per the English translation provided by the parties.

the authorities to inform the public in an adequate and effective manner, as well as to involve the public in the decision-making process, Resolution No. 132 is not in compliance with article 6, paragraphs 2 and 4, of the Convention. In support of its argument, the communicant submitted the legal opinion of the Aarhus Centre of Georgia, stating that the Resolution at issue is a by-law in the sense of article 8, of the Convention, and that its content is not in compliance with the Constitution of Georgia, the laws of Georgia (the Forest Code and the Environmental Permit Law) and the international obligations derived from the Aarhus Convention.

26. The Party concerned declares it is in compliance with the Convention and questions the legal basis of the communicant's arguments. It argues that the Law on Licences and Permits of 2005 abolished the 1996 Environmental Permit Law. For this reason, article 6, paragraph 1 (b), of the Convention is not applicable. However, forest use licence terms and conditions envisage the maintenance of an ecological balance.

27. The Party concerned states that the decision to hold an auction constitutes a legal administrative act, according to the General Administrative Code. Details of the auction are published on the Internet and in the printed media one month before the date of the auction and any interested party has the possibility to protect their legal rights before the auction, during the administrative procedure before the issuance of the licence and after the issuance of the licence.

28. With regard to the auctions at issue, the Party concerned affirms that all the necessary information was published within the applicable deadlines and that the public had the time and the opportunity to challenge any Government acts through the available administrative and judicial review procedures, as provided in particular in the General Administrative Code and Resolution No. 132. In its view, the fact that the auction of 11 December 2008 was cancelled further to the administrative action from the public demonstrates that Georgian law provides for effective protection of public participation rights (see para. 32 below).

Use of domestic remedies

29. According to the communicant, a number of civil society organizations, including the communicant, and representatives of the scientific community, had appealed before the relevant authorities against the auction of October 2008, but the authorities never responded to the appeal.

30. On 24 June 2007, the association Green Alternative (at times collaborating with the communicant) filed an administrative appeal to the Prime Minister requesting the repeal of the decrees of the Ministry of Environmental Protection and Natural Resources that confirmed the result of the auction of 1 May 2007. On 3 August 2007, the Prime Minister refused to repeal the decrees in question. On 12 September 2007, the Green Alternative appealed the Prime Minister's decision at the Tbilisi Administrative Court with the same request to repeal the decrees. The hearing took place on 15 September 2008. The communicant argues that neither the licensee nor representatives of the Ministry of Economic Development (i.e., the ministry responsible for the auction of 1 May 2007) were present, whereas the Party concerned claims that the Ministry of Environmental Protection and Natural Resources, the Ministry of Economic Development and the Prime Minister were represented at the proceedings. On 25 September 2008, the Court turned down the appeal. In the view of the communicant, the Court did not specify the grounds for the rejection; the Party concerned disagrees.

31. On 6 November 2007, the Green Alternative filed a petition with the Ombudsman requesting that it examine the legitimacy of the licences awarded through the decrees following the auction of 1 May 2007. The Ombudsman considered that the process for

promulgating the decrees at issue was not in compliance with Georgian legislation and issued a recommendation letter addressed to the Minister of Environmental Protection and Natural Resources that the decrees be repealed. The Minister did not react to the Ombudsman's recommendation.

32. In fall 2007, it was announced that an auction for long-term forest use licences was scheduled to take place in December 2007; the auction was later postponed to February 2008. The Green Alternative filed an application to the Administrative Court, requesting the cancellation of the planned auction. At the hearing of 5 February 2008, the authorities presented a temporary decision of the Acting Minister of Environmental Protection and Natural Resources of 29 January 2008 that cancelled the auction. Given the temporary character of the cancellation decision, the Green Alternative appealed before the Prime Minister to repeal the decree of the Ministry of Economic Development authorizing the auctions.

III. Consideration and evaluation by the Committee

33. The Aarhus Convention was signed by Georgia on 25 June 1998 and entered into force for Georgia on 30 October 2001.

34. The communicant is a non-governmental organization promoting environmental protection and falls under the definition of "the public" and the "public concerned" as set out in article 2, paragraph 5, of the Convention.

Clear, transparent and consistent framework (art. 3, para. 1)

35. The following decisions are being challenged before the Committee: the forest use licences issued by auction of 1 May 2007; those issued by auction of 7–8 October 2008; and those that had been planned to be issued by auction of 11 December 2008. The Committee observes that the auction of 11 December 2008 was eventually cancelled; for this reason, it decides not to examine the events surrounding the decision-making process involving the auction of 11 December 2008.

36. At the outset, the Committee notes that at the written and oral submissions of the parties, there was lack of clarity with regard to the applicable law regulating administrative proceedings for the issuance of licences and permits at the time of the forest licences relating to the two auctions (paras. 24 and 26 above).

37. The Committee notes that when the Law on Licences and Permits and Resolution No. 132 concerning licences on forest use came into force in 2005, the Environmental Permit Law of 1996 had not been formally revoked. With regard to the hierarchy of norms, the Committee recalls the general principles of law according to which a new law sets aside an old law. In addition, the Party concerned submitted the text of article 25 of the Georgian Law on Normative Acts confirming that principle and confirming that the two laws are of the same hierarchical level, while Resolution No. 132 was enacted to detail rules and conditions for issuance of licences on forest use. The communicant has not challenged these arguments. Hence, the licences issued by auction of 1 May 2007 were governed by the 2005 Law on Licences and Permits and Resolution No. 132.

38. For the auction of 7–8 October 2008, the Committee notes the entry into force of the Law on Permits for Impact on the Environment on 1 January 2008, which explicitly abolished the 1996 Environmental Permit Law. The Committee recalls the general principles of law according to which a special law sets aside a general law. In this regard, it notes that the 2005 Law on Licences and Permits and Resolution No. 132 regarding forest sector licences were not superseded by the 2008 Law on Permits for Impact on the

Environment, because the scope of the two laws was parallel and distinct. The latter includes a list of activities and sectors that it regulates and forest use licences are not mentioned. Hence, the Committee understands that the same legal framework applies to the licences issued by auction of 7–8 October 2008, as for the licences issued by auction of 1 May 2007, namely the 2005 Law on Licences and Permits and Resolution No. 132.

39. At the same time, the Committee notes that the Forest Code has been in force since 1999 and is applicable to both auctions. The Forest Code provides for its hierarchical superiority over any other laws and regulations on forest matters (art. 115.1: Should this Code and other laws regulating forest relations conflict, this Code has a superior power over the other) and is a legal text of general reference with regard to the conservation, use and management of forest resources.

40. The Forest Code provides for public participation rights as detailed in the 1996 Environmental Permit Law (Forest Code art. 35). Given that the 1996 Environmental Permit Law was tacitly abolished by the 2005 Law on Licences and Permits and Resolution No. 132 of 2005, the Committee understands that after 2005, when Resolution No. 132 came into force, the public participation rights in forest management use and planning continued to be warranted by the 1999 Forest Code; however, such rights were no longer detailed in the Environmental Permit Law, but in the provisions of administrative code on public participation in decision-making, which were incorporated by reference in Resolution No. 132 (art. 4). Hence, in the view of the Committee, for the sets of licences issued by the auctions of 1 May 2007 and 7–8 October 2008, the rights of the public to participate in the decision-making process to issue such licences were established by the Forest Code and further detailed by Resolution No. 132 of 2005 and the relevant administrative code provisions on public participation for any administrative decision.

41. The Committee finds that, in its written and oral submissions, the Party concerned was not very clear on whether the legal framework, and in particular the provisions concerning the rights of the public to participate in the decision-making regarding the granting of forest use licences, had changed or not after 2008. The Committee acknowledges that administrative law is rather complex in many jurisdictions. It finds that the Georgian legislation related to public participation in respect of forestry is rather unclear and complicated and, in its view, this situation should be remedied. The Committee, however, refrains from examining whether this amounts to non-compliance with the requirements of article 3, paragraph 1. This is because the relevant activities in accordance with the Committee's findings relating to article 6, paragraphs 1 (a) and (b) fall outside the scope of the Convention (see below) and thus the relevant legislation relating to the activities at issue does not implement the Convention as required by article 3, paragraph 1.

Decisions on specific activities (art. 6, para. 1)

42. The main allegations of the communicant concern the failure of the Party concerned to comply with article 6, paragraphs 2 and 4. In this respect, the Committee assessed whether the forest use licences issued by auctions of 1 May 2007 and 7–8 October 2008 were administrative decisions that permit activities which are subject to subparagraphs (a) or (b) of article 6, paragraph 1.

43. Article 6, paragraph 1 (a) applies to decisions on whether to permit proposed activities listed in annex I to the Convention. Forest use and management activities are not listed in this annex to the Convention. However, paragraph 20 of the annex also includes all activities that according to domestic law require EIA with public participation. The Committee observes that the determination of whether an activity falls within the ambit of paragraph 20 of annex I to the Convention depends on three elements, namely: (i) public participation; (ii) EIA in the context of which public participation takes place; and (iii) domestic legislation providing for EIA.

44. In the context of the present case, it is clear that, until 2005, forest use projects were subject to EIA according to the 1996 Environmental Permit Law. The legal environment changed in 2005, when the Georgian Law on Licences and Permits and Resolution No. 132 came into force and the national legislature thereby tacitly abolished the 1996 environmental permit regime. Through the new laws, forest use and management were no longer subject to EIA.

45. However, the Forest Code, which is still in force and constitutes the main legal reference for public participation in forest use and management activities, warrants public participation rights of citizens and representatives of public organizations in the decision-making process for managing the State Forest Fund. Until 2005, public participation rights were further provided under the EIA procedure detailed in the 1996 Environmental Permit Law. The Party concerned during the discussion of the communication stated that while forest use is no longer subject to EIA, a number of steps precede the issuance of a licence that include elements of an EIA, although not officially requiring an EIA. These steps involve assessments and studies in order to develop the terms of a licence, including quantitative restrictions on logging and other conservation and sustainable use measures (see in particular arts. 4 and 8 of Resolution No. 132).

46. The Committee notes that even if paragraph 20 of annex I to the Convention refers to the taking place of an EIA, national legislation may provide for a process that includes all basic elements for an EIA, without naming the process by the term "EIA". Such a de facto EIA process should also fall within the ambit of annex I, paragraph 20. It is critical, however, to define the extent to which the de facto EIA process qualifies as an EIA process, even if it is not termed as such.

47. Within the jurisdiction of the Party concerned, there is presently a process termed EIA (for instance under the 2008 Law on Permits for Impact on the Environment), which encompasses public participation for the issuance of licences of an exclusive list of activities, in which forest use and management are not included; and there is also a process preceding the issuance of other licences, such as the forest use licences under Resolution No. 132 where, according to the submissions of the Party concerned, the key elements of an EIA process, including public participation (under the administrative code) are integrated (de facto EIA). In this case, however, the Committee is not convinced that the de facto EIA process for the issuance of forest use licences amounts to an EIA in the meaning of annex I, paragraph 20. In that regard, the Committee notes that Georgian legislation already provides for EIA under specific activities listed in its 2008 Law on Permits for Impact on the Environment, among which forest use activities were not included. This is an indication that the national legislature did not have the intention to subject forest use and management activities to an EIA process. Therefore, the Committee finds that licences issued by the auctions of 1 May 2007 and 7–8 October 2008 are not decisions within the scope of article 6, paragraph 1 (a), of the Convention.

48. The Committee considered whether the forest use licences at issue are decisions in the meaning of article 6, paragraph 1 (b) of the Convention. In this case, the Committee is not convinced that article 6, paragraph 1(b) is applicable.

IV. Conclusions and recommendations

A. Findings

49. As regards the alleged non-compliance with the provisions of article 6, paragraphs 2 and 4, the Committee finds that Georgia is not in a state of non-compliance, because the

decisions at issue do not fall within the ambit of article 6, paragraph 1 (see paras. 47 and 48 above).

50. While the Committee does not find that the Party concerned fails to comply with the Convention, it finds that the Georgian legislation relating to public participation in respect of forestry is rather unclear and complicated and this in the view of the Committee should be remedied (see para. 41 above).

B. Recommendation

51. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, noting the agreement of the Party concerned that the Committee take the measure referred in paragraph 37 (b) of the annex to decision I/7, and noting with appreciation the ongoing work on the national Environmental Code, recommends that the Party concerned take the necessary steps to ensure that its national legislation with regard to public participation in respect of forestry is clear.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Twenty-eighth meeting
Geneva, 15–18 June 2010

Report of the Compliance Committee on its Twenty-eighth meeting

Addendum

Findings and recommendations with regard to communication ACCC/C/2009/36 concerning compliance by Spain

Adopted by the Compliance Committee on 18 June 2010

I. Introduction

1. On 2 March 2009, the Spanish non-governmental organization (NGO) "Plataforma Contra la Contaminación del Almendralejo" (hereinafter the communicant) submitted a communication to the Committee alleging the failure by Spain to comply with its obligations under article 3, paragraph 8, article 4, paragraphs 1 and 2, article 6, paragraphs 4 and 5, and article 9, paragraphs 1 and 5, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication alleges a general failure of the Party concerned to implement several provisions of the Convention. In particular, the communicant alleges that by failing to ensure that public authorities provide environmental information upon request in a timely manner and without the need to state an interest, the Party concerned is not in compliance with article 4, paragraphs 1 and 2, of the Convention; that by failing to ensure that its public authorities allocate sufficient time for public consultations on complex projects and provide appropriate access to project documentation, the Party concerned is not in compliance with article 6, paragraphs 4 and 5, of the Convention; and that by excluding small NGOs from

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legal aid for bringing cases to the courts, the Party concerned is not in compliance with article 9, paragraphs 1 and 5, of the Convention. The communication presents a number of cases to support the allegations of non-compliance. Finally, the communicant alleges non-compliance with article 3, paragraph 8, of the Convention, because its members have been publicly insulted and harassed by the Mayor of Almendralejo in the mass media.

3. At its twenty-third meeting (31 March–3 April 2009), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 7 May 2009. On 16 June 2009, the secretariat sent a letter to the Party concerned with a number of questions raised by the Committee members regarding the communication.

5. At its twenty-fourth meeting (30 June–3 July 2009), the Committee agreed to discuss the content of the communication at its twenty-sixth meeting (15–18 December 2009).

6. On 4 November 2009, the Party concerned addressed the questions raised by the Committee and, by letter dated 27 November 2009, it sent additional comments and commented on the allegations contained in the communication.

7. The Committee discussed the communication at its twenty-sixth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. The Party concerned submitted additional information to the Committee on 13 January, 3 February and 3 March 2010 and the communicant submitted information on 24 January, 21 February and 5 March 2010. The Committee prepared draft findings at its twenty-seventh meeting (16–19 March 2010), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 28 April 2010. Both were invited to provide comments by 26 May 2010.

8. The Party concerned and the communicant provided comments on 28 May 2010 and 6 May 2010, respectively.

9. At its twenty-eighth meeting (15–18 June 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the meeting report. It requested the secretariat to send the findings to the Party concerned and to the communicant.

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

National legal framework

10. Law 27/2006 of 18 July 2006 is the main piece of legislation transposing the Aarhus Convention into domestic law in Spain.

11. Access to information is covered by Law 27/2006 and also by a number of other legal instruments, including, inter alia, Law 30/1992 on the legal system of public administration and the common administrative procedure; Law 11/2007 on electronic access by citizens to public services; and Law 37/2007 on reuse of public sector

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

information. In addition, Royal Legislative Decree 1/2008 on environmental impact assessment (EIA) ensures that the public is informed about the availability of information gathered in the context of an environmental impact study. Finally, Law 16/2002 on integrated pollution prevention and control (IPPC) also provides for the rights of the public to access information in the matters it regulates. Law 30/1992 (article 37.7) requires that sometimes the physical presence of the requester, or her/his legal representative, is required in order to obtain information in cases of large and complex records.

12. Permits for the carrying out of certain activities are granted by the local authorities (councils) in whose area the activity takes place. In general, according to the 1978 Constitution, extensive administrative and legislative competences are allocated to the Autonomous Communities (*juntas*). According to the relevant national and European Union (EU) legislation, the competent body of the Autonomous Community drafts a report on the activity (unless otherwise provided by the local legislation), and if it forms a negative opinion regarding the activity the local authorities do not issue the licence.

13. Public participation is provided for by Law 27/2006, and also by EIA and IPPC relevant legislation (Royal Legislative Decree 1/2008, in conjunction with Law 30/1992, and Law 16/2002).

14. Law 27/2006, in conjunction with Law 30/1992 (art. 20 et seq.), provides for the rights of the public regarding access to justice in the case of breach of environmental legislation: the acts and omissions of a public authority can be challenged by initiating administrative and judicial (civil and criminal) procedures. Also, legal entities which by their statute have the objective of protecting the environment have the right to bring judicial action, as long as they have been legally constituted for at least two years before bringing proceedings and have been carrying out the purposes specified in their statutes in the territory affected by the administrative action or omission.

15. According to Law 1/1996, in order to receive financial aid, non-profit entities, including NGOs, have to be recognized as "public utility associations", as defined in article 32 of Organic Law 1/2002 of 22 March. Specifically, to obtain financial aid NGOs have to comply with the following requirements, inter alia: their statutory objectives must tend to promote the public interest (including family, human rights and the environment); they must have adequate staff, equipment and organization to ensure compliance with their statutory objectives; and they have to have been effectively fulfilling their statutory purposes for two years. In addition, according to Royal Decree 1740 of 19 December 2003 on procedures applicable for the declaration of an entity as a public utility/interest entity, interested entities must provide details on their human and financial resources (art. 2, paras. 4 (f) and (g), respectively).[2]

16. In terms of legal representation, article 23.2 of Law 29/1998 requires that parties to a court case on appeal, which will be heard by two or more judges, must have two lawyers, one "procurador" and one "abogado". This requirement is not applicable when the case is initially brought to a first instance court, where it is heard by one judge.

17. Finally, the Spanish Constitution (art. 54) provides for the institution of the Ombudsperson (Defensor del Pueblo),[3] under the high commissioner of the Parliament, with the mandate to defend the basic rights of citizens and to supervise the activities of

[2] "4. La memoria de actividades deberá referirse pormenorizadamente a los siguientes extremos: ...
(f) Los medios personales de que disponga la entidad, con expresión de la plantilla de personal;
(g) Los medios materiales y recursos con los que cuenta la entidad, con especial referencia a las subvenciones públicas y su aplicación."

[3] Further information on the Spanish Ombudsperson is available at: http://www.defensordelpueblo.es/.

public administration. Its mandate is further regulated mainly by Organic Law 3/1981. The Ombudsperson performs its functions autonomously. After it has received a complaint which it considers admissible, the Ombudsperson examines the case. The public authority against which the complaint has been submitted may be required to respond in writing. Depending on the outcome of its investigation, the Ombudsperson makes recommendations to the authority. If the latter, within a reasonable period of time, has not taken any action to implement the Ombudsperson's recommendations or fails to notify the Ombudsperson why it has not been able to do so, the Ombudsperson may inform the authority supervising the authority concerned. In case of continuous non-compliance, the Ombudsperson includes the case in its annual report or in a special report to the Parliament.[4]

Facts

18. Almendralejo is a city of approximately 30,000 inhabitants in the autonomous community (*junta*) of Extremadura. The communicant describes a trend towards increasingly polluting industrial activity in Extremadura, including, inter alia, the construction of an oil refinery in the area of Sierra de San Jorge and three thermal power stations in the area of Alange-Mérida. The communicant provides some general information on its efforts to access information held by the local authorities, including concerning waste disposal activities, but its communication focuses on alleged non-compliance by the Party concerned with regard to two projects, the Vinibasa distillery and the oil refinery project in the area.

Waste disposal

19. The communicant says that it submitted several requests for access to information held by the local authorities concerning the operation of a waste treatment plant and, in particular, its compliance with the Municipal Regulation on Waste Disposal and Treatment.

20. Specifically, the communicant claims that it submitted a first request on 2 June 2005, and reiterated the same request on 23 June 2005. The authorities responded to both requests — initial and reiterated — on 26 October 2005, five months after the submission of the initial request. On 21 September 2007, the communicant submitted a new request for information (annex 1 to the communication). The Mayor responded on 21 November 2007, and attached a response from the technical matters division of the municipality. The request of the communicant was denied on the grounds that there was no motivation and no purpose for such a request and that only city councillors had the right of access requested by the communicant (annex 2 to the communication).

21. In addition, on 17 January 2008, the communicant informed the Ministry of Environment about the problems caused by the waste disposal and treatment plant (annex 3 to the communication). On 17 March 2008, the Ministry responded that the concerns of the communicant regarding the behaviour of the authorities were beyond the Ministry's competence. The Ministry informed the communicant about its rights deriving from Law 27/2006 and advised it to refer the case to the courts (annex 4 to the communication).

Vinibasa distillery

22. The communicant provides information in his communication about activities relating to the wine distillery Vinibasa in the urban area of Almendralejo (a full chronology of the events can be found in annex 29 to the communication). According to the communicant, the plant had no permit to carry out some activities that put at risk the health

[4] Organic Law 3/1981, article 30.

and the physical integrity of the population. Specifically, Vinibasa's proposals for a permit to introduce changes to its installations had been rejected by the relevant local authorities. As a result, the odours in the city were intolerable and the methane atmospheric concentration was very high. Also, according to the communicant, there were 2 million litres of alcohol and 25 million tons of used *orujo* (strong alcoholic liquor distilled from grape or herbs pressings) stored in the facilities of Vinibasa. The local authorities never intervened, despite the complaints submitted by the local population.

23. The communicant reported Vinibasa's activities to "El Servicio de Protección de la Naturaleza" (SEPRONA), the national environmental authority. SEPRONA verified the facts and, on 27 November 2007, reported to the responsible authorities: (a) the Guadiana Hydrographic Confederation (CHG) for violation of the Water Law; (b) the Directorate-General for Environmental Assessment and Quality (Section of Non-hazardous Waste of the Autonomous Community of Extremadura) for violation of the Waste Law; (c) the Directorate-General of Agricultural Development of Extremadura for violation of Royal Decree 1310/1990 regulating the use of the waste mud in the agricultural sector; and (d) the Director General of Industrial Planning for violation of Law 38/1972 on the Protection of the Atmospheric Environment.

24. On 4 December 2007, the communicant sent a letter to CHG (at the Ministry of Environment), requesting information on the measures it took after SEPRONA reported the violations by Vinibasa. The communicant did not receive any response. On 18 February 2008 the communicant requested a review of this request before the Minister of Environment. On 11 April 2008, the Secretary General of CHG replied to the communicant that fact-finding was being carried out to determine whether a violation of article 116 of the Water Law had taken place and that the communicant would be informed of the results. On 1 August 2008, the communicant wrote to CHG enquiring about the development of the case (annex 6 to the communication). The communicant claims that it has received no reply from the authorities.

25. The Directorate-General of Agricultural Development of the Autonomous Community of Extremadura also responded that a disciplinary record could not be opened, because the company using the waste mud was located in Andalusia. The Directorate-General of Industrial Planning, Energy and Mining refused access to the file on the grounds that the communicant "could not be considered as an interested person".

26. The communicant decided to produce a report on possible emissions of dioxins and furans. On 11 December 2006 the communicant submitted its report and supporting bibliography to the Directorate-General of Consumer Affairs and Community Health of the Autonomous Community of Extremadura.

27. On 27 February 2007, the communicant was invited to a meeting with the Head of the Food Security and Environmental Health and the Head of the Epidemiology Service, as well as with an administrative officer of the latter. They had examined the documentation submitted by the communicant and agreed that there was a need to investigate the matter. The Head of the Epidemiology Service agreed to carry out a study on the possible effects on citizens' health caused by the emissions from the incineration. Also, the Food Security and Environmental Health Service committed to request the Directorate-General of Environment to carry out a full analysis of the emissions by Vinibasa.

28. The first study was carried out as agreed and confirmed the communicant's previous report. The Head of the Food Security and Environmental Health Service had also invited the "Servicio Ambiental de Racionalización de Actividades" to conduct the second study at issue (annex 7 to the communication), but it has never been conducted.

29. The communicant also claims that due to its action undertaken against Vinibasa, the Mayor of Almendralejo accused the members of the association (communicant) in the mass

media as “new inquisitors”, “manipulators” and “ignorant”, and said that “they only try to promote scandal in the city, looking for publicity with unfounded accusations” (annexes 8–10 to the communication).

Oil refinery in Sierra de San Jorge

30. In addition, the communicant alleges that the public is not informed about and is not given the opportunity to participate in the decision-making for the projects currently being implemented in Extremadura.

31. On 3 June 2008, there was an announcement in the Official Bulletin of the province of Badajoz (issue 105) about the display and presentation to the public of the oil refinery project in Sierra de San Jorge. Accordingly “for a period of 30 days starting one day following the publication day of the announcement, any interested party can examine the Basic Project and the environmental impact study, as well as the papers relating to the Request for Integrated Environmental Authorization (only for the refinery) in the field of Industry and Energy of the Subdelegation of the Badajoz Government in Avda. The papers relating to the Request for Integrated Environmental Authorization will also be available during this period at the Directorate-General for Environmental Assessment and Quality, the Commission of Industry, Energy and Environment (Autonomous Community of Extremadura)”.

32. On 16 June 2008, the communicant sent a letter to the Directorate-General for Environmental Assessment and Quality within the Ministry of Environment and Rural and Marine Affairs (MARM), and complained that the set conditions, described in the announcement, did not allow for studying all the documentation (annex 11 to the communication). In particular, the communicant complained in its letter that the amount of EIA documentation was very large to be inspected within the set deadline of 30 days; it requested that the EIA documentation be sent to the communicant, preferably in CD-ROM/DVD form, and that the deadline be extended to five months. On 16 July 2008, the Assistant General Director of Environmental Evaluation replied to the communicant that the public information phase of the project at issue had been completed and that he did not have the EIA documentation. He referred the communicant to a directorate at the Ministry of Industry.

33. On the same date (16 June 2008), the communicant sent a similar letter to the Directorate-General for Environmental Assessment and Quality within the Commission of Industry, Energy and Environment of Extremadura. On 9 July 2008, the General Director replied reiterating the existing conditions for the public to access the environmental impact study (annex 13 to the communication), as detailed in the announcement, including the requirement that the requester be physically present before the designated authorities. The communicant adds that it was prohibited from making copies of the project document, taking photos or burning a CD-ROM or DVD with the relevant information.

34. Consequently, the communicant sent a letter to the same authority pointing to the fact that these conditions impeded it from participating in an effective manner and asking the authority to include the complaint in the project authorization. The communicant claims that there were at least 8,000 comments expressed against the project by the local population.

Substantive issues

35. The communicant alleges a general failure by Spain to comply with its obligations under the Convention. In its view, even if the regulatory framework were sufficient, there is no effective implementation. In the case of Vinibasa, the public authorities did not take any effective action (see also annexes 23–28 to the communication, with newspaper excerpts).

This is supported by a further case concerning the wine by-products industry, submitted by the communicant on 11 November 2009 (annexes 17–22 to the communication).

36. The communicant alleges that the Mayor of Almendralejo falsely accused the members of the association in the media because of the actions taken against the projects, and that this constitutes non-compliance by the Party concerned with article 3, paragraph 8, of the Convention. In response, the Party concerned states that any coercive or retaliatory behaviour, including by public administration officials, against citizens exercising their civil and political rights, including activists, contravenes the fundamental constitutional rights and constitutes a crime (art. 169 et seq. and 542 of the Spanish Penal Code).

37. The communicant further alleges that the relevant authorities either responded with great delay to its request for information (i.e., five months after the submission of the request), or else they ignored its requests or denied access to the requested information. Hence, according to the communicant, the Party concerned was not in compliance with article 4, paragraph 2, of the Convention. In addition, the communicant alleges that by requesting an interest to be stated in its request and refusing to provide information in the form requested, the Party concerned was not in compliance with article 4, paragraph 1.

38. The Party concerned argues that existing Spanish legislation protects in an adequate and comprehensive manner the rights of the public for access to information. Spanish administrative authorities at the central and regional level, and especially the citizens' information offices, process a large number of citizens' queries concerning the environment; they respond by phone, by mail, by e-mail or in person. Citizens are informed about the status of their requests and they may obtain copies of the documents requested in person (especially for very large documentation), by phone, fax, mail, or e-mail. The authorities also inform the citizens about their rights to public participation and access to justice. Charges of a reasonable amount may apply for copies of some documents, as provided by law. According to Law 27/2006, the in situ consultation of any public lists or registers or environmental information in general or the copying of up to 20 pages (A4 format) is free of charge. Photocopies can be made at the Government Documentation Centres. It also states that the relevant authorities reported that the communicant had never been denied access to information.

39. The Party concerned also points out that every year the Spanish authorities handle thousands of requests for environmental information, which are generally all processed in a fair and timely manner. However, due to that heavy workload, a case of delay or unfair refusal may occur in the normal course of events and that, in its view, the Convention seems to assume that a refusal or delay in providing information is a perfectly possible outcome.

40. Furthermore, the Party concerned argues that under Spanish administrative law (art. 43 of Law 30/1992 of the Common Administrative Procedure) the lack of response from the administration to a request for information is positive silence.

41. The Party concerned also refers to Law 11/2007 (22 June 2007) on electronic access by citizens to public services; and Law 37/2007 (16 November 2007) on reuse of public sector information, and the great effort of the authorities to have most information available online. In general, the public is encouraged to use the Internet, especially for large amounts of information ("sabia" application on www.mma.es with information on EIA documentation or www.chguadiana.es). For instance, most information on EIA-related project documentation is available at databases administered by MARM and by the environmental affairs departments of the autonomous communities. Therefore the Party concerned denies that the communicant was refused access to information.

42. The communicant alleges that the Vinibasa distillery carried out activities without a permit. In response to this allegation, the Party concerned refers to the report of the

Almendralejo City Council and the report of CHG, both dated 15 September 2009 (and annexed to the response of the Party concerned of 4 November 2009). The City Council report, among others, refers to the applicable regulations and states that local authorities strictly comply with the procedures to grant permits. The CHG report states that, between 2003 and 2007, CHG took 10 disciplinary measures against the Almendralejo City Council for water law violations and accordingly imposed penalties (ranging from 200 to 240,000 euros); and that the last inspection of Vinibasa conducted by the CHG Water Quality Department on 3 July 2009 confirmed that the facility was operating in compliance with water legislation. The Party concerned also says that Vinibasa has permanently closed its facilities.

43. With regard to the other main allegation at issue, the communicant alleges that the conditions set for the public to participate in the decision-making for the oil refinery project in Sierra de San Jorge were restrictive: in its oral submissions the communicant stated that the information was accessible in the village of Merida, approximately 30 kilometres away, and for the pipeline component of the project, approximately 200 kilometres from Almendralejo; that the public could only access the information, which exceeded 1,000 pages, through three computers on the site, one of which did not function; and that the information was not allowed to be copied in a digital form from the computers despite the communicant's request. For these reasons, in the view of the communicant, the Party concerned did not allow for early and effective public participation and was not in compliance with article 6, paragraph 4, of the Convention.

44. In response to the allegations of the communicant concerning the oil refinery, the Party concerned claims that the EIA procedure for the project "Construction of an Oil Refinery in Extremadura (Balboa) in the municipality of Mainona Saints Badaloz" is managed by the Directorate-General for Environmental Assessment and Quality of MARM. The project involves the refinery itself and all the facilities and infrastructure necessary for its operation, including a number of pipelines for waste and natural gas, energy lines, etc. The Party concerned argues that the EIA process for the project has not been completed yet. In fact, according to the Party concerned, the public information procedure has already taken place (organized by the Ministry of Industry, Tourism and Trade) in the provinces of Badajoz, Seville and Huelva and that on 20 October 2008, the results of the procedure were submitted to the Directorate-General for Environmental Assessment and Quality for the preparation of the environmental impact study.

45. With regard to public participation, in general, the Party concerned refers to the applicable legislation and argues that the central Government and the autonomous communities strongly encourage the exercise of public participation rights at an early stage by publishing all information on the Internet and by notifying associations, organizations and stakeholders. For instance, in the case of the oil refinery project, the "non-technical summary" and the "synthesis document" of the environmental impact study were available to the public on the Internet. The Party concerned states that, in practice, the environmental impact study takes into account the public information outcome and a project is authorized only after due consideration of the views expressed by the public during the EIA process. Since the entry into force of Law 27/2006, plans and programmes by MARM support public participation and all relevant information, including the so called "Aarhus report", are published. Also, the Party concerned states that projects affecting the environment and health are extensively regulated by Spanish and EC legislation (e.g., EIA and IPPC Directives).

46. The communicant alleges that, by denying free legal aid, the Party concerned made access to justice impossible for the communicant because of lack of resources and that it therefore failed to comply with article 9, paragraphs 1 and 5 of the Convention. The communicant argues that it is a small NGO with an extremely limited budget

(approximately 150 euros), and is heavily dependent on the voluntary contributions of its members. The communicant further explains that, because of its financial situation, it cannot be declared as a public utility/interest entity and thus cannot benefit from free legal aid. In addition, the communicant claims that the requirement of Spanish legislation for dual representation for cases on appeal (see para. 16 above) poses difficulties for individuals and entities with limited financial resources to pursue justice. In general, the communicant alleges that Law 1/1996 is outdated and should be amended to allow for small NGOs to benefit from legal aid.

47. The Party concerned claims that the existing system of legal aid is in compliance with article 9, paragraph 5, of the Convention. It asserts that the only financial requirement for NGOs, including small ones, is that members of NGO representative bodies do not receive public funds. The Party concerned believes that, not only has it considered the establishment of such financial assistance mechanisms, as provided by the Aarhus Convention, but it has a fully operational system to this effect. Also, on the requirement for dual legal representation, the Party concerned stresses that the rule of dual representation applies only to higher courts composed of more than one judge; and that, in any event, before pursuing judicial remedies, the public concerned have the possibility to seek review by the administrative authorities, which is entirely free of charge and does not require any legal representation or assistance.

48. On a final point, the Party concerned, in its letter dated 27 November 2009, stresses that according to the Spanish Constitution the activities carried out by the Almendralejo authorities are the sole responsibility of those authorities and that the central Government cooperates with them.

Use of domestic remedies

49. The communicant claims that recourse to justice was attempted twice, but its applications for free legal aid, as prescribed in Law 1/1996, were denied. Specifically, the first request for legal aid submitted by the communicant to the relevant authorities on 2 December 2008 was denied and the communicant appealed this decision before the court in Almendralejo. The Court, in its decision of 4 December 2008, rejected the appeal on the grounds that the legal requirements for provision of legal aid according to Law 1/1996 in conjunction with Law 27/2006 were not fulfilled (annex 15 to the communication). The second request was submitted to the relevant authorities and rejected on 29 July 2008. The communicant appealed against this decision of the authorities before the administrative court in Merida, which turned down the appeal on 23 December on the grounds that the organization could not derive any rights prescribed in Law 1/1996 and that the decision of the authorities on free legal aid did not infringe any constitutional rights of the organization (annex 16 to the communication).

50. The communicant also reported the Vinibasa case and the three thermal power stations to the Ombudsperson in Spain, who, in his letter dated 16 April 2009, said that investigations would start (annex 30 to the communication). The Ombudsperson did not find that the problem stemmed from a lack of public participation; however, he found there was serious pollution and inadequate administrative supervision (Annex 30).

III. Consideration and evaluation by the Committee

51. The Aarhus Convention was signed by Spain on 25 June 1998, ratified on 29 December 2004, published in the Spanish Official Journal on 16 February 2005 and entered into force for Spain on 29 March 2005. As mentioned above, on 18 July 2006, the

Government of Spain enacted Law 27/2006 regulating the rights of access to environmental information, public participation, and access to justice in environmental matters.

52. The Committee notes that it is an obligation for the Government to ensure that all public authorities, central or regional, apply the provisions of the Convention and the relevant legislation.

53. The Committee recalls that in some cases it had decided to suspend consideration of a communication, pending decision by the national ombudsman (see, e.g., ACCC/C/2008/28 Denmark). The Committee, after having taken into account the diversity of the national legal systems and that the powers of the Ombudsperson under the Spanish system seem to be rather limited, decides to consider the present communication.

Access to information without stating an interest (art. 4, para. 1 (a))

54. The communicant provided information evidencing that in several instances it was denied access to information because the authorities said it did not have a sufficient interest to justify obtaining information (see paras. 20 and 25 above), which was denied by the Party concerned. However, the Committee has looked at the replies of the authorities provided by the communicant in its written submissions and concludes that they confirm the allegations of the communicant. Hence, the Committee finds that the public authorities failed to make the requested information available without an interest having to be stated and that the Party concerned therefore failed to comply with article 4, paragraph 1.

Access to information within one month (art. 4, para. 2)

55. The communicant provided evidence that on several occasions public authorities did not respond to its requests for access to information (see para. 24 above); or replied with great delay, i.e. in different instances five, two and four months, respectively, after the request (see paras. 20, 21 and 24 above). The Committee acknowledges that in several instances the public authorities did respond to the requests of the communicant within one month from the date of the request, and sometimes they required the physical presence of the communicant (see, e.g., paras. 32 and 33).

56. Although the Convention does not envisage a heavy workload as a justification for not meeting the deadlines for provision of environmental information or as one of the exceptions indicated by the Convention, nevertheless the Committee appreciates that in certain circumstances a temporarily heavy workload may cause some delays. In no circumstances, however, can it justify lack of any response at all to requests for information or providing it later than two months after the request.

57. The Committee is also of the opinion that, while in many instances, in particular where enjoyment of certain rights depends upon prior agreement of the public authorities, the silence of public authorities may be considered as "tacit agreement" and therefore an acceptable legal technique, the concept of "positive silence" cannot be applied in relation to access to information. The right to information can be fulfilled only if public authorities actively respond to the request and provide information within the time and form required. Even establishment of a system which assumes that the basic form of provision of information is by putting all the available information on publicly accessible websites does not mean that Parties are not obliged to ensure that any request for information should be individually responded to by public authorities, at least by referring them to the appropriate website.

58. Furthermore, the Committee would like to underline that article 4, paragraph 7, of the Convention specifically prohibits a Party from using the concept of "positive silence" for information requests. It provides that a "refusal of a request shall be in writing if the request was in writing […] A refusal shall state the reasons for the refusal […]".

59. Therefore, the Committee finds that in most cases under consideration in the present communication, the Spanish authorities failed to make the information available as required by article 4, paragraph 2, of the Convention.

Access to information in the form requested (art. 4, para. 1 (b), in conjunction with art. 6, para. 6)

60. In the case of the oil refinery project, the Committee notes that the public authorities made the information available only in one location and that the physical presence of the requester was necessary (to access the data in the computers); that they did not allow for the digital copying of the information available on the computers in Merida; that they did not provide the information to the communicant in the form requested; and that they did not refer to any website or database where all this information would be available without charge to the communicant.

61. The Party concerned considers that having two fully operational computers at the location and posting the information on the website to be "sufficient and relevant" for article 6 purposes and that there is no need that the information be "brought to somebody's house". The Committee recognizes that article 6, paragraph 6, refers to giving "access for examination" of the information that is relevant to decision-making, but the Committee notes 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 close to the place of residence of the requester or entirely in electronic form, if the requester lives in another town or city. 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.

Reasonable timeframes and access to information (art. 6, paras. 3 and 6)

62. The Committee notes that public participation in decision-making for a specific project is inhibited when the conditions described by the communicant in the case of the oil refinery project are set by the public authorities. The Committee finds that, by requiring the public to relocate 30 or 200 kilometres, by allowing access to thousands of pages of documentation from only two computers without permitting copies to be made on CD-ROM or DVD, and by, in these circumstances, setting a time frame of one month for the public to examine all this documentation on the spot, the Spanish authorities failed to provide for effective public participation and thus to comply with article 6, paragraphs 6 and 3, respectively, of the Convention.

Anti-harassment (art. 3, para. 8)

63. The communicant alleged that it was insulted and harassed by local authorities in the mass media. The communicant provided copies of press articles in support of its allegation (see para. 29 above and annexes 8–10 to the communication). Also, the communicant stressed the weight such insults may have for the individual in a small community, compared to bigger cities, to the extent that the private life of the individual is seriously attacked and his/her job may be jeopardized. The Party concerned in general stated that such behaviour from the public authorities constitutes a criminal act, but did not specifically respond to the allegations.

64. The Committee finds that by insulting the communicant publicly in the local press and mass media for its interest in activities with potentially negative effects on the environment and health of the local population, the public authorities, and thus the Party concerned, failed to comply with article 3, paragraph 8, of the Convention.

Effective access to justice and not prohibitively expensive remedies (art. 9, paras. 4 and 5)

65. With regard to the requirements set by law for the provision of legal aid, the Committee examines the legal framework, provided both by the Party concerned and the communicant (see paras. 14-15 above) which, according to the communicant, impeded its efforts to seek justice in the courts.

66. The Committee notes that the present system of legal aid, as it applies to NGOs (see para. 15 above), appears to be very restrictive for small NGOs. The Committee considers that by setting high financial requirements for an entity to qualify as a public utility entity and thus enabling it to receive free legal aid, the current Spanish system is contradictory. Such a financial requirement challenges the inherent meaning of free legal aid, which aims to facilitate access to justice for the financially weaker. The Committee finds that instituting a system on legal aid which excludes small NGOs from receiving legal aid provides sufficient evidence to conclude that the Party concerned did not take into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice. Thus, the Party concerned failed to comply with article 9, paragraph 5, of the Convention and failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention.

67. In addition, with regard to the rule of dual representation ("abogado" and "procurador"; see para 16 above), for those seeking judicial review on appeal in Spain, the Party concerned did not oppose that this rule applies after the first instance (one judge). The Committee further notes that Spanish citizens therefore have to pay the fees for two lawyers after the first instance, and also the fees for the two lawyers of the winning party in the event that they lose their case (loser pays principle). The Committee observes that the Spanish system of compulsory dual representation may potentially entail prohibitive expenses for the public. However, the Committee does not have detailed information on how high the costs of the dual representation may be, while it recognizes that such costs may vary in the different regions of the country. The Committee therefore stresses that maintaining a system that would lead to prohibitive expenses would amount to non-compliance with article 9, paragraph 4, of the Convention.

IV. Conclusions and recommendations

68. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

69. The Committee finds that as a result of public authorities not making the requested information available unless an interest was stated on the part of the requester, the Party concerned failed to comply with article 4, paragraph 1, of the Convention (see para. 54 above).

70. The Committee finds that as a result of public authorities not responding or delaying response to requests for environmental information, and without notifying the requester that a one-month delay is needed along with reasons for that delay, the Party concerned was not in compliance with article 4, paragraph 2, of the Convention (see para. 59 above).

71. The Committee finds that the public authorities did not allow for access to information in the form requested, and did not provide copies, and as a result the Party

concerned failed to comply with article 4, paragraph 1 (b), in conjunction with article 6, paragraph 6, of the Convention (see para. 61 above).

72. The Committee also finds that public authorities set inhibitive conditions for public participation, and as a result the Party concerned failed to comply with article 6, paragraphs 3 and 6, of the Convention (see para. 62 above).

73. The Committee also finds that local authority officials insulted the communicant publicly in the local mass media for its interest in activities with potentially negative effects on the environment, and thus that the Party concerned failed to comply with article 3, paragraph 8 of the Convention (see para. 64 above).

74. Finally, the Committee finds that, by failing to consider providing appropriate assistance mechanisms to remove or reduce financial barriers to access to justice to a small NGO, the Party concerned failed to comply with article 9, paragraph 5, of the Convention, and failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention (see para. 66 above); and also stresses that maintaining a system that would lead to prohibitive expenses would amount to non-compliance with article 9, paragraph 4, of the Convention (see para. 67 above).

B. Recommendations

75. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends the Party concerned:

(a) To take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that the recommendations of the Committee in paragraph 119 (a) (ii) and (iii) of its findings for communication ACCC/C/2008/24 become effective;

(b) To ensure the implementation of recommendations of the Committee in paragraph 119 (a) (iv) of its findings for communication ACCC/C/2008/24;

(c) To change the legal system regulating legal aid in order to ensure that small NGOs have access to justice;

76. To examine the requirements for dual legal representation (“abogado” and “procurador”) for the court of second instance in the light of the observations of the Compliance Committee in paragraph 67 of the present document.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Fourth session
Chisinau, 29 June–1 July 2011
Item 5 (b) of the provisional agenda
Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee

Addendum

Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus (adopted by the Compliance Committee on 24 September 2010)

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I. Introduction

1. On 14 March 2009, members of the public (hereinafter, "the communicant") submitted a communication to the Compliance Committee alleging a failure by Belarus to comply with its obligations under article 4, paragraph 1, and article 6, paragraphs 2, 3, 6, 7, 8, and 9, of the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention; the Convention).

2. The communication alleges that by failing to make information available to the public with regard to the hydropower plant project on the Neman River in Belarus (hereinafter, "the HPP project"), which is currently under implementation, the Party concerned failed to comply with article 4, paragraph 1, and article 6, paragraph 6, of the Convention. The communication further alleges that by failing to notify and consult adequately with the public in the decision-making process for the HPP project, the Party concerned failed to comply with the requirements of article 6, paragraphs 2, 3, 7, 8 and 9, of the Convention.

3. At its twenty-third meeting (31 March–3 April 2009), the Committee determined on a preliminary basis that the communication was admissible.[1] The communicant in its communication asked that certain parts of the communication, including parts that could reveal its identity, should be kept confidential. The Committee held that this request should be honoured on the basis of paragraph 29 of decision I/7 of the Meeting of the Parties to the Aarhus Convention. The Committee also invited the communicant to address a number of questions clarifying the matters raised in the communication.

4. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 1 May 2009, along with a number of questions put forward by the Committee soliciting additional information on matters relating, inter alia, to the applicable legal framework and the decision-making procedures for the project.

5. At its twenty-fourth meeting (30 June–3 July 2009), the Committee agreed to discuss the content of the communication at its twenty-sixth meeting (15–18 December 2009).

6. On 5 August 2009, the communicant brought to the attention of the Committee the information submitted by the Ukrainian non-governmental organization (NGO) Ecoclub before the Implementation Committee of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and concerning compliance by Belarus with the provisions of the Espoo Convention.

7. On 30 September 2009, the communicant addressed some of the questions posed by the Committee to the Party concerned, especially with regard to the applicable legislation.

8. On 8 October 2009, the Committee received information in the form of an amicus curiae memorandum from the NGO European ECO-Forum. The amicus memorandum alleged that the legislation recently introduced in Belarus on public participation in decision-making on nuclear issues was inadequate; and that the requirements set by the Aarhus Convention concerning the construction of a nuclear power plant had not been fulfilled. On 24 November 2009, the Council of Public Associations "Ecohome" and the Belarusian Party of "Greens" sent a joinder motion to the amicus memorandum. The

[1] The redacted text of the communication is available on the website of the Compliance Committee at http://www.unece.org/env/pp/compliance/C2009-37/Communication/CommunicationACCC-C-2009-37public.pdf.

Committee noted that some elements of the amicus memorandum went beyond the scope of the original communication, in that, for instance, one of the main allegations of the amicus memorandum concerned the allegedly inadequate national legislation on public participation in decision-making on nuclear issues, and the substantial transboundary character of the nuclear power plant. It decided through its electronic decision-making procedure not to expand the consideration of the present communication to any new facts or allegations brought about by the amicus memorandum or the joinder motion that fall out side the scope of or are not directly relevant to the original communication.

9. On 25 November 2009, the Party concerned addressed the questions raised by the Committee, but did not specifically comment on the allegations of the communication.

10. The Committee discussed communication ACCC/C/2009/37 at its twenty-sixth meeting, with the participation of representatives of the communicant and the amicus. The Party concerned did not respond to the invitation to participate in the meeting and was not represented at it. At the same meeting, the Committee confirmed the admissibility of the communication.

11. The Committee completed the preparation of its draft findings at its twenty-eighth meeting (15–18 June 2010). Due to the issue of confidentiality, the draft findings were first sent to the communicant on 14 July 2010, seeking its agreement for the information contained therein to become public. The communicant provided its agreement on 14 July 2010 and, in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 3 August 2010. Both were invited to provide comments by 31 August 2010.

12. The Party concerned and the communicant provided comments on 1 September and 16 August, respectively.

13. At its twenty-ninth meeting (21–24 September 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

14. In finalizing its findings, the Committee took note of the additional information submitted by the Party concerned. The Committee recalls that, in general, any substantial new information should be presented to the Committee by any party at least two weeks in advance of the meeting at which it will be discussed, but in any case, no later than the commencement of the Committee's deliberations on the merits of the case. Hence, the opportunity offered to the parties to provide comments on draft findings should not be used to provide unrequested information which could have been transmitted to the Committee before it started its deliberations, or at least before the draft was finalized.

15. The new information submitted by the Party concerned by way of comments to the draft findings did not provide sufficient evidence to modify the conclusions of the findings, and the recommendations should be seen in the light of the information available to the Committee when it concluded its deliberations on the communication and finalized the draft findings. The Committee encourages the Party concerned to consider whether the new legislation that entered into force in 2010 accommodates the recommendations set out below.

II. Summary of facts, evidence and issues [2]

A. National legal framework in Belarus

1. Regulatory framework for access to information

16. According to article 34 of the Constitution of the Republic of Belarus of 1994 (as amended in 1996 and 2004) (hereinafter, "the Constitution") and article 6 of the Law "On information, informatization and the protection of information", citizens of Belarus are guaranteed the right to receive, store and disseminate complete, reliable and timely information on the activities of State bodies and public associations, on political, economic, cultural and international life, and on the state of the environment. State bodies, public associations and officials must afford citizens the opportunity to familiarize themselves with material/information that affects their rights and legitimate interests, in accordance with the procedure established by law. The right to information may be restricted by legislation with the purpose of safeguarding the honour, dignity and personal and family life of citizens and the full implementation of their rights.

17. In addition, the Law of the Republic of Belarus of 26 November 1992 "On Environmental Protection" (as amended), specifies the composition of and the particular types of environmental information, as well as the forms of, and procedures for, its provision and dissemination. The Law defines environmental information and provides the grounds that would allow for limiting access to such information, such as in the case of State secret or presenting a harm to a judicial process, preliminary investigation or administrative process. It should, however, be noted that, according to the Constitution and the Law of the Republic of Belarus of 29 November 1994 "On State Secrets" (art. 14), information about the state of the environment cannot be regarded as a State secret.

2. Regulatory framework for development control in Belarus

18. The regulatory framework for development control in relation to the HPP project, at the time of the activities that are the subject of the communication, consisted of the Law of the Republic of Belarus of 18 June 1993 "On State Environmental *Expertiza*",[3] as amended on 14 July 2000 (hereinafter, "the Environmental *Expertiza* Law"), and Decision No. 8 of the Ministry of Natural Resources and Environmental Protection of 11 May 2001 (as amended on 22 April 2001) on "Instructions on the procedure for State environmental *expertiza*" (hereinafter, "the Environmental *Expertiza* Instructions"). The scheme was supplemented with the "Instructions on the procedure for environmental impact assessment of the planned economic and other activities in the Republic of Belarus" (hereinafter, "the OVOS Instructions") and the "List of types and objects of economic and other activities which are subject to mandatory environmental impact assessment" (hereinafter, "the OVOS List"), both adopted by Decision No. 30 of the Ministry of Natural Resources and Environmental Protection of 17 June 2005.

19. The above regulatory framework for development control in Belarus is based on the concept of the "State *expertiza*". This includes a requirement that the planned activities which have potential impact on the environment are subject to "State environmental

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

[3] The environmental assessment systems in the former Soviet countries in Eastern Europe are largely based on the "State environmental review" or "ecological expertise" mechanism formally established in the Soviet Union in the second half of the 1980s.

expertiza", conducted by the competent environmental authorities or by the external experts nominated by the competent environmental authorities. The procedure is finalized with the "*expertiza* conclusion", which is subject to approval by the Ministry of Natural Resources and Environmental Protection (hereinafter the Ministry of Environment), and binding for the developer (art. 14, Environmental *Expertiza* Law). The activity can be implemented only if the conclusion is positive (see below). Also, each specific case is subject to construction permit procedures and the central or local government authorities may decide whether to permit the activities or not.

20. The activities that are considered to have significant potential impact on the environment are subject to "OVOS", an acronym whose terms, in direct translation, can be rendered as "assessment of impact upon the environment".[4] There is a list of activities which always require OVOS, but conducting the OVOS may also be required by environmental authorities in case of any other activity subject to environmental *expertiza*.

21. *Expertiza* and OVOS are closely interlinked procedures, with OVOS preceding the *expertiza*. According to article 6 of the Environmental *Expertiza* Law, both are required at the stage of developing a feasibility study for a project and at the stage of developing a construction design for a project.

22. OVOS is the procedure during which the developer collects all the necessary information concerning the impact of the project on the environment and compiles the relevant impact assessment documentation. The OVOS procedure is not of a permitting nature and is closely connected to the development of the overall project documentation. The role of the authorities is limited: at the beginning of the OVOS procedure, in reply to the "declaration of intent" (*zajavka*) submitted by the developer, the authorities issue the "environmental conditions for developing project documentation" (*ecologicieskije uslovia na projektovanije*) which serve as a basis for the terms of reference for the OVOS. The terms of reference are to be developed by the developer and approved by the environmental authorities. Following the elaboration of the terms of reference, the developer (or the consultant hired by the developer) conducts the necessary investigation and studies, and prepares a "statement on potential environmental impact" (*zajavlenije o vozmoznom vozdiejstvie*, hereinafter, "the OVOS Statement"). The OVOS Statement should be made subject to wide consultation with the interested authorities and the public (*obszczestviennyje sluchanija*). It is the developer who is responsible for notifying the public, providing respective information to the public and conducting public consultations. Once the consultations are completed, the developer is responsible for preparing the OVOS Report (*otchiet*), summarizing the results of the OVOS.

23. The OVOS Report, along with the other required documentation, is submitted by the developer to the relevant authorities for environmental *expertiza*. At the environmental *expertiza* phase, the authorities (or the external experts nominated by them) examine the compliance of the submitted documentation, including the information on public participation, with the requirements set by law. The environmental *expertiza* procedure is finalized with the "*expertiza* conclusion": the project in question can be implemented only if the authorities issue positive conclusions.[5]

3. Regulatory framework for public participation in development control

24. According to article 37 of the Constitution: "Citizens of the Republic of Belarus shall have the right to participate in settlement of State affairs, both directly and through

[4] The OVOS, however, should be distinguished from what is generally understood as an environmental impact assessment (EIA); the two terms are not exactly synonymous (see para. 74).

[5] *Expertiza* Law article 14, and Law on Environmental Protection article 34.

freely elected representatives. The direct participation of citizens in administration of affairs of society and the State shall be safeguarded by holding referenda, discussion of draft laws and issues of republican and local significance, and by other means specified in law. The citizens of the Republic of Belarus shall take part in discussion of issues of state and public life at republican and local meetings, under the procedure established by the legislation".[6]

25. With regard to public participation in development control, the Environmental *Expertiza* Law in its article 12 states that the developer has the responsibility to provide citizens or their associations that are willing to participate in the OVOS process with the relevant information, and to ensure their participation in the development of the OVOS documentation.

26. The OVOS Instructions detail the obligations of the developer relating to public participation procedure.[7] The procedure, according to paragraph 44 of the OVOS Instruction, involves four stages:

(a) Public notice;

(b) Examination by the public of the OVOS Statement and other project documents;

(c) Public discussion;

(d) Preparation of a record of public hearings with an appended list of comments and suggestions submitted by the public during the hearings, including the grounds for acceptance/rejection.

27. The OVOS Instructions do not require any particular form for the public notice about the hearings. They only state (para. 45) that such public notice may be communicated through: publishing the OVOS Statement (as a whole or its short version) in the mass media; publication and dissemination of special information materials like leaflets or bulletins; and direct information via mail, e-mail or other electronic means. Where hearings are to take place at the national level, the developer has the obligation to publish the notice about the hearings through the national mass media. The notice should contain information about the duration, date and location of the public hearings, and on how the public may access the OVOS Statement and other project documents (para. 48).

28. As already mentioned, the main means of public consultation is the organization of public discussion at the meeting (hearing) with the developer, the OVOS consultant and the interested authorities. Examination by the public of the OVOS Statement and other project documents generally occurs mainly through the publication of the OVOS Statement (as a whole or its short version) in the mass media, but the law envisages that they can also be made available in the places indicated in the public notice. The developer is responsible for the active dissemination of the OVOS Statement during the period between the public notice and the public hearings (para. 59), and also for making the OVOS Statement and other project documents available for inspection during the entire project design procedure (para. 51).

29. The developer is responsible for the organization of the hearings and shall conduct them together with the OVOS consultant who prepared the OVOS Statement. The explanations given regarding the OVOS Statement and other documents shall constitute the

[6] See text available at: http://www.law.by/work/EnglPortal.nsf/6e1a652fbefce34ac2256d910056d559/d93bc51590cf7f49c2256dc0004601db?OpenDocument.

[7] See OVOS Instructions, part VI.

basis for the hearings (para. 50). The hearings shall be organized no earlier than 30 days from the date of the public notice, and shall last as a rule no longer than one month, and only in exceptional cases may this time frame be extended (para. 59).

30. According to paragraph 52 of the OVOS Instructions, within five working days after the hearing a record of hearing should be prepared, which should include the list of participants as well as the list of all comments and suggestions submitted. The developer and the OVOS consultant are bound to consider the comments and suggestions submitted and attach them to the record, together with an indication as to whether they were approved or rejected and the grounds for their rejection or approval. The record of the hearing should be distributed (para. 58) to the "subjects who participated in OVOS", namely, according to paragraph 3, the developer, the consultant who prepared the OVOS Statement and various interested authorities. The record is to be stored by the developer with a view to its being attached to the OVOS Report.

31. According to the OVOS Instructions, public discussions (hearings) are not held in cases where the planning documentation of the proposed activities contain information classified as State secret, as well as other information of limited distribution.[8]

32. The Environmental *Expertiza* Law does not envisage any procedure for public participation at the stage of *expertiza* itself. The public may however, if certain conditions are met, initiate a "public environmental *expertiza*" whereby the independent specialists nominated and paid by the initiators (usually public associations) examine the compliance of the submitted documentation, including the information on public participation, with the requirements set by law and submit their conclusions to the authorities responsible for the State environmental *expertiza*.[9] The conclusions of the public *expertiza* have only recommendatory character,[10] but they need to be considered by the authorities responsible for the state environmental *expertiza*.[11]

33. The Environmental *Expertiza* Law requires the conclusions of the State environmental *expertiza* to be notified to the developer and the relevant authorities. It does not envisage any requirement to inform the public of the environmental *expertiza* decision.

B. Facts

34. The Neman River is a major eastern European river of 937 km in length, most of which is navigable. It rises in Belarus, flows through Lithuania and drains into the Baltic Sea. It is the natural border between Lithuania and the Russian Federation's Kaliningrad Oblast. Moreover, according to the communicant, it is a habitat for 250 bird species, including 156 breeding species and up to 50 species with special conservation status.

35. The communication concerns the alleged failure by the Party concerned to comply with the requirements of the Convention on access to information and public participation with regard to the ongoing construction of the first phase of a hydropower plant project on the Neman River, which has the following features: 17 MW power capacity (approximately 87.6 million MWh/year), 10 metres dam height, a reservoir of 43 km length and 1 km wide, and approximately 48 million m^3 of water storage capacity.

[8] Ibid. paras. 20.4 and 60.
[9] Article 61 of Law on Environmental Protection of 26 November 1992.
[10] Ibid.
[11] Article 11 of the Law on State environmental *expertiza*.

36. The proposed activity, as confirmed by the Party concerned, belongs to the category of activities ("major dams and reservoirs") which according to the OVOS List are subject to mandatory environmental impact assessment.

37. In 2002, Hrodnaenerga (the developer, a regional energy company) developed the project feasibility study, which was submitted to the Ministry of Environment for environmental *expertiza*.

38. On 7 February 2003, the Ministry of Environment of Belarus approved the positive conclusion of the environmental *expertiza* of the feasibility study. This granted an overall environmental permit for the project's implementation.

39. The project for construction of the HPP on Neman River was approved by the Council of Ministers of Belarus on 17 July 2007. There is no information whether the construction project had been submitted for environmental *expertiza* prior to its approval by the Council of Ministers.

40. In spring 2008, the local population noticed that construction work had started on the Neman River. This provoked a number of local initiatives against the construction, as well as requests for information related both to the activity itself and to the procedure of its approval.

C. Substantive issues

1. Access to information

41. The public concerned filed a number of requests to various public authorities for access to information concerning the OVOS and *expertiza* related to the HPP project.[12] In particular it requested access to the following information:

(a) Project documentation;

(b) Information on when and where the OVOS Statement had been published;

(c) Information on how and when the public had been informed about public hearings; and

(d) Conclusions of the environmental *expertiza*.

42. In their written response, which in most cases, according to the communicant, came later than one month after the requests had been submitted, the public authorities informed the public that the requests had been forwarded to the developer. Subsequently, the developer had provided general information to the requesters about the project and had informed that public consultations had taken place, since the project had been extensively discussed by the press and on television programmes starting in 2001 and more extensively in 2005 and 2007. The developer claimed to have kept a number of the press releases informing the public about the project and the protocols that recorded the feedback from the public.

43. Specifically, the communicant alleges that while the developer, Hrodnaenerga, provided general information on the project, it never addressed the specific points of the requests and refused to provide more specific project-related documentation. In some instances access to information was denied on the grounds that there was no clear purpose for the use of the requested information from the public.

[12] The exact dates of the requests and the names of the public authorities concerned were submitted to the Committee, but are not revealed for the sake of confidentiality.

44. The communicant alleges that all the information was environmental information as defined in article 2, paragraph 3 (b), of the Convention and that none of the grounds for refusal of access to environmental information (i.e., lack of individual concern and unspecified purpose of the request) fall under the exceptions mentioned in article 4 of the Convention. Hence, the communicant alleges that by not providing the information on the HPP project as requested by the public, the Party concerned was not in compliance with the requirements of article 4, paragraph 1, and article 6, paragraph 6, of the Convention.

45. The Party concerned, in its written reply, does not address any of the above allegations, nor does it provide any explanation in relation to the situation described above. It limits itself to answering a question posed by the Committee concerning access to information relating to decision-making. It maintains that national legislation does not restrict provision of information relating to decision-making, and that the information contained in the conclusions of the State environmental *expertiza* and of the OVOS are generally available and may be provided through:

(a) A verbal statement of the information requested;

(b) An examination of the documents containing the information requested and/or providing excerpts from them;

(c) A written reply containing the requested information.

2. Application of article 6 to the decision-making regarding the HPP project

46. According to the communicant, under the national legislation of Belarus, the environmental *expertiza* is a permitting process in the meaning of article 6, paragraph 1; whereas the OVOS procedure preceding the *expertiza* shall be considered as an environmental impact assessment (EIA) procedure, with the particularity that it is the task of the developer to inform the public and to hold public consultations on the proposed project.

47. Furthermore, the communicant submits that the HPP project is an activity subject to paragraph 13 of annex I to the Convention, because it envisages construction of a dam with water storage capacity of approximately 48 million m^3 (well above the threshold of 10 million m^3 envisaged in paragraph 13 of annex I). Alternatively, the communicant argues that the HPP project falls within the ambit of paragraph 20 of annex I to the Convention, which envisages the application of the requirements of article 6 to any activity not specifically mentioned in the annex, for which national legislation on EIA requires a public participation process to take place. In support of this argument, the communicant refers to the OVOS Instructions, according to which the construction of the HPP is a type of activity that requires the conduct of an OVOS, and the public consultation process is necessary for the carrying out of the OVOS.

48. Consequently, the communicant alleges that before issuing the State environmental *expertiza* conclusion in relation to the HPP project, the Party concerned was under the obligation to follow the procedure as envisaged in article 6 of the Convention, and that the procedure was not followed; in particular paragraphs 2, 3, 6, 7, 8 and 9 of article 6 were not complied with.

49. The Party concerned acknowledges application of article 6 to the HPP project, but maintains that it was in full compliance with the applicable requirements of the Convention in the respective decision-making.

3. Public participation procedure

50. The communicant alleges that it was not aware of any public notice on public consultations to be carried out before the approval of the HPP project and on possibilities to

get access to the respective OVOS Statement. Furthermore, the fact that the above documents, despite repeated requests, were never provided after the procedure had ended proves, according to the communicant, that the public was not informed in an adequate, timely and effective manner, about the proposal for the HPP project, and this constitutes non-compliance with article 6, paragraph 2, of the Convention.

51. The Party concerned acknowledges that national legislation provides for no specific form of public notice or uniform requirements for its content, and refers to the already mentioned provisions of paragraph 45 of the OVOS Instructions indicating possible means of notification. In this context, the Party concerned stated that the procedure for informing the public of the planned construction of the HPP project had been initiated on 10 May 2001 with an article entitled "The idea of an HPP on the Neman: first public hearings", published in the *Birzha informatsii (*"Information Stock") newspaper, and that in January 2003 Hrodna provincial television had broadcast a programme on which a representative of Hrodnaenerga had presented the reasons for constructing an HPP. Furthermore, the Party concerned referred to a number of newspaper articles published in 2003.

52. The communicant doubts whether informing the public through articles in the newspapers and through television (TV) programmes is an adequate procedure for ensuring effective public notice. It also draws attention to the fact that the above-mentioned article in the newspaper *Birzha informatsii* about the HPP public hearings clearly indicates that "the organizer of the public hearings regretted that neither the developer nor the designer of the project participated".

53. Furthermore, the communicant claims that the public concerned was not aware of the public consultations that took place before the approval of the HPP project. In response to the request by the public concerned for relevant information on public hearings, the developer referred to a number of TV programmes and publications, as well as round tables, but did not provide the requested records from public hearings. The communicant claims that the discussion of the proposed project in the newspapers and through TV programmes is not an adequate procedure for ensuring effective public participation. The communicant claims also that the public has no other possibility to submit comments to the authorities, after the conclusion of the discussions organized by the developer. Therefore, the communicant alleges that the public participation procedures undertaken by the developer did not fulfil the conditions set by article 6, paragraphs 3 and 7, of the Convention.

54. The Party concerned states in its written reply that, according to article 4 of the Law of the Republic of Belarus "On applications by citizens", citizens of Belarus have the right to present applications (i.e., suggestions, remarks and complaints) to the officials of State bodies and other organizations. Foreign citizens and stateless persons in the territory of Belarus have an equal right to that of citizens to present applications within the limits of their rights and liberties specified by Belarusian legislation.

55. The communicant alleges that public authorities are not bound by the law to take into account comments that the developer received from the public. Both the Environmental *Expertiza* Law and the Instructions are silent on the subject. Consequently, the communicant alleges also non-compliance with article 6, paragraph 8, of the Convention.

56. The Party concerned denies all these allegations and states that the procedure for the HPP project was in full compliance with the Convention. According to the Party concerned, the approval was preceded by conducting OVOS by the developer, and that the *expertiza* Report No. 45 of 7 February 2003 approved the project on the condition that the developer carry out public consultations at the following stage of the project because of the significant public interest. Public consultations, according to the Party concerned, took place in 2005 and 2007, as required by Belarusian law and the Convention, and involved discussion of the

project in the press and on TV programmes. Furthermore, the Party concerned maintains that reasoned argument was provided by the developer on why comments by the public, as reflected in the records of the public hearings, were accepted or rejected.

57. Finally, the communicant alleges that the Environmental *Expertiza* Law does not contain any requirement for communication of the environmental *expertiza* conclusions/ decision to any person other than the developer, and that a copy of such conclusions was not disclosed despite the requests by the public concerned. Thus, the communicant claims that by not providing the public concerned with the conclusions of the environmental *expertiza*, the Party concerned was not in compliance with article 6, paragraph 9, of the Convention.

58. The Party concerned says that national legislation does not stipulate a form for the public notice of the final decision on the planned activities. In accordance with the Laws of the Republic of Belarus "On the media" and "On the legislation of the Republic of Belarus", in each specific case, the final decision may be notified to the public through: publication in official newspapers of record, posting on the Internet site of the National Centre for Legal Information of the Republic of Belarus, posting on the official Internet sites of Republic-level State administrative bodies and local executive and administrative bodies, and general notification through the print media, television and radio.

III. Consideration and evaluation by the Committee

A. Legal basis and scope of considerations of the Committee

59. Belarus signed the Aarhus Convention on 16 December 1998. The Convention was approved through Decree No. 726 of the President of the Republic of Belarus on 14 December 1999, and the notification of approval was filed with the depositary on 9 March 2000. The Convention entered into force for Belarus on 30 October 2001.

60. The activities regarding the HPP project that are the subject of the communication started in 2001, i.e., when the Convention was in force in Belarus.

61. The communicant's allegations relate to the application of the Convention in the specific instance of the HPP project and do not pertain to compliance in general of the respective national legal framework with the provisions of the Convention. The Committee, however, finds it useful to make some observations concerning features of the relevant national legal framework in force at the time of the events that are the subject of the communication, without engaging in a comprehensive review of the legal system

62. The Committee regrets that it did not have any opportunity to discuss the matter with both the communicant and the Party concerned, and that where the observations of the Party concerned do not address specifically some of the communicant's allegations, the Committee must rely mostly on the facts and evidence provided by the communicant, bearing in mind, however, that the Party concerned was provided with the opportunity to discuss the matter but chose not to do so.

B. Admissibility and use of domestic remedies

63. The communicant has attempted to challenge the decision to permit the HPP project without success, but their attempts were limited because of fear that it might be penalized.

C. Considerations by the Committee

1. Access to information — general issues

64. Without attempting to assess the definition of "environmental information" as adopted in Belarusian law, the Committee notes that under the applicable Belarusian law the documents requested by the members of the public (see para. 41 above) are considered to be "environmental information", because article 74 of the Environmental Protection Law of 1992 clearly mentions information related to both OVOS and environmental *expertiza* as "environmental information". Hence, there is no debate that the information requested by the communicant should be considered as "environmental information" in the meaning of article 2, paragraph 3, of the Convention.

65. The Committee notes that the requests for information concerning the HPP project were originally submitted to the competent authorities, but they were all forwarded to the developer. In this context, the Committee would like to observe that while the "onward referral" is a legitimate practice under article 4, paragraph 5, of the Convention, this practice is allowed provided that certain conditions are met.

66. The first condition for "onward referral" under article 4, paragraph 5, is that the request for information is referred to another "public authority". The Committee notes that in Belarus, the OVOS process, including public participation, is carried out by the developer, which may be a privately owned legal entity, and that the OVOS outcome constitutes the basis for the environmental *expertiza*, the final decision of permitting nature, which is issued by the public authorities. While reliance on the developer in the context of public participation may raise doubts as to the compliance with the Convention (see paras. 75 et seq. below), the issue may be seen differently in the context of access to information.

67. The Committee considers that it is not conflicting with the Convention when national legislation delegates some functions related to maintenance and distribution of environmental information to private entities. Such private entities, depending on the particular arrangements adopted in the national law, should be treated for the purpose of access to information as falling under the definition of a "public authority", in the meaning of article 2, paragraph 2 (b) or (c) of the Convention.

68. In this context, the Committee notes that in Belarus the Environmental *Expertiza* Law and the relevant Instructions make the developer responsible for maintaining the OVOS- and *expertiza*-related documentation. Therefore, for the purpose of access to information issues, which are the subject of the present communication, the developer should be treated as a public authority under the obligation to provide access to environmental information in compliance with the requirements of article 4 of the Convention.

69. The possibility to delegate some functions related to the maintenance and distribution of environmental information to private entities should be seen in the context of article 5; in particular the obligation to ensure that public authorities possess environmental information which is relevant to their functions and the obligation to establish practical arrangements to ensure that environmental information is effectively accessible to the public, as required in article 5, paragraphs 2 (a) and 2 (b). respectively. Thus, the second condition to be met under article 4, paragraph 5, is that an onward referral does not compromise compliance with the above obligations under article 5.

70. The Committee does not have sufficient information about the national framework for recordkeeping and distribution of environmental information in Belarus, but it is concerned that the Environmental *Expertiza* Law and the relevant Instructions bestow the whole responsibility for maintaining the OVOS- and *expertiza*-related documentation, including the documents evidencing public participation, upon the developer only, and do

not include any obligation in this respect for the authorities which are competent to examine the results of the OVOS and for issuing the *expertiza* conclusions.

2. Access to information — article 4, paragraphs 1 and 3

71. The public authorities, including the developer, did not address the request of the members of the public and, in some instances, requested that a specific purpose for the use of the information be stated. The Committee notes that the statement of a specific interest is not included in the grounds that may justify the refusal of the public authorities to provide access to information, which are listed in article 4, paragraphs 3 and 4, of the Convention. Besides, article 4, paragraph 1 (a), of the Convention specifically provides that the requested information shall be available "without an interest having to be stated".

72. The Committee notes that there is a dual regime on access to information in Belarus: on the one hand, the general law on access to information requires that an interest be stated for access to information; on the other hand, the requirement to state an interest to access information does not apply in the case of access to environmental information (see paras. 16 and 17 above). In the present case, the requested information is environmental information and access should have been allowed, according to Belarusian legislation and the Convention. The Committee finds that the failure of the public authorities to provide the requested information constitutes a failure of the Party concerned to comply with article 4, paragraph 1, of the Convention; alternatively, the failure of the public authorities might constitute non-compliance by the Party concerned with article 6, paragraph 6, of the Convention, but the Committee in this case deems that it is not important to identify whether the Party concerned failed to comply with article 4, paragraph 1, or with paragraph 6, paragraph 6, of the Convention.

3. Access to information — article 4, paragraph 2

73. While the communicant indicated that replies from the public authorities came later than one month after the requests had been submitted, the information presented to the Committee is not sufficient to assess whether indeed there were any instances of non-compliance with the requirements of article 4, paragraph 2, of the Convention.

4. Application of article 6 to the decision-making regarding the HPP project

74. In the view of the Committee, the conclusions of the environmental *expertiza* shall be considered as a decision whether to permit the HPP project; OVOS and the *expertiza* in Belarus shall be considered jointly as the decision-making process constituting a form of an EIA procedure: the procedure starts with the developer submitting to the competent authorities the "declaration of intent" (*zajavka*), which includes the development of the EIA documentation and the carrying out of the public participation process (see also paras. 22 and 23 above), and ends with the issuance of the conclusions by the competent authorities, which, together with the construction permit, is the decision of permitting nature,.

75. Also, in the view of the Committee, the HPP project belongs to activities listed in annex I to the Convention. According to the information submitted by the communicant and not questioned by the Party concerned, the HPP project involves the construction of a dam with water storage capacity of 48 million m^3, and hence it is an activity subject to paragraph 13 of the annex to the Convention. Furthermore, in the light of the above considerations and the fact that the HPP project belongs to a category of activities listed in the OVOS List, as activities subject to mandatory OVOS, the HPP project is also an activity subject to paragraph 20 of the annex to the Convention. Thus, the public participation procedures in the context of the decision-making process of whether to permit the HPP project should be in compliance with the provisions of article 6 of the Convention.

76. In sum, the specific features of the regulatory framework for development control and EIA procedure in Belarus are as follows: that in the OVOS/*expertiza* system it is usually the responsibility of the developer to organize public participation at the OVOS stage of the procedure, while at the *expertiza* stage the possibility for public participation is usually provided only through the public environmental *expertiza*. The organization of a public environmental *expertiza* is not a mandatory part of the decision-making, and therefore it cannot be considered as a primary tool to ensure implementation with the provisions of article 6 of the Convention. It may, however, play a role as an additional measure to complement the public participation procedure required as a mandatory part of the decision-making. In the OVOS/*expertiza* system, the mandatory public participation procedure is required at the OVOS stage and the developer is usually responsible for organizing the procedure, including for notifying the public and making available the relevant information and for collecting the comments (see also paras. 28 and 29 above).

77. The Committee has already noted (ACC/C/2006/16 Lithuania, para. 78) that such a reliance on the developer in providing for public participation raises doubts as to whether such an arrangement is fully in line with the Convention because it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from a public authority, and that comments should be submitted to the relevant public authority (art. 6, paras. 2 (d) (iv)–(v) and 6).

78. The above observations do not mean, however, that the responsibility for performing some or even all the above functions related to public participation should always be placed on the authority competent to issue a decision whether to permit a proposed activity. In fact, in many countries the above functions are being delegated to various bodies or even private persons. Such bodies or persons, performing public administrative functions in relation to public participation in environmental decision-making, should be treated, depending on the particular arrangements adopted in the national law, as falling under the definition of a "public authority" in the meaning of article 2, paragraph 2 (b) or (c).

79. To ensure proper conduct of the public participation procedure, the administrative functions related to its organization are usually delegated to bodies or persons which are quite often specializing in public participation or mediation, are impartial and do not represent any interests related to the proposed activity being subject to the decision-making.

80. While the developers (project proponents) may hire consultants specializing in public participation, neither the developers themselves nor the consultants hired by them can ensure the degree of impartiality necessary to guarantee proper conduct of the public participation procedure. Therefore, the Committee in this case finds that, similarly to what it has already observed in the past "reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention" (ACCC/C/2006/16 Lithuania, para. 78).

81. 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. Furthermore, any arrangements requiring or encouraging them to enter into public discussions before applying for a permit are well in line with article 6, paragraph 5, provided the role of such arrangements is supplementary to the mandatory public participation procedures.

5. Exemption from public participation requirement — article 6, paragraph 1 (c)

82. According to the OVOS Instructions, public discussions (hearings) are not held in cases where the planning documentation of the proposed activities contain information

classified as State secret, as well as other information of limited distribution. Article 6, paragraph 1 (c), of the Convention allows the Parties not to apply the provisions of article 6 to activities serving national defence purposes, if providing public participation would have an adverse effect on these purposes. The Committee does not have sufficient information, in this case, to assess whether the exemption employed by Belarusian law is indeed broader than the scope allowed under article 6, paragraph 1 (c), of the Convention; but it raises its concern that if the scope of the Belarusian legislation is broader that the scope of this provision, this might constitute a situation of non-compliance.

6. Adequate, timely and effective public notice — article 6, paragraph 2

83. Belarusian legislation (the OVOS Instructions) requires that the public be informed about the public consultation process and lists possible ways that the notification may take place, but leaves the decision on the form of the public notice to the discretion of the developer. The notice should contain information about the duration, date and location of the public hearings, and on how the public may access the OVOS Statement and other project documents. Thus, it covers only some of the issues to be included in the notice as required in article 6, paragraphs 2 (a) to 2 (e). Furthermore, there is no clear requirement that the public be informed in a timely, adequate and effective manner.

84. In the present example of the HPP project, there is insufficient evidence to satisfy the above requirements in the national legislation and to prove that the public was informed in a timely manner to participate. The Party concerned refers to a number of press articles and says that the notification was initiated on 10 May 2001 with an article entitled "The idea of an HPP on the Neman: first public hearings" published in the *Birzha informatsii* newspaper (see also para. 51 above). The content of the article, however, was only a report from the meeting held and not a public announcement to notify the public about the meeting to be held. Furthermore, the article mentions that the meeting was found by the participants to be premature in relation to the HPP project, because it preceded the submission of the declaration of intent (*zajavka*) and neither project documentation nor EIA documentation had been prepared at that stage. Therefore, such a meeting, although it may be useful for early information and awareness, cannot reasonably be considered as fulfilling the requirements for providing effective public participation procedure and, importantly, it cannot substitute for the public notice, as required under article 6, paragraph 2.

85. All the other press articles referred to by the Party concerned are dated between 23 January and 8 November 2003, and therefore they cannot be considered to be public notice under article 6, paragraph 2, in relation to the *expertiza* conclusions issued on 7 February 2003. Moreover, the Committee doubts if the articles can serve as notice for the purpose of the OVOS in relation to the construction design approved in July 2007, because the time span was too short to allow the developer to prepare the documentation considering that the conclusions were issued on 7 February 2003. In addition, too long a time lapsed between the articles and the approval.

86. With regard to the legislation and the general practice followed for public notification in Belarus, there is a legal obligation for the developer to notify the public about the conduct of public hearings, but the law fails to set the details to ensure that the public is informed in an adequate, timely and effective manner. The practice of publishing the OVOS Statement (in abridged or even full versions) cannot substitute for it. Also, in the view of the Committee, journalists' articles commenting on a project in the press or on television programmes (as referred to by the Party concerned), in general, do not per se constitute a public notice for the purpose of public participation, as required under article 6, paragraph 2, of the Convention. For this reason, the Committee finds that the Party concerned failed in the case of the HPP project to comply with article 6, paragraph 2; and

also that there is a general failure of the Belarusian system to comply with these provisions of the Convention.

7. Reasonable time frames for public participation — article 6, paragraph 3

87. Belarusian legislation (the OVOS Instructions) provides that public hearings shall be organized no earlier than 30 days from the date of public notice and shall last as a rule no longer than 1 month; and that only in exceptional cases may this time frame be extended. The period between the public notice and the public hearings is meant to allow the public to access the relevant documentation and prepare itself. The comments, however, can be submitted practically only through the public consultation procedures.

88. The Committee recalls its earlier findings with regard to the reasonable time frames, in particular in relation to communication ACCC/C/2006/16 (Lithuania, para. 69) whereby some general interpretation rules were established, according to which the requirement to provide "reasonable time frames" implies that the public should have sufficient time to get acquainted with the documentation and to submit comments, taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small, simple project with only local impact may well not be reasonable in case of a major complex project.

89. In this context, the Committee appreciates a flexible approach to setting the time frames aiming to allow the public to access the relevant documentation and to prepare itself, and considers that while a minimum of 30 days between the public notice and the start of public consultations is a reasonable time frame, the flexible approach allows to extend this minimum period as may be necessary taking into account, inter alia, the nature, complexity and size of the proposed activity.

90. The Committee, however, does not consider appropriate a flexible approach, whereby only the maximum time frame for public participation procedures is set, as this is the case in Belarus in relation to the time frames for public consultations and submitting of comments. Such an approach, regardless of how long the maximum time frame is, runs the risk that in individual cases time frames might be set which are not reasonable. Thus, such an approach, whereby only maximum time frames for public participation are set, cannot be considered as meeting the requirement of setting reasonable time frames under article 6, paragraph 3, of the Convention.

91. In the particular case of the public participation procedure regarding the HPP project, given all the problems with establishing whether and when the public was notified and whether and when any consultations did take place, the Committee is not in a position to assess whether the Party concerned was in compliance with article 6, paragraph 3, of the Convention.

8. Access to documents relevant to decision-making — article 6, paragraph 6

92. Belarusian legislation (the OVOS Instructions) provides that the obligation to provide the public with the relevant information rests only with the developer, an approach that in the view of the Committee is not in line with the Convention (see paras. 77 and 80 above).

93. Furthermore, Belarusian law envisages specifically that the OVOS Statement be made publicly available, but not that the OVOS Report shall be made available to the public. There is also no clear obligation to provide the public with the records of the hearings. Bearing in mind the significance of both documents as a basis for the decision, this seems to be a considerable shortcoming of the legislation; however, given that such documents seem to be covered by the definition of environmental information available to

the public (see para. 64 above), this shortcoming does not necessarily amount to non-compliance with the Convention.

9. Public discussions and submission of comments — article 6, paragraph 7

94. Belarusian legislation (the OVOS Instructions) provides that the main means of public consultation is the organization of the public discussion at the meeting (hearing) with the developer, OVOS consultant and the interested authorities. The developer is responsible for the organization of the hearings and shall conduct them together with the OVOS consultant who prepared the OVOS Statement. The comments can be submitted practically only during the hearings, and the law does not envisage the possibility for the public to submit the comments at the stage of *expertiza* directly to the authority competent to issue the conclusions of the *expertiza*. Although there is a requirement to record the comments submitted by the public at the OVOS stage, and to provide them to the authority competent to issue the *expertiza* conclusions, the Committee is of the view that the above arrangements do not ensure that the competent authority has direct access to all the comments submitted and is in a position to take due account of them. Bearing this in mind, and also the views about the role of the developer in the procedure (see paras. 77 and 80 above), the Committee is of the opinion that the arrangements in Belarusian law regarding public discussions and submission of comments are not in compliance with the requirements of article 6, paragraph 7, in conjunction with article 6, paragraph 2 (d) (v), of the Convention.

95. The Committee notes that, on the basis of the information submitted and the lack of any evidence to the contrary, it appears that the public did not have sufficient possibilities to submit any comments, information, analyses or opinions relevant for the HPP project, before a permit for the project was issued. The Committee is of the view that the organization of discussions on the proposed project in the newspapers and through TV programmes is not a sufficient way to assure compliance with article 6, paragraph 7, of the Convention.

10. Due account taken of the outcomes of public participation — article 6, paragraph 8

96. Under Belarusian legislation, some obligations related to taking due account of the outcomes of public participation rest with the developer and the OVOS consultant, who are bound to consider all the comments and suggestions submitted by the public and to include them in the record of hearings, together with an indication of whether these comments were approved or rejected and the grounds for their rejection or approval. The applicable laws do not, however, envisage similar obligations in relation to the authorities (or the experts) competent for issuing the *expertiza* conclusions. They are bound only to consider the conclusions of the public *expertiza*, which, as a non-mandatory element of the procedure (see para. 320 above), cannot be considered as a measure implementing the provisions of article 6 of the Convention. Bearing the above in mind, the Committee is of the opinion that the law of Belarus fails to comply with the requirements of article 6, paragraph 8, of the Convention.

97. Considering the discussed deficiencies in providing public participation in relation to the HPP project, the Committee is not sure if there were any outcomes of public participation that could have been taken into account in the *expertiza* conclusions, and therefore it is not in a position to assess whether the Party concerned was in compliance with article 6, paragraph 8, of the Convention in this respect.

11. Informing the public of the final decision — article 6, paragraph 9

98. The legislation of Belarus does not envisage a clear requirement to inform the public about issuing the *expertiza* conclusions and possibilities to have access to the text of the

conclusions along with the reasons and considerations on which they are based. In fact, there is no clear requirement to prepare such a statement of reasons, and no requirement for public authorities to keep the files of such conclusions. Thus, the Committee is of the opinion that Belarusian law fails to comply with the requirements of article 6, paragraph 9, of the Convention, in particular by not establishing appropriate procedures to promptly notify the public about the environmental *expertiza* conclusions and by not establishing appropriate arrangements to facilitate public access to such conclusions.

99. In the light of the evidence provided, the Committee is of the view that the public concerned was not informed about the environmental *expertiza* conclusions regarding the HPP project and that its requests to access to these conclusions were denied (see also paras. 43 and 48 above). Consequently, the Committee finds that the public authorities failed to ensure that the public concerned was promptly informed of the decision for the construction of the HPP and, hence, that the Party concerned was not in compliance with article 6, paragraph 9, of the Convention.

12. Anti-harassment — article 3, paragraph 8

100. The communicant and the amicus inform the Committee that one may face criminal charges and be prosecuted for the act of engaging in the activities of a group that is not registered. Furthermore, they argue that the current regulatory framework for the establishment of NGOs and associations is very restrictive in Belarus.

101. The communicant, in its communication, did not submit any allegation of non-compliance with article 3, paragraph 8, of the Convention and the Committee has not received any evidence to support such allegation, in particular any copies of the relevant provisions restricting freedom of associations or providing for criminal charges in case of involvement in group initiatives with peaceful objectives, if the group is not registered. Although in this situation the Committee is not in a position to assess whether there is any non-compliance with article 3, paragraph 8, of the Convention, the Committee, sympathizes with the communicant, who has requested that its identity be kept strictly confidential for the fear that it may be penalized, prosecuted or otherwise harassed.

IV. Conclusions and recommendations

102. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

103. The Committee finds that in relation to the HPP project the Party concerned:

(a) By failing to provide the requested information, it failed to comply with article 4, paragraph 1, of the Convention (para. 72 above);

(b) By not providing for adequate, timely and effective public notice, according to the criteria of the Convention, it failed to comply with article 6, paragraph 2 (para. 86 above);

(c) by not providing the public with sufficient possibilities to submit any comments, information, analyses or opinions relevant for the HPP project, it failed to comply with article 6, paragraph 7 (paras. 94 and 95 above);

(d) By not informing the public promptly about the environmental *expertiza* conclusions, namely a decision of the construction of the HPP project, it failed to comply with article 6, paragraph 9 (para. 99 above).

104. Moreover, the Committee finds that the following general features of the Belarusian legal framework are not in compliance with the Convention:

(a) Requiring an interest be stated for access to environmental information (art. 4, para. 1);

(b) Not adequately regulating the public notice requirements: in particular by not providing for mandatory means of informing the public, setting insufficient requirements as to the content of public notice and not providing for a clear requirement for the public to be informed in an adequate, timely and effective manner (art. 6, para. 2);

(c) Setting only maximum time frames for public hearings and allowing thereby in individual cases for time frames to be set which might be not reasonable (art. 6, para. 3);

(d) Making the developers (project proponents) rather than the relevant public authorities responsible for organizing public participation, including for making available the relevant information to the public and for collecting comments (art. 6, paras. 2 (d) (iv)–(v), 6 and 7);

(e) Not establishing mandatory requirements for the public authorities that issue the *expertiza* conclusion to take into account the comments of the public (art. 6, para. 8);

(f) Not establishing appropriate procedures to promptly notify the public about the environmental *expertiza* conclusions, and not establishing appropriate arrangements to facilitate public access to these conclusions (art. 6, para. 9).

105. Furthermore the Committee is concerned that:

(a) In relation to compliance with article 5, paragraphs 1 (a) and (b), the law in Belarus renders only the developer responsible for maintaining the documentation relevant to OVOS and *expertiza*, including the documents evidencing public participation, and they do not impose any obligation in this respect on the authorities competent to examine the results of OVOS and those competent to issue expertiza conclusions;

(b) The law in Belarus concerning situations where provisions on public participation do not apply may be interpreted much more broadly than allowed under article 6, paragraph 1 (c), of the Convention.

B. Recommendations and other measures

106. The Committee, pursuant to paragraph 35 of the annex to decision I/7, and taking into account the cause and degree of non-compliance, recommends the Meeting of the Parties to the Convention:

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, to recommend to the Party concerned to take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(i) The general law on access to information refers to the 1992 Law on Environmental Protection that specifically regulates access to environmental information, in which case the general requirement of stating an interest does not apply;

(ii) There is a clear requirement for the public to be informed of decision-making processes that are subject to article 6 in an adequate, timely and effective manner;

(iii) There are clear requirements regarding the form and content of the public notice as required under article 6, paragraph 2, of the Convention;

(iv) There are reasonable minimum time frames for submitting the comments during the public participation procedure, taking into account the stage of decision-making as well as the nature, size and complexity of proposed activities;

(v) There is a clear possibility for the public to submit comments directly to the relevant authorities (i.e., the authorities competent to take the decisions subject to article 6 of the Convention);

(vi) There is a clear responsibility of the relevant public authorities to ensure such opportunities for public participation as are required under the Convention, including for making available the relevant information and for collecting the comments through written submission and/or at the public hearings;

(vii) There is a clear responsibility of the relevant public authorities to take due account of the outcome of public participation and to provide evidence of this in the publicly available statement of reasons and considerations on which the decisions is based;

(viii) There is a clear responsibility of the relevant public authorities to:

a. Inform promptly the public of the decisions taken by them and their accessibility;

b. Maintain and make accessible to the public: copies of such decisions along with the other information relevant to the decision-making, including the evidence of fulfilling the obligations regarding informing the public and providing it with possibilities to submit comments;

c. Establish relevant publicly accessible lists or registers of the decisions held by them;

(ix) Statutory provisions regarding situations where provisions on public participation do not apply cannot be interpreted to allow for much broader exemptions than allowed under article 6, paragraph 1 (c), of the Convention;

(b) Pursuant to paragraph 37 (c) of the annex to decision I/7, to invite the Party concerned to:

(i) Draw up an action plan for implementing the above recommendations with a view to submitting an initial progress report to the Committee by 1 December 2011, and the action plan by 1 April 2011;

(ii) Provide information to the Committee, at the latest six months in advance of the fifth Meeting of the Parties, on the measures taken and the results achieved in implementation of the above recommendations.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Thirty-first meeting
Geneva, 22–25 February 2011

Report of the Compliance Committee

Addendum

Findings and recommendations with regard to communication ACCC/C/2009/38 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 25 February 2011

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I. Background

1. On 7 May 2009, Road Sense (hereinafter the communicant) submitted a communication to the Committee, alleging non-compliance by the United Kingdom with its obligations under the preamble and articles 1, 3, 4 and 5, paragraph 1, article 6, paragraphs 2, 4, 5, 7 and 9, and article 9, paragraphs 2 and 3, of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in respect of the procedures adopted in the promotion of the proposed construction of a road by-pass around the Scottish city of Aberdeen, known as the Aberdeen Western Peripheral Route (AWPR). The proposed AWPR involves the construction of 46 kilometres of offline dual carriageway, typically of two-lane standard, with junctions connecting it to the existing network of trunk and non-trunk roads around Aberdeen.

2. The communication alleges that the Party concerned has breached articles 1, 3 and 4 of the Convention by failing to provide information on the state of the environment and the status of protected species which would be impacted by the AWPR. It alleges that the Party concerned failed to ensure that the environmental information provided in the Environmental Statement for the AWPR and the Report to Inform an Appropriate Assessment for the crossing of the River Dee Special Area of Conservation was fit for that purpose, and thereby failed to meet the requirements of the preamble to the Aarhus Convention and its article 3. It also alleges that the Party concerned has breached article 5 by not providing information which could enable the public to take measures to prevent or mitigate harm arising from a threat to those protected species.

3. Moreover, the communication alleges that the Party concerned has breached article 6 by failing to seek public comment on the proposed route for the AWPR in an open way, by failing to provide information on new objectives for the proposal and by failing to invite the public to submit any comments, information, analyses or opinions on the proposed route. It further alleges that the introduction of a new objective for the regional strategic transport plan without any public participation was in breach of article 7. It alleges that the Party concerned restricted the scope and circumstances of a public inquiry into the AWPR in a manner contrary to the principles of justice enshrined in articles 7 and 9. Finally, it alleges that the lack of access for the public in Scotland to an open and inexpensive 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 the proposed AWPR is in breach of article 9.

4. At its twenty-fourth meeting (30 June–3 July 2009), the Committee determined on a preliminary basis that the communication was admissible. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties, the communication was forwarded to the Party concerned on 27 July 2009 together with a number of questions seeking further information. Also, on 27 July 2009, the Committee wrote to the communicant with a request for clarification on certain issues.

5. The communicant and the Party concerned addressed the questions raised by the Committee on 21 December 2009 and on 4 January 2010, respectively.

6. At its twenty-sixth meeting (15–18 December 2009), the Committee agreed to discuss the content of the communication at its twenty-seventh meeting (16–19 March 2010).

7. By letter dated 1 March 2010 and its attachments, the communicant provided additional written submissions and documentation for consideration by the Committee,

seeking to clarify certain aspects of the 4 January 2010 response of the Party concerned and to update the Committee on recent developments.

8. The Committee discussed the communication at its twenty-seventh meeting, with the participation of representatives of the Party concerned and the communicant. At the beginning of the discussion the Committee confirmed the admissibility of the communication.

9. By letters dated 31 March 2010, the communicant and the Party concerned each provided further documentation and information requested by the Committee during the discussion at its twenty-seventh meeting.

10. On 15 April 2010, the Party concerned provided additional information about all documentation that had been disclosed by the Scottish Natural Heritage to the communicant and, on 20 May 2010, the Party concerned responded to the points made by the communicant in its letter of 21 March 2010.

11. On 4 June 2010, the communicant also provided additional information to the Committee. On 13 July 2010, the Party concerned responded to the points made by the communicant on 4 June 2010.

12. By letter dated 27 October 2010 the Committee sought further clarification from the communicant and the Party concerned. The communicant and the Party concerned responded to the questions raised by the Committee on 21 and 24 November 2010, respectively.

13. The Committee began to prepare draft findings at its twenty-seventh meeting and completed the preparation of draft findings at its thirtieth meeting (14–17 December 2010). In accordance with paragraph 34 of the annex to decision 1/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 12 January 2011. Both were invited to provide any comments by 9 February 2011.

14. The Party concerned and the communicant provided comments on 21 February and the communicant raised issues in regard to article 9, in particular paragraph 4, of the Convention.

15. At its thirty-first meeting, the Committee proceeded to finalize its findings related to access to information and public participation in closed session, taking account of the comments received, while postponing consideration of issues relating to article 9. The Committee then adopted its findings and agreed that they should be published as an addendum to its meeting report. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

A. Legislative framework

Roads (Scotland) Act 1984

16. In accordance with section 54 of the Scotland Act 1998, competence for transport is devolved to the Scottish Government. Transport Scotland is an executive agency of the Scottish Government. The Roads (Scotland) Act 1984 sets out the procedure for

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

constructing new roads, including the promotion of draft orders and compulsory purchase orders.

17. In accordance with Part 1 of Schedule 1 to the Roads (Scotland) Act 1984, the authority promoting the road is obliged to publish notice of its intention to make an order under that Act. Interested parties then have a period of at least six weeks to object to the draft orders.

18. The draft orders must be accompanied by an environmental statement produced in accordance with section 20A of the Roads (Scotland) Act 1984, which provides, inter alia, that: "The Scottish Ministers shall publish notice of the environmental statement so as to ensure that members of the public who are likely to be concerned are given a reasonable opportunity to express an opinion before they decide whether to proceed with the project, and they shall not make any such decision without taking into consideration any opinion so expressed to them within a period of 3 weeks from the date of publication of the notice of the environmental statement." The environmental statement must be accompanied by a non-technical summary.

19. Paragraphs 5 and 6 of Schedule 1 to the Roads (Scotland) Act 1984 requires a public local inquiry to be held to consider objections received by the Secretary of State (now the Scottish Ministers by virtue of section 53 of the Scotland Act 1998) from any person on whom copies of the draft orders are required to be served or from any other person appearing to be affected, unless the Scottish Ministers are satisfied in certain circumstances that the holding of an inquiry is unnecessary.

20. Paragraph 7 of Schedule 1 to the Roads (Scotland) Act 1984 describes the duties incumbent upon the Scottish Ministers when determining whether or not to confirm the Schemes and Orders which were the subject of the public local inquiry. After considering the objections to the proposed AWPR and the report of the Reporters appointed to hear the public local inquiry, the Scottish Ministers may approve the draft Schemes and Orders as promoted, with modifications which they see fit to impose, or may refuse to confirm the Schemes and Orders. In reaching this decision, the Scottish Ministers must have regard to the Environmental Statement published in relation to the project and any opinion on the Environmental Statement or project which is expressed in writing by any consultation body or other person. The Roads (Scotland) Act 1984 does not prescribe a timescale within which this decision is to be taken.

21. In the event that the Scottish Ministers decide to confirm the Schemes and Orders, the Schemes and Orders will be subject to the affirmative order procedure, which means that to come into force they must be approved by resolution of the Scottish Parliament.

22. The validity of the Scottish Ministers' decision may be challenged under the provisions of Schedule 2 to the Roads (Scotland) Act 1984 and Part 4 of the First Schedule to the Acquisition of Land (Authorization Procedure) (Scotland) Act 1947 by application to the Court of Session. This application must be made within six weeks of the date on which the notice that Parliament has passed a resolution approving the instrument is first published.[2]

[2] Para. 30, p. 8 of the Scottish Ministers' Decision letter dated 21 December 2009, forwarded by the communicant on 1 March 2010.

B. Background of facts[3]

Preliminary studies (1990s)

23 The first work on the AWPR was started by Grampian Regional Council in the early 1990s. After a public consultation exercise on various route options, Grampian Regional Council recommended an option known as the "Murtle" option as its preference for the southern section of the route in early 1996. That route was later endorsed by Aberdeen City Council and Aberdeenshire Council, the local authorities formed to succeed the Grampian Regional Council.

Development of the Modern Transport System (2000–2003)

24. In September and October 2000, 10,000 questionnaires were sent to households and businesses regarding a proposed Modern Transport System for the North East (MTS). Following this public consultation exercise and studies in 2002 and 2003, a route for the northern section of the AWPR was also adopted by the councils. At that time, both local authorities, working through the North East of Scotland Transport Partnership (NESTRANS) developed the MTS. The AWPR was considered a key element of the MTS which also included passenger and freight rail, public transport, park and ride, cycling and walking measures. In 2003 the Scottish Executive confirmed that it would take forward the AWPR as a strategic trunk road.

Route options investigated (2003–2004)

25. In 2004 the then Minister for Transport commissioned a study to review the work undertaken in the 1990s on the Murtle route and consider a range of alternative options for the southern leg. A private engineering firm was appointed to carry out this work and produce designs for the route. The study assessed four alternative route options in addition to the preferred Murtle route corridor.

Public exhibitions (2005)

26. The results of the 2004 study into options for the AWPR were presented to the public for their comments in spring 2005. This took the form of a series of public exhibitions in communities situated close to the potential routes. The exhibition was run in a roadshow format and staffed by engineers from the AWPR project. Indicative maps and graphic illustrations were available to be viewed by the public and information packs with feedback forms were provided. More than 7,000 responses were received following the consultation.

Decision on the route corridor (2005)

27. Following the spring 2005 exhibitions and the studies by the private engineering firm, the Transport Minister took a decision on the optimum corridor for the AWPR. On 1 December 2005 the Minister announced that the best strategic route would be a combination of the Milltimber Brae and Peterculter/Stonehaven routes presented at the public exhibitions. This would consist of a peripheral route around the city of Aberdeen and a fast-link from the A90 at Stonehaven.

[3] This background is drawn from the timeline on the AWPR website (see www.awpr.co.uk).

Environmental studies (winter 2005–ongoing)

28. Since winter 2005, environmental studies have been undertaken, including studies on flora, fauna and various species of wildlife. The findings of the environmental studies that had been completed at the time of publication were compiled in an Environmental Statement and summarized in the Non-Technical Summary document.

Definition of route corridor (southern section) (spring 2006)

29. In the period of winter 2005–spring 2006, the AWPR team investigated a variety of route options around the proposed southern leg of the route in order to identify a preferred route corridor which could be taken forward for further study. The findings of these studies were produced in the Initial Assessment Stage Report.

30. In May 2006, the Minister for Transport made public the preferred route corridor within which the final road would lie. The Minister's decision was documented in the Final Assessment Stage Report (available on the AWPR website).

Draft orders (winter 2006–spring 2008)

31. In December 2006, the Scottish Ministers published the draft Special Road Orders for AWPR along with supporting documents. The documents were sent to statutory consultees and were made available in local libraries, council offices and on the Web. Public exhibitions were held locally to present the detailed proposals to the public during January 2007. The documents published included the draft Special Road Orders which show the main line of the new road, an Environmental Statement setting out the impact of the route on the environment in and around the route corridor, a Non-Technical Summary of that document and draft de-trunking orders for the existing trunk road. The publication of these documents marked the start of the statutory consultation process, during which any person could make formal objections or representations about the proposals. The consultation closed on 9 February 2007.

32. In September 2007, an updated Environmental Statement showing the proposed environmental mitigation measures intended to reduce the impact of the road was published. A second round of formal public consultation on the proposed route, including a series of public exhibitions, took place following the publication of the orders and closed in late October 2007.

33. In light of the status of the Dee Special Area of Conservation (SAC), Transport Scotland determined that an Appropriate Assessment was required in order to meet the provisions of the European Union (EU) Habitats Directive.[4] Consultants commissioned by Transport Scotland completed the Report to Inform an Appropriate Assessment in April 2008. The Report concluded that, subject to appropriate mitigation, the construction and operation of the AWPR would not have an adverse impact on the conservation objectives for the qualifying species (freshwater pearl mussel, Atlantic salmon and otter), and that there would be no adverse effects on the integrity of the River Dee SAC.

34. By letter dated 8 August 2008, Scottish Natural Heritage advised Transport Scotland, and subsequently the Scottish Ministers, that it had formed the view that, provided the proposals were undertaken in accordance with the proposed conditions/legal modifications, the proposed AWPR would not adversely affect the integrity of the River Dee SAC.

[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7, as amended from time to time.

Public local inquiry (winter 2008/09)

35. The Scottish Ministers appointed Reporters to conduct a public local inquiry into the AWPR in April 2008. The Reporters were to consider all evidence presented at the inquiry prior to making recommendations to Ministers for their consideration. If Ministers thereafter decided to proceed with the scheme, it would go before Parliament for final approval. The public local inquiry began on 9 September 2008 and concluded on 10 December 2008 and closing submissions were lodged during January and February 2009. The report of the public local inquiry is available on the public local inquiry website (http://awpr-pli.net/).

The communicant's request for the report on freshwater pearl mussels

36. In July 2008, Mr. Hawkins, a member of the communicant, requested a copy of the report relating to the site condition monitoring of freshwater pearl mussels in the River Dee from Scottish Natural Heritage (SNH), the independent Government adviser on nature conservation and landscape matters in Scotland. Although Mr. Hawkins offered to sign an undertaking not to release any information in relation to the breeding sites of freshwater pearl mussels to other parties, SNH decided not to release the report and a redacted version was provided to Mr. Hawkins in August 2008. The decision to withhold the requested information was made under Regulation 10 (5) (g) of the Environmental Information (Scotland) Regulations 2004, which provides: "A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially ... the protection of the environment to which the information relates." According to the letter, this was down on the grounds that "any release of this data could increase the risk of persecution. If SNH was to release this data to you we would also be obliged to release it to any other person who asked for it, reducing the current level of protection afforded to freshwater pearl mussels in the Dee".

Making of orders

37. Following consideration of the Public Local Inquiry Reporters' Report and all outstanding objections not withdrawn, the Scottish Ministers announced their decision on 21 December 2009 to make the Schemes and Orders subject to a number of detailed modifications to the published draft Schemes and Orders. The Schemes and Orders show the precise line where the new road will be built. In accordance with previous commitments given, a Direction was issued under Section 143A of the Roads (Scotland) Act 1984 confirming that the Schemes and Trunk Road Orders would be subject to the Affirmative Procedure in the Scottish Parliament, meaning that they would not come into force until approved by resolution of the Scottish Parliament.

38. In January 2010, the Scottish Parliament approved the Schemes and Trunk Road Orders by resolution on 3 March 2010 in accordance with the Affirmative Procedure process. The Schemes and Trunk Road Orders came into force on 31 March 2010.

Appeal to the Scottish Information Commissioner

39. Mr. Hawkins, on behalf of the communicant, appealed to the Scottish Information Commissioner regarding the decision by SNH to withhold the information regarding the freshwater pearl mussels. In his decision dated 25 May 2010, the Scottish Information Commissioner found that SNH was entitled to withhold information contained in certain documents identified during the investigation, where the information related to the location of the freshwater pearl mussel populations. In relation to the remaining information, SNH had indicated that it no longer sought to apply the exception contained in Regulation 10 (5) (g) of the Environmental Information (Scotland) Regulations 2004. The Commissioner held that SNH had incorrectly applied the exception earlier and required it to

disclose the information thereby excepted to Mr. Hawkins. The Commissioner also held that SNH had failed to provide the advice and assistance reasonably expected of it by providing a misleading impression to Mr. Hawkins of the nature and extent of the information that had been withheld. Thus, the Commissioner found that SNH had failed to comply with its duty under Regulation 9 (1) of the Environmental Information (Scotland) Regulations 2004 in those respects.[5]

Statutory appeal under the Road (Scotland) Act 1984

40. In April 2010, the communicant lodged a statutory appeal under the Roads (Scotland) Act 1984. In summary, the basis for the appeal was:

(a) The Ministers in coming to their decision to build the AWPR failed to have regard to all the findings of the Public Inquiry, in particular with respect to the acknowledged levels of environmental damage that would be caused;

(b) Ministers attributed economic benefits to the road, and these provided the main justification for building the AWPR, yet the public were excluded from challenging those claimed benefits at the Public Inquiry;

(c) In coming to a decision with respect to European Protected Species, Ministers ignored the provisions of the European Habitats and Species Directive.

The communicant also sought an order to cap the potential liability for expenses. The communicant was granted an order to cap its liability for expenses with respect to the appeal at £40,000 on 20 January 2011. The full hearing for the appeal was set for 22 February 2011 for eight days.

C. Substantive issues

Report to Inform an Appropriate Assessment not fit for purpose — preamble and article 3, paragraph 2 of the Convention

41. The communicant identifies a number of alleged deficiencies in the April 2008 Report to Inform an Appropriate Assessment commissioned by Transport Scotland in accordance with the EU Habitats Directive. These alleged deficiencies, inter alia, include that appendix 9 to the Report, concerning River Dee Salmon, is significantly flawed and it cannot be concluded beyond a reasonable scientific doubt that the project will not adversely impact the integrity of the Dee SAC. Second, that the Habitats Directive requires an "in combination procedure" so that all developments which might affect a protected site are included in a combination assessment, and not just those concurrent with the subject development as assumed by Transport Scotland. Moreover, the Report gives few details of the mitigation measures proposed, and much of the mitigation is left to contractors to perform. The communicant alleges that these deficiencies negate any significance which might be attached to the Report's findings or to the response of SNH dated 8 August 2008. In addition, the communicant objects to the procedure whereby the environmental statement and the Report to Inform an Appropriate Assessment were commissioned from consultants by the promoter of the route. It alleges that the commissioned reports presented information especially tailored to the needs and requirements of Transport Scotland and that, in effect, the consultants were acting at the behest of Transport Scotland and supporting its case for the AWPR, rather than providing independent advice to the public and to the Scottish Government on the environmental impact of the route.

[5] Decision 073/2010 Mr. A D Hawkins and Scottish Natural Heritage, dated 25 May 2010.

42. The communicant submits that by providing inadequate and inaccurate environmental information the Party concerned adversely affected the ability of the public to oppose a public decision with adverse effects upon the environment and to enable informed environmental decisions to be made. It contends that this is contrary to the preamble of the Convention, which recognizes "the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information". The communicant alleges that the Party concerned failed to fulfil its obligation under article 3, paragraph 2, to endeavour to ensure that its officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

43. In relation to the communicant's allegations under article 3, paragraph 2, the Party concerned submits that it has taken the necessary legislative and regulatory measures required to implement the Convention's obligations. Regarding the preamble, the Party concerned submits that the preamble is intended to act as an aid to interpretation of the operative provisions of the Convention, and does not represent a binding or operative provision of the instrument. Notwithstanding this, however, the Party concerned submits that the broad interpretative principles found in the preamble have been observed.

44. Moreover, the Party concerned submits that the substantive issue of whether the environmental information contained in the Environmental Statement and the Report to Inform an Appropriate Assessment is fit for purpose is a matter of fact, and a matter on which evidence was presented by the communicant at the public local inquiry. Given that the communicant made its allegations to the Committee before the Reporters had reported their recommendations following the public local enquiry, and before the Scottish Ministers had yet undertaken an appropriate assessment of the proposed AWPR, the Party concerned submits that the communicant's allegation that the information in the Environmental Statement and the Report to Inform an Appropriate Assessment was unfit for purpose was made prematurely.

Refusal to provide details of breeding sites of freshwater pearl mussels — articles 1, 4 and 5

45. The communicant claims that the refusal to provide information on the state of the environment by an agency of the Scottish Government is a breach of articles 1 and 4 of the Convention, and fails to take account of the provisions of article 3. It alleges that lack of access to the information on freshwater pearl mussels contained within the report has prevented it from taking action in several respects. Firstly, without the report it has been unable to query the adequacy of measures taken by the Scottish Government and its agents to avoid deterioration of habitats for the freshwater pearl mussel within the Aberdeenshire River Dee SAC and to hold the Scottish Government to account for its failure to act. The communicant alleges that on this point the Party concerned is also failing to comply with article 5, paragraph 1 (c), of the Aarhus Convention, which requires in the event of any imminent threat to the environment (in this case to freshwater pearl mussels) there should be access to information which could enable the public to take measures to prevent or mitigate harm arising from the threat. Secondly, the communicant contends that failure to provide the report, which includes information on the distribution of freshwater pearl mussels in relation to a new bridge proposed for the AWPR, has impaired the communicant's ability to oppose effectively the construction of the AWPR. This refusal has been compounded by the willingness of SNH to provide that report to consultants assisting Transport Scotland in making their case for the construction of the AWPR. Thirdly, the communicant reports that it has brought a complaint to the Commission of the European Union alleging that the promoters of the proposed AWPR route have failed to comply with

the Habitats Directive and the Strategic Environmental Assessment (SEA) Directive.[6] The communicant contends that unless it has access to the report commissioned by SNH, which points to deterioration in the status of freshwater pearl mussels, it will be unable to draw the attention of the European Commission to the lack of enforcement of the Habitats Directive by the Scottish and United Kingdom Governments.

46. The Party concerned submits that its decision not to disclose the report was in accordance with article 4, paragraph 4 (h), of the Convention. It submits that freshwater pearl mussels are an endangered species throughout Europe, with populations declining due to overfishing, changes to water quality from engineering and other river works, as well as illegal pearl fishing. Scotland is considered a stronghold for the species. The population in the River Dee has been subject to illegal pearl fishing in the past. The Party concerned states that the Public Local Inquiries Procedures and Rules require all parties including the Reporter to be able to have access to all material presented and there is no power to restrict evidence. The Party concerned states that the dissemination of any information in relation to freshwater pearl mussels is carefully risk assessed to ensure full protection of the species at all times. It contends that the release of the detailed information requested by the communicant could have led to publication of the location and status of all known freshwater pearl mussel populations within the River Dee, making these locations more vulnerable to targeted illegal pearl fishing. It notes that its decision not to disclose this was affirmed by the Scottish Information Commissioner in his decision of 25 May 2010.

47. With respect to the communicant's allegation under article 5, paragraph 1 (c), the Party concerned submits that that provision relates to situations in which there is an imminent or immediate threat to the environment, which is not the case with the proposed AWPR. It submits that the environmental impacts of the proposed AWPR have been assessed and reported in the Environmental Statement in any event. It submits that the communicant has provided no examples of the Scottish Government having failed to provide information which could enable the public to take measures to prevent or mitigate harm arising from a threat to a protected species within the meaning of article 5, and the allegation is therefore unfounded.

Refusal to release "badger report" — article 1, 4 and 5

48. The communicant contends that the Party concerned has also breached articles 1 and 4 of the Convention in relation to its refusal to release a report prepared by agents of Transport Scotland on badgers along the route of the AWPR on the grounds that if the information was divulged to the public it would increase the risk of persecution of badgers. It claims that, subsequently, the Reporters conducting the Public Inquiry for Scottish Ministers would not allow evidence to be given on the badger report by the communicant, and did not wish to have the report itself presented to the Inquiry. The communicant alleges that the absence of the report prevented its witnesses from arguing that not enough was being done to protect badgers from the effects of the route and it was unable to question effectively the adequacy of the mitigation measures proposed by Transport Scotland. The communicant claims that the short time remaining until the Public Inquiry meant that it was not possible for it to make a request under the Freedom of Information (Scotland) Act 2002.

49. The Party concerned contends that the communicant's allegation that there has been a failure, in breach of article 4 of the Convention, to provide information on the state of the environment and the status of protected species impacted by the proposed AWPR is unfounded. The Party concerned states that badgers and their setts are legally protected by

[6] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

the Protection of Badgers Act (1992) and other relevant legislation. The Environmental Impact Statement published in 2007 included an assessment of a range of protected species, including badgers. Assessment results are provided as technical appendices to the Environmental Statement, with information summarized in the main body of the text. Appendix 10.2 details the assessment on badgers. The Party concerned contends that, similar to the freshwater pearl mussel highlighted above, the precise locations of badger setts were not published within the Environmental Statement as it was considered that disclosing the information would put this protected species at increased risk of badger baiting and snaring. The Party concerned notes that the communicant did not make a request under either the Freedom of Information (Scotland) Act 2002 or the Environmental Information (Scotland) Regulations 2004 for Appendix 10.2 to the Environmental Statement (the badger assessment appendix).

Inadequate public participation regarding the proposed AWPR option — article 6

50. The communicant alleges that on 1 December 2005 the Minister announced that the AWPR would follow a route that was not one of any of the five routes considered during the public consultation. The new route combined elements of an original Milltimber Brae route with the addition of a Fast Link connecting the AWPR to the A90 trunk road at Stonehaven, 15 km south of Aberdeen. The communicant alleges that by doing so, the Scottish Government effectively consulted on five route options and then chose a sixth. Parties affected by the changes to the route of the AWPR were unable to comment upon the new route or its increased environmental impact either during the consultation in the spring of 2005 (which did not include the route finally selected) or during the subsequent consultation in 2006 on route alignment (where consideration was not given to the choice of the route itself).

51. The communicant alleges that there had been no previous public intimation of a proposed Fast Link, and accordingly no public consultation in respect thereof. Moreover, at the time of the announcement, on 1 December 2005, the Fast Link was to be a conventional single carriageway. Subsequently, the promoters proceeded to refine the alignment of the chosen route and to upgrade the Fast Link to a dual carriageway.

52. With respect to the obligations of the Party concerned under the Convention, the communicant alleges that the public were not informed in advance of any proposal for a Milltimber Brae/Fast Link route option, or invited to comment on that route option, as required under article 6, paragraph 2. Effective public participation on all options in an open way was not provided as required under article 6, paragraph 4. Moreover, the public were not informed of new objectives established for the route (which were defined only after the route had been selected), although this is required under article 6, paragraph 5. In addition, the public were not able to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions on the final choice of route, although this is required under article 6, paragraph 7, of the Convention.

53. Under the Freedom of Information Scotland Act, the communicant asked the Scottish Government to provide information on the reasons for choosing the Milltimber Brae/Fast Link route. That information was not provided. Asked for minutes of the meeting recording that decision, a representative of the Scottish Government indicated that no notes or minutes were kept. The communicant contends that this is an extraordinary situation for any meeting at which an important decision, with heavy financial implications, was taken. The communicant submits that in failing to provide evidence on the reasons for the change in the route of the AWPR announced on 1 December 2005 the Scottish Government has failed to meet its obligations under article 6, paragraph 9, of the Convention.

54. The Party concerned responds that the Milltimber Brae and Fast Link corridor option was a combination of two options presented during the spring 2005 public consultation (i.e., a combination of the Milltimber Brae and Peterculter/Stonehaven options presented at the exhibitions in spring 2005). Following the announcement to adopt the Milltimber Brae and Fast Link corridor option on 1 December 2005, letters were issued to statutory and non-statutory consultees (including community councils) in early 2006. The Party concerned accepts that these letters were the first occasion when the combined option comprising both the Southern Leg and the Fast Link were issued for consultation purposes. However, the public and interested parties were subsequently given the opportunity to comment on the entire scheme, including the Southern Leg and Fast Link, following the publication of the draft Schemes and Orders in December 2006 and autumn 2007. The Party concerned states that the publication of the statutory documentation in accordance with the Roads (Scotland) Act 1984 allowed the public and interested parties the opportunity to examine the proposed alignment for the Scheme (including the Southern Leg and Fast Link) and offer comment in the form of support, objection or other representation. Formal public exhibitions were also held at specific locations along the route to coincide with the publication of the draft Schemes and Orders. The Party concerned states that the Roads (Scotland) Act requires the Scottish Ministers, upon making their decision whether or not to confirm the draft Schemes and Orders, to make available the content of their decision and any conditions which are to apply.

Narrow scope of public inquiry and not all options open — article 6, paragraph 4

55. The communicant contends that the public inquiry that was held between September 2008 and January 2009 was into a proposal which the Government stated had already been confirmed as a matter of policy. The communicant contends that the scope of the inquiry, as set by the Reporters acting under direction from the Scottish Government Minister, was too narrow and thus unfairly prejudiced those parties, including the communicant, objecting to the scheme. No discussion was permitted of a no-bypass option or other forms of traffic management — nor any discussion permitted of an option to the east of the city — since the starting point for the inquiry was that the Minister had already taken the decision that in principle that there was to be a bypass to the west of the city. The communicant notes that the impact of this restriction is made clear by some of the Reporters' findings and conclusions — for example the Reporters concluded that the selected route would be very damaging to the long-established woodlands at Kingcausie and to nearly all of the "Local 3 Landscape Character Areas" — but felt powerless to find against the scheme on these grounds as there was no alternative scheme available. The communicant contends that, in the light of the above, the public inquiry cannot be considered to fulfil article 6, paragraph 4, which requires early public participation when all options are open.

56. The communicant contends that no consultation was carried out on the southern leg of the route in relation to the MTS. Further, the communicant alleges that the consultation on the northern leg does not seem to have included information on the crossing of the River Dee. The communicant also states that the questionnaires regarding the MTS sent to 10,000 households in September and October 2000 cannot be equated with an open consultation, as those not selected to obtain a questionnaire must also be able to give their views. Finally, the Party concerned has not provided information on the geographic locality of the households consulted.

57. The Party concerned contends that the communicant is incorrect in alleging that the Scottish Government has failed to seek public comment on the route proposals for the proposed AWPR in an open way. It states that considerable consultation has taken place throughout the development of the AWPR. It contends that public consultations for the southern leg were conducted in the 1990s, when it was known as the western leg. It does not accept that the public inquiry did not comply with article 6, paragraph 4. Moreover, it

states that the statutory scheme of the Roads (Scotland) Act, 1984 allowed the public the opportunity to express objections in writing as well as to participate at local inquiries. Formal public exhibitions were also held at specific locations along the route. The Party concerned contends that it was open to persons objecting to the draft Schemes and Orders to argue for an alternative route. It contends that a number of objections to the draft Orders raised alternatives to the proposed AWPR route and thus these were considered at the public local inquiry. It notes that the communicant participated in the public local inquiry and presented evidence to the inquiry on a range of matters.

Change to Modern Transport System — article 7

58. The communicant contends that the change in route was subsequently justified by Transport Scotland on the basis that the transport planning objectives for the AWPR had now changed to introduce an additional, retrospective strategic transport objective: "Provide traffic relief (including the removal of long distance heavy goods vehicle traffic) on the existing congested A90 route through and to the south of Aberdeen". The communicant states that the introduction of a new objective regarding the relief of traffic on the A90 was a major change to the objectives of the strategic transport plan (the MTS) and that, in amending the strategic transport plan to introduce a new and far-reaching objective without any discussion or public participation, the Scottish Government breached article 7 of the Convention.

59. The Party concerned contends that the objectives for the MTS have not changed since it was published in 2003. It states that the revised objective the communicant refers to is in fact a revision of one of the objectives of the AWPR project itself, and is not an objective of the MTS. It states that the objectives for the AWPR project were reviewed and consolidated in 2005 as part of the process of identifying the preferred corridor.[7]

Access to justice — article 9

60. The communicant contends that the Party concerned has breached article 9, paragraphs 2 and 3, of the Convention, on the grounds that there is effectively no access for the public in Scotland to an open and inexpensive review procedure before a court of law and/or other independent and impartial body established by law to challenge the substantive and procedural legality of the proposed AWPR.

61. The communicant alleges that the public local inquiry into the proposed AWPR cannot be considered to provide an independent and impartial body through which to challenge the legality of the decision to construct the AWPR, having regard to its scope and the acquiescence of the Reporters with the instructions of a Scottish Minister regarding the scope of the inquiry. It notes that this particular problem may well apply in all cases where a public local inquiry is held into projects promoted by the Scottish Government itself. It contends that such an inquiry could not possibly be regarded as independent, or fair to the interests of the public and those affected by the proposal.

62. In addition, the communicant argues that there is restricted ability to seek justice through the Scottish system of judicial review. Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the actual merits of the case.

[7] The AWPR Project Development 2005–2006 Consolidation Assessment Report is available at http://www.awpr.co.uk/d/Documents%20and%20Reports/Project%20Development%202005%20-%202006%20Consolidation%20Report.pdf.

63. The communicant also contends that the very high cost of seeking judicial review in Scotland effectively precludes any individual or small organization seeking environmental justice through this procedure. In this respect, the communicant contends that the principles governing the right to obtain Protective Expenses Orders are unclear, and even the Scottish courts are minded to grant such an order, the cap on costs may be set too high.

64. The communicant alleges that regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, together with the Scottish Legal Aid Board's guidance effectively prohibit a grant of legal aid in public interest environmental cases.[8] The communicant contends that in order to meet the requirements of regulation 15, an applicant must show that they will suffer serious prejudice if the application is refused. However, the Guidance states that "the criteria for a wider public interest will not be met … where we consider the interest is, in fact, a private interest". The communicant claims that it appears to be an impossible argument to win. If the individual does not have a substantial impact from the issue then regulation 15 is not satisfied and legal aid will be refused. However, if the interest and connection to the individual is real, then the applicant may be told that the interest is in fact a private interest and no wider public benefit can be taken into account.

65. Moreover, although in Scotland there is no formal time limit within which judicial review proceedings must be commenced, there is a time limit of six weeks to appeal a Ministerial decision with respect to Road Orders. The communicant believes that this is insufficient time to mount an effective challenge against a Ministerial decision with respect to the environmental impact of a major road.

66. The Party concerned contends that the public local inquiry was not intended to represent the independent and impartial body through which the communicant was entitled under article 9 to challenge the legality of the decision to construct the AWPR. In particular, it notes that a public local inquiry, which is designed to inform a decision which has not yet been taken, is inadequate as an independent and impartial body through which to challenge the legality of the decision to construct the AWPR. Rather, the Party concerned contends that once the decision to proceed with the AWPR was taken, there was a statutory procedure for challenging the decision under paragraph 2 of Schedule 2 to the Roads (Scotland) Act 1984. It notes that the Scottish Ministers' decision approving the draft Schemes and Orders was required to include information on the right to challenge the validity of the decision. The public was then able to take steps to challenge either the substantive or procedural legality of the decision via the procedure provided for under statute. In respect of the communicant's allegations regarding the limited scope of judicial review, the Party concerned contends that, while the principle function of judicial review is to examine the procedural and legal propriety of a decision, a petition for judicial review can call into question the proportionality or irrationality of a decision or examine any question of error in relation to that decision and that this is wholly consistent with article 9, paragraph 2, of the Convention.

III. Consideration and evaluation by the Committee

General considerations

67. The United Kingdom deposited its instrument of ratification of the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

[8] Text of oral presentation on behalf of Road Sense, at the hearing of the Committee on 17 March 2009.

Report to Inform an Appropriate Assessment not fit for purpose — preamble and article 3, paragraph 2

68. In respect of the communicant's allegations that the Report to Inform an Appropriate Assessment was not fit for purpose, and thus in breach of the preamble and article 3, paragraph 2, of the Convention, the Committee notes that the preamble, while being an important aid to interpreting the Convention, does not in itself create binding legal obligations. With respect to the communicant's allegations in respect of article 3, paragraph 2, the Committee is not in a position to assess the factual accuracy of the Report to Inform an Appropriate Assessment. It does not consider that the communicant's allegations give rise to a breach of article 3, paragraph 2, of the Convention.

Information on location of freshwater pearl mussels — articles 1, 4, paragraph 4 (h), and 5

69. The Committee notes that, since the discussion of the communication at its twenty-seventh meeting, the Scottish Information Commissioner (SIC) has released his decision regarding Mr. Hawkin's application for access to the information on the location of the pearl mussels. The Commissioner found that SNH should have disclosed the Freshwater Pearl Mussels reports, redacted only for the locations of the freshwater pearl mussels.

70. As a result of the Commissioner's decision that all information except the locations of the mussels should be released, the Committee now only needs to consider whether the withholding of the remaining redacted information is in compliance with article 4, paragraph 4 (h), of the Convention.

71. Having not seen the redacted information, for present purposes the Committee must assume that the redacted information indeed relates to the location of the freshwater pearl mussels. The Committee notes the submission by the Party concerned that the mussels have been subject to illegal fishing in the past.

72. On that basis, the Committee finds that the redacted information relates to the "breeding sites of rare species" under article 4, paragraph 4 (h), being in this case the breeding sites of rare freshwater pearl mussels.

73 However, that is only the first step. Article 4, paragraph 4, requires the grounds for refusal to be "interpreted in a restrictive way, taking into account the public interest served by disclosure".

74. The Committee notes that SNH accepted that "its stance in no way reflected upon Mr. Hawkin's own suitability as an individual to obtain access to the requested information" (para. 30, SIC Decision 073/2010 Dr A D Hawkins and Scottish Natural Heritage). However, SNH took the view that, if it disclosed the redacted information to Mr. Hawkins, the information would thereafter be in the public domain and SNH would not be able to refuse to disclose the information to any other member of the public, some of whom may use the information in ways harmful to the ongoing survival of the mussels.

75. The Committee notes that the Commissioner considered whether SNH could or should have provided the withheld information to Mr. Hawkins in return for an undertaking that he not disclose the information to any other person (para. 33, SIC Decision 073/2010 Dr A D Hawkins and Scottish Natural Heritage).The Commissioner held that the Environmental Information Regulations provide a general right of access to environmental information, which applies equally to all people. They contain no provision for the supply of information only to qualified people, or to those who give an undertaking not to distribute that information further (para. 31 of the decision). Therefore, the Commissioner held that he had no power to require or enforce any licensed or conditional release of information under the terms of the Environmental Information Regulations (para. 32 of the

decision). He noted that this does not prevent a public authority choosing to provide information to certain individuals on a confidential or licensed basis. However, any such arrangements would be a matter for those parties alone, and is not required under the Regulations.

76. The Committee notes that article 4 of the Convention refers to the "public", whereas article 6 of the Convention makes reference to the "public concerned". However, the Convention makes no further distinction between members of the public concerned. Thus, all members of the public concerned are equally entitled to enjoy the rights under the Convention.

77. Thus, if the exception in article 4, paragraph 4 (h), is to be read restrictively to allow Mr. Hawkins to have access to the redacted information in order that he might exercise his right to participate under article 6, then other members of the public concerned would be entitled to the same right. The problem is that, while SNH does not question Mr. Hawkins' suitability to receive the redacted information, there may be others among the public concerned who would be less trustworthy. However, disclosing the redacted information to Mr. Hawkins would mean that all members of the public concerned would be entitled to such disclosure. Recognizing the possibility that disclosure to the wider public concerned may result in adverse effects on the breeding sites of the mussels, the Committee finds that the Party concerned was not in non-compliance with article 4 by withholding the redacted information in the circumstances of this case.

78. With respect to the communicant's allegations under article 5, paragraph 1 (c), this provision conveys an obligation on Parties to actively disseminate information on imminent threats to members of the public that may be affected by that threat, rather than to respond to information requests, which is the subject of article 4. The Committee finds that the communicant has not substantiated that the elements set out in article 5, paragraph 1 (c), are met in the circumstances of this case.

Badger report — articles 1, 4, paragraph 4 (h), and 5

79. The communicant has indicated that it does not intend to make a request under the Scottish Freedom of Information (Scotland) Act or the Environmental Information (Scotland) Regulations for access to the report on the location of badger setts, as it is now too late to utilize any additional information on badger setts. While noting the reason for the communicant's decision not to make such a request, the Committee considers that in choosing not to do so, the communicant has failed to have recourse to the available domestic remedies. In the circumstances, the Committee decides that it should not consider this allegation further.

Restricted scope of public inquiry — article 6, paragraph 4

80. The Committee finds that the AWPR is an activity covered by annex I of the Convention and thus subject to article 6, paragraph 1 (a), of the Convention for two reasons. First, the AWPR involves the construction of a new road of four lanes of more than 10 km in length (paragraph 8 (c) of annex I). Second, the AWPR is an activity regarding which national legislation (section 20A of the Roads (Scotland) Act 1984) requires that public participation be provided under the environmental impact assessment procedure (para. 20 of annex I).

81. In respect of the communicant's submission that, due to the fact that the Reporters' terms of reference did not require them to hear evidence regarding whether the road was needed, the Party concerned failed to meet the requirement of article 6, paragraph 4, of the Convention that all options be open, the Committee notes that there has been an ongoing

public participation process regarding the AWPR for more than a decade. In this respect, the Committee recalls its findings on communication ACCC/C/2006/16 (Lithuania):

> 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.[9]

82. In the light of the above, the relevant issue is to ensure that there was public participation regarding all options, including the "zero option", at some previous stage. Considering the chronology set out in paragraphs 23 to 40 above, the Committee finds that at several stages, e.g., during the development of the Local Transport Strategies and Modern Transport Strategies and the Aberdeen & Aberdeenshire Structure Plan, as well as the spring 2005 consultations, the public had opportunities to make submissions that the AWPR should not be built and to have those submissions taken into account. In this regard, the Committee notes that it is not empowered to examine events that, in some cases, significantly predate the entry into force of the Convention for the Party concerned. The Committee considers that the public had a number of opportunities during the ongoing participation process over the years to make submissions that the AWPR not be built, and to have those submissions taken into account. The Committee therefore finds that the Party concerned is not in non-compliance with article 6, paragraph 4.

No public participation on route chosen — article 6, paragraphs 6 and 7

83. Based on the evidence presented, the Committee finds that the selected route differs from the options the public was invited to consult upon during the informal consultations conducted in spring 2005 in at least two respects. First, the Fast Link is some distance to the east from the Peterculter/Stonehaven route. Second, all the options consulted upon during the spring 2005 consultation were presented as alternatives. However, the route selected actually adopts two of these options, to create a southern leg with two different feeder roads, one route leaving the A90 at Stonehaven heading north, and the other leaving the A90 at Charleston and heading west. To the Committee's understanding, the first occasion on which statutory and non-statutory consultees were formally consulted on the route selected was when letters were sent to them in early 2006. The Committee understands that the wider public was not formally consulted on the possibility of a southern leg incorporating two routes (i.e., both a southern leg and a Fast Link) until the Draft Special Road Orders were published in December 2006 as part of the statutory authorization process.

84. In addition to not being subject to the spring 2005 consultation, the Committee notes that the Fast Link that was presented in the 1 December 2005 decision by the Minister was a single carriageway and that, subsequent to the Minister's decision, a decision was taken to make it a dual carriageway instead.

85. The Committee notes with some concern that the route finally selected and the dual carriageway character of the Fast Link were not subject to the informal consultation process. It finds that the decision to increase the Fast Link from a single to a dual carriageway is not, as submitted by the Party concerned, a purely technical matter. It, however, finds that these aspects were ultimately subject to public participation through the statutory authorization process following the publication of the Draft Schemes and Orders in December 2006. In light of the subsequent statutory consultation that did provide for

[9] ECE/MP.PP/2008/5/Add.6, para. 71.

public participation on these aspects, the Committee can not conclude that the Party concerned is in non-compliance with article 6, paragraphs 6 and 7.

New strategic objective in the Modern Transport System — article 7

86. The communicant alleges that the reason given by the Party concerned for the new route was in order to comply with a new transport objective of the MTS. The Party concerned denies that the MTS was changed. The Committee notes the disagreement between the parties as to whether the MTS was changed to introduce a new transport objective.

87. Having reviewed the documentation referred to by the parties, including the MTS and the AWPR Project Development 2005–2006 Consolidation Assessment Report, the Committee finds that the objective referred to by the communicant is to be found in the latter document only. The Committee does not consider that this document is a plan subject to the requirements of article 7, but rather a document relating to a specific activity subject to article 6, and notes that it has already considered the communicant's allegations under article 6 above. It will therefore not consider this allegation further.[10]

Access to justice — articles 9

88. The Committee notes the communicant's indication in its letter of 21 November 2010 that it has brought a Statutory Appeal under the Roads (Scotland) Act 1984 in respect of the Scottish Parliament's approval of the Schemes and Trunk Road Orders on 3 March 2010. The hearing of the Statutory Appeal is set for eight days commencing on 22 February 2011. The Committee also notes that the communicant has been granted an order to cap its potential liability for expenses with respect to the appeal at £40,000 on 20 January 2011.

89. In light of these developments, the Committee and awaiting further clarification from the communicant finds that it would be premature for it to consider the communicant's allegations regarding access to justice at this stage. It therefore decides to conclude its findings in respect of the other aspects of the communication.

IV. Conclusion

90. Having considered the above, the Committee does not find that the matters examined by it in response to the communication establish non-compliance by the United Kingdom with its obligations under articles 3, paragraph 2, article 4, article 5, paragraph 1 (c), article 6 or 7 of the Convention.

[10] In reaching this conclusion, the Committee refers to footnote 6 in its findings and recommendations with regard to compliance by Albania (ECE/MP.PP/C.1/2007/4/Add.1) and the definition of "plans" in the European Commission Guide for Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment. This states that "a plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas." The definition of "programme" is "the plan covering a set of projects in a given area … comprising a number of separate construction projects".

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Fourth session
Chisinau, 29 June–1 July 2011
Item 5 (b) of the provisional agenda
Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee

Addendum

Findings and recommendations with regard to communication ACCC/C/2009/41 concerning compliance by Slovakia (adopted by the Compliance Committee on 17 December 2010)

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I. Introduction

1. On 1 July 2009, the Austrian non-governmental organization (NGO) Global 2000/Friends of the Earth Austria (hereinafter, "the communicant"), in collaboration with Friends of the Earth Europe (FoEE), Greenpeace Slovakia and International, Za Matky Zem and VIA IURIS, and with the legal support of Oekobuero, submitted a communication to the Compliance Committee alleging a failure by Slovakia to comply with its obligations under article 6 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter "the Aarhus Convention" or "the Convention").

2. The communication alleges that, with regard to the Mochovce Nuclear Power Plant (hereinafter, "the Mochovce NPP"), by failing to provide for public participation in the decision-making process for a construction permit additional to the one already granted in 1986, as well as related permits in 2008, the Party concerned failed to comply with article 6, paragraphs 1, 4 and 10 of the Convention. The communicant also alleges that, since it was not possible to appeal against the different decisions due to restricting standing requirements in Slovak law and by generally not providing for access to justice in environmental matters in its legislation, the Party concerned fails to comply with article 9, paragraphs 2, 3 and 4, of the Convention.

3. At its twenty-fourth meeting (30 June–3 July 2009), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 23 July 2009, along with a number of questions put forward by the Committee soliciting additional information from the Party on matters relating, inter alia, to the applicable legal framework and the decision-making procedures for the project.

5. At its twenty-fifth meeting (22–25 September 2009), the Committee agreed to discuss the content of the communication at its twenty-seventh meeting (16–19 March 2010).

6. The Party concerned and the communicant addressed the questions raised by the Committee on 2 December 2009 and on 29 December 2009, respectively.

7. The Committee discussed the communication at its twenty-seventh meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the communicant and the Party concerned provided documents and written statements to the Committee. The Committee also received a letter signed by mayors of four Slovak municipalities near the Mochovce NPP.

8. The Party concerned submitted additional information to the Committee on 13 and 14 April 2010; and the communicant on 20 May 2010.

9. The Committee prepared draft findings at its twenty-ninth meeting (21–24 September 2010), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 11 October 2010. Both were invited to provide comments by 8 November 2010.

10. The Party concerned and the communicant provided comments on 29 and 30 November 2010, respectively.

11. In its reply, the Party concerned expressed "strong concerns about the conclusions" reached by the Committee in its draft findings. The Party concerned argued, inter alia, that

it appeared from the draft findings that no analysis was performed as to whether the conditions for application of public participation obligations under article 6 were fulfilled. In particular, the Party concerned argued that the reference to "mutatis mutandis, and where appropriate" in article 6, paragraph 10, should be understood as meaning that "it is for the relevant national authority to make the additional assessment identifying where it is 'appropriate' to carry out a public participation procedure". The Party concerned also argued that "it is not open to the Committee to substitute its views for those of the authority; it can only interfere when the decision is manifestly unreasonable". Moreover, the Party concerned referred to the amendments of legislation adopted in 2009 and submitted that these amendments bring Slovak law fully in compliance with the requirements of the Convention. The Party concerned also asked the Committee to hold a second meeting with the Party concerned "where the facts and applicable law could be presented before the Compliance Committee in person".

12. In its reply, the communicant in general agreed with the findings. It clarified that since the Mochovce NPP environmental impact assessment (EIA) was concluded in May 2010, new legislation applies and the public concerned will have standing. The communicant also explained that, while it had alleged at the discussion during the twenty-seventh meeting that this was not the case, it is now aware that the new legislation is applicable for cases following the Mochovce NPP EIA.

13. At its thirtieth meeting, the Committee considered the request from the Party concerned for a second discussion with the Party concerned, and decided that such a discussion was not necessary, since the Committee had received the concerns of the Party in writing. At the same meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as addendum to the Committee's report to the fourth meeting of the Parties (or as separate document, as appropriate). It requested the secretariat to send the findings to the Party concerned and the communicant.

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

14. This communication, while also pertaining to Slovak legislation, essentially concerns the alleged failure by the Party concerned to provide for public participation in accordance with article 6 of the Convention in three specific instances of decision-making by the Slovak Nuclear Regulatory Authority (*Úrad Jadrového Dozoru*; hereinafter, "UJD") concerning the Mochovce NPP. These are:

(a) Decision No. 246/2008 of 14 August 2008 to permit the change of construction of Mochovce NPP Units 3 and 4;

(b) Decision No. 266/2008 of 14 August 2008 to permit the implementation of changes in safety-related equipment during completion of the Mochovce NPP Units 3 and 4; and

(c) Decision No. 267/2008 of 14 August 2008 to permit the implementation of changes in the document "Preliminary Safety Report of NPP Mochovce Units 3 and 4".

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

A. Legal framework

15. The main Slovak legislation concerning nuclear installations is found in Act No. 541/2004 Col. on the Peaceful Use of Nuclear Energy, as amended (hereinafter, "the Nuclear Act") and Act No. 50/1976 on Land-se and Building Proceedings (hereinafter, "the Building Act"). UJD is the competent administrative body to issue the various consents or permits for the use of nuclear energy under these acts.

16. For nuclear installations, the three main decisions required, all issued by UJD, are:

(a) Consent for the location of the installation under the Building Act;

(b) A construction permit under the Building Act; and

(c) An operation permit under the Nuclear Act and the Building Act, which is a two-tier permit consisting of a permit to commence operation and a permit for operation.

17. Other additional permits are also required, e.g., on the disposal and transport of nuclear material.

18. While the general rules for public participation are set out in the Code of Administrative Procedures (Act 71/1967), there are also specific rules on public participation in Act No. 24/2006 on Environmental Impact Assessment (hereinafter, "the EIA Act") and in the Building Act. The EIA procedure is not a permitting procedure in itself, nor does it provide for public participation as a part of the permit procedure, although the results of the EIA shall be considered in subsequent permitting procedures.

19. The Code of Administrative Procedure provides for participation in administrative procedures for persons whose rights and legally protected interests or obligations are the subject matter of or may be directly affected by the decision, persons who claim that their rights, legally protected interests or obligations may be affected by the decision (until it is proven otherwise), and persons recognized as participants under specific laws.

20. When the EIA procedure was initiated for the Mochovce NPP in February 2009, the public concerned that could participate in the EIA procedure, according to the EIA Act, included civic initiatives (at least 500 natural persons with permanent residence in the affected municipality), civic organizations promoting environmental protection (at least 250 natural persons of over 18 years of age, of whom at least 150 with permanent residence in the affected municipality) and non-governmental organizations promoting environmental protection established under special regulations and active for more than two years (necessary proof of registration).

21. Under the Building Act, the parties to the process are: the applicant; persons with ownership or other land rights that may be affected by the permit; other persons assigned such status by relevant regulations (such as the EIA Act); a building surveyor or other qualified person; and the designer of the building. The Constitutional Court of Slovakia has ruled that this list of participants is definitive for the purposes of construction proceedings and any expansion is not permissible.

22. Decisions by UJD can be first appealed to UJD itself. In such cases UJD is to apply the provisions on participation in the Code of Administrative Procedure. Appellate decisions by UJC can be brought to the Regional Court for a legal review, in accordance with the Act on Civil Procedure.

B. Facts

23. The Mochovce NPP is located in Southern Slovakia, 120 km east of the capital, Bratislava, in Levice Okres (district). The location permit for the project was issued in 1979, and the construction permit for the four reactors (Soviet Generation II reactors, type VVER 440/V213, designed in the 1970's) was initially issued on 12 November 1986, under the condition that construction be completed in 115 months.

24. Two reactors, Mochovce 1 and 2, were finalized and started operating in 1989, whereas the other two, Mochovce 3 and 4, were only partially constructed. The work on these two reactors was curtailed in the early 1990's due to financial constraints. On 5 May 1997, the period for the completion of construction work under the construction permit was extended by the relevant authority for the first time to 31 December 2005, and later, for the second time, on 15 July 2004, it was extended to 31 December 2011. In 2007, Slovakia decided to complete the Mochovce NPP by finalizing and putting into operation reactors Mochovce 3 and 4. The developer responsible for the project is ENEL/SE, a consortium between the Italian company Enel SpA and the Slovak Slovenské Elektrané a.s.

25. In May 2008 the developer applied for the three permits in question. The applications were approved, by UJD decisions 246/2008, 266/2008 and 267/2008, on 14 August 2008.

26. UJD decision 246/2008 permits the change of construction of NPP Mochovce Units 3 and 4, and provides a long list of binding conditions and different deadlines. The decision also extends the general deadline for completing the construction to 31 December 2013. In its justification, UJD refers to the notice made to different public bodies. While UJD does not consider it necessary to carry out an EIA before granting the construction permit, it holds that such an assessment, based on the EIA Act, should be made before permitting the operation of the facility.

27. UJD decision 266/2008 of August 2008 permits the implementation of changes in safety-related equipment during completion of the NPP Mochovce Units 3 and 4. It includes a list of 120 items for which changes would be undertaken.

28. UJD decision 267/2008 of 14 August 2008 permits the implementation of changes in the document "Preliminary Safety Report of NPP Mochovce Units 3 and 4". In its decision, UJD refers to the fact that the preliminary safety report for NPP Mochovce Units 3 and 4 was elaborated in 1984 and 1986, and that the applicant had submitted the updated version of the report in full to UJD because of the changed legislative requirements during the period in which the completion of NPP Mochovce Units 3 and 4 was being planned.

29. Before the decisions were made, in June and August 2008, two organizations, Greenpeace Slovakia and Za Matku Zem, filed their statements with UJD relating to the developer's application for construction changes, as parties to the proceedings in accordance with the general provisions of the Code of Administrative Procedure, and claimed that it was necessary to carry out the EIA and have the EIA final statement before the decision was issued by UJD. Their arguments were rejected on the grounds that these organizations did not fulfil the criteria necessary for organizations to participate in the proceedings. In decision 246/2008, while there is no reference made to the statements submitted by the two organizations, it is stated that the parties to the proceedings had not raised any objection.

30. While it is not fully clear to the Committee when the preparatory work for the nuclear plant restarted, the construction work officially restarted on 3 November 2008.

31. In September 2008, the Slovak Ministry of Environment decided that an EIA would be carried out not for the construction changes to the project, but for its operation, and that

such an assessment would be finalized before the initiation of its operation. Accordingly, the scoping phase of the environmental impact assessment started in February 2009.

32. The completion of the first reactor of NPP Mochovce Units 3 and 4 is scheduled for February 2012.

C. Domestic remedies

33. In September 2008, Greenpeace Slovakia and Za Matku Zem appealed decision 246/2008, arguing that one of the required documents, the EIA report, was missing, and that for that reason UJD could not issue the permit. In May 2009, UJD dismissed the appeal by Greenpeace (Za Matku Zem did not continue the proceedings), and confirmed the decision of the first instance, on the grounds that the appeal had arrived too late, that the Ministry of the Environment had issued an opinion that the project was not a new activity and did not introduce new major changes, and that Greenpeace Slovakia was not considered a party to the proceedings under the Code of Administrative Procedure.

34. In May 2009, Greenpeace Slovakia filed a petition with the regional court in Bratislava to review the legality of the decision on appeal. In its petition, it claims that its rights to public participation and access to justice were infringed. Greenpeace Slovakia also claims that it failed to comply with the 15-day deadline for appeals because UJD did not communicate decision 246/2008 on time. At the time of adopting these findings, the case is still pending in the regional court.

D. Substantive issues

Relation between the 1986 and 2008 decisions

35. While it is not disputed that nuclear power plants are covered by article 6 of the Convention, the communicant and the Party concerned disagree about the relation between the construction permits granted in 1986 and 2008.

36. According to the communicant, the 2008 permit involved a considerable update and review of the 1986 construction permit, to the extent that it would not have been possible to follow the 1986 permit and also comply with updated nuclear safety and technology standards. The modifications involved huge changes such as, for instance, a shift to a digital system, a shift of fuel and a power upgrade. Furthermore, the recommendations given by the European Commission, based in the Euratom treaty, differ widely from what was permitted in 1986. Thus, according to the communicant, the criteria in article 6, paragraph 10, were fulfilled, and the Party concerned was under an obligation to ensure public participation before the decision on the 2008 permit was made.

37. The communicant also claims that the necessary changes set out in the 2008 decision are such that they have to be considered as a new project in the sense of annex I, paragraphs 1 and 22, to the Convention. In order to fulfil the updated safety and technological requirements, the changes in the plant design had to be very different from the one licensed in 1986. For that reason, in view of the communicant, the Convention is also applicable on this basis.

38. According to the Party concerned, the 2008 permit decision is a permit for a change in the construction before completion. The change relates to a permit granted in 1986 rather than a new building. It is the continuation of an existing project that was suspended in 1990 for financial reasons. The 2008 decision did not replace the 1986 construction permit, but only modified it. Thus, the 2008 permit was not about an extension, but about the completion of a plant in accordance with the original project. Moreover, according to the

Party concerned, the 2008 permit entailed stricter requirements and additional conditions with higher standards than before. Yet, it did not provide for any physical change in the planned activity.

Early public participation

39. It is not disputed that there was no opportunity for the public to participate in the decision-making procedure leading to UJD decisions 246/2008, 266/2008 or 267/2008.

40. According to the communicant, by providing for public participation only in the EIA procedure, after the issuance of the construction permit and while construction was proceeding, the Party concerned failed to comply with article 6, paragraph 4, of the Convention. Fundamental technological, safety and other environment-related decisions had already been taken at the time the construction was proceeding and contracts had been signed with suppliers. Thus, according to the communicant, it is absolutely unclear how the public's view would be taken into account in the decision-making process when changes were no longer feasible at the time of the EIA procedure. To provide for public participation in such circumstances cannot be compatible with the Convention because by then public participation is neither early nor effective and major options are no longer open.

41. According to the Party concerned, the 2008 construction permit was not an extension but a completion of an installation in accordance with the original project. Thus, there was not a change in the activity, and no new activity was permitted by the 2008 decisions. It follows that there was no obligation to provide for public participation before the construction permit was issued. The EIA procedure initiated in 2009 was carried out in accordance with the Convention on Environmental Impact Assessment in a Transboundary Context and applicable EU law. In this process several members of the wider public and NGOs, as well as neighbouring countries, participated. The permit to operate the activity will be issued only after the EIA procedure, and the outcome of the EIA procedure will be taken into account in that decision.

Access to justice

42. The original communication was limited to claiming a failure by the Party concerned to comply with article 6 of the Convention. In the course of the proceedings before the Committee, the communicant expanded its claim so as to include a claim of a breach of article 9, paragraphs 2 and 3, by the Party concerned, since it had not been possible to appeal against the permitting decisions due to restricting standing requirements, and since no injunctions had been granted, with the result that the construction could start immediately after the issuance of the permits.

III. Consideration and evaluation by the Committee

43. Slovakia deposited its instrument of accession on 5 December 2005. The Convention entered into force for Slovakia on 5 March 2006.

44. Nuclear power plants, such as the Mochovce NPP, are activities covered by article 6, paragraph 1, and annex I, paragraph 1, of the Convention, for which public participation shall be provided in permit procedures. The Committee notes that the original construction permit for Mochovce NPP Units 3 and 4 was issued in 1986, long before the Convention entered into force for Slovakia. This does not, as such, prevent the Convention from being applicable to subsequent reconsiderations and updates by public authorities of the conditions for the activity in question, and to possible permits given for extensions of the activity, after the entry into force of the Convention for the Party concerned.

Use of domestic remedies and access to justice

45. The Committee notes that while its findings are being finalized the appeal by Greenpeace Slovakia to the Bratislava regional court is still pending. In the appeal to the court, the UJD decision is challenged, inter alia, on the ground that there was no opportunity for public participation, which is indeed the core issue also in the case before the Committee. While it cannot be excluded that the regional court will reverse the UJD decision, the Committee decides not to defer the case before it in order to await the outcome in the Bratislava regional court.

46. According to the information received from the communicant and the Party concerned, it may take a long time, possibly up to three years, before the court makes its decision. Yet, the 2008 UJD construction permit prescribes that the construction should be completed by 31 December 2013. In this context, the Committee notes that the regional court did not decide to inhibit the construction of the Mochovce NPP while the case is pending before it. In other words, the construction of the plant is being carried out despite the appeal for judicial review and it may almost be completed before the court has made its decision. The Committee moreover considers that for a major installation like this, when a construction permit has been granted and the construction is carried out, there may be considerable pressure on a court not to stop the activity and not to annul the permit decision for lack of public participation. Even if it were to do so, the construction in itself is likely to cause significant environmental effects. For these reasons, the Committee decides to examine the communication and not to await a possible decision by the national court.

47. In this context, the Committee also notes that the communicant expanded its original claims against the Party concerned, submitting that the Party concerned also failed to provide for access to justice in accordance with article 9 of the Convention. Although the Committee decides to examine the claims concerning lack of public participation in the case, despite the pending case before the national court, it would not be appropriate to examine the claims about access to justice without awaiting the outcome of the pending case. For this reason, the Committee decides not to consider the added claim about access to justice, and to limit its findings to the issue of public participation in the decision-making processes leading to the 2008 decision on the Mochovce NPP.

Relation between the 1986 and 2008 decisions: reconsideration or update of operating conditions — article 6, paragraph 10 — or change to or extension of activity — annex I, paragraphs 1 and 22

48. Before considering whether the minimum requirements for public participation in article 6 of the Convention were met by the Party concerned in the decision-making processes concerning Mochovce NPP, the relation between the 2008 decisions and between the 2008 and 1986 decisions must be clarified.

49. The three decisions in question for the Mochovce NPP, i.e., UJD decisions 246/2008, 266/2008 and 267/2008, deal with different aspects of the Mochovce NPP and concern different legal issues, i.e., the construction, safety modifications and the implementation of changes in the preliminary safety report. Although they form part of a tiered decision-making where the requirements for public participation may apply at different occasions, among themselves, the three decisions are nevertheless closely related in the procedure. Indeed, decisions 246/2008, 266/2008 and 267/2008 appear to have been issued in the same process. They were all issued by UJD on the same date, based on applications by the same developer, that were all submitted in May 2008. In one way or the other, they all deal with the operating conditions for the nuclear plant.

50. Nuclear power plants, such as the Mochovce NPP, are covered by article 6 of the Convention. In the present case, however, the applicability of the Convention depends on

the relation between the 1986 and the 2008 decisions. The Convention is not applicable to the 1986 decision. The application for the 2008 UJD decisions was made in May 2008. Thus, the Convention was applicable, and accordingly the Party concerned was obliged to ensure public participation before taking the 2008 UJD decisions, if they amounted to a reconsideration or an update of the operating conditions, under article 6, paragraph 10 of the Convention, or if the decisions concerned a change to or extension of the activity in accordance with annex I, paragraph 22, to the Convention.

51. If the 2008 construction permit implied a reconsideration or an update of the operating conditions of the Mochovce NPP, the Party concerned should have ensured that the provisions on public participation in article 6, paragraphs 2 to 9, of the Convention were applied, "mutatis mutandis, and where appropriate".

52. The Party concerned was also under an obligation to ensure that the provisions of article 6 were applied if the 2008 construction permit concerned a change to or extension of the activity in question, and if the change or extension in itself met the criteria/threshold set out in annex I to the Convention.

53. As held in paragraph 49 above, the three decisions made in August 2008, while part of larger, tiered decision-making, were closely related. Thus, when determining whether the 2008 decision-making on the Mochovce NPP by UJD amounted to a reconsideration or an update of the operating conditions by a public authority, according to article 6, paragraph 10, of the Convention, or a change to or an extension in itself that met the criteria of annex I to the Convention, the Committee considers the legal effects of the three 2008 decisions together.

54. The 2008 decisions entailed a number of new conditions for the Mochovce NPP. The Committee notes that the legal requirement in Slovak as well as EU law for a nuclear power plant in 2008 were considerably different from those that applied in Czechoslovakia in 1986, when the original construction permit was granted. UJD decision 246/2008 provides a long list of new binding conditions and different deadlines; UJD decision 266/2008 includes a list of 120 items for which changes would be undertaken; and UJD decision 267/2008 refers to the changed legislative requirements during the planning period for the completion of Mochovce NPP Units 3 and 4. During the formal discussions with the communicant and the Party concerned at the Committee's twenty-seventh meeting, the Party concerned referred to the Mochovce NPP as a "non-standard case".

55. Based on the information given by the communicant and the Party concerned, including the translation of the three decisions in question, it is clear that UJD decision 246/2008 in itself — but even more so in combination with decision 266/2008 and decision 267/2008 — regardless of whether it involved any significant change or extension of the activity, amounted to a reconsideration and update of the operating conditions by a public authority of an activity (a nuclear power plant) referred to in article 6, paragraph 1 (a), of the Convention. Thus, in accordance with article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied, "mutatis mutandis, and where appropriate". In this context, the Committee wishes to stress that, although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause "mutatis mutandis, and where appropriate" does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation.

56. The Committee considers that the clause "where appropriate" introduces an objective criterion to be seen in the context of the goals of the Convention, recognizing that "access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take

due account of such concerns" and aiming to "further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment". Thus, the clause does not preclude a review by the Committee on whether the above objective criteria were met and whether the Party concerned should have therefore provided for public participation in the present case.

57. The Committee finds that when the authority reconsidered or updated the operating conditions for an activity of such a nature and magnitude, and being the subject of such serious public concern, as this nuclear power plant, with the changes and increased potential impact on the environment as presented to the Committee, public participation would have been appropriate. This conclusion is not countered by the fact that most, if not all, changes in the 2008 construction permit lead to stricter requirements than those set in the 1986 permit. Thus, by failing to provide for public participation according to article 6, paragraphs 2 to 9, the Party concerned failed to comply with article 6, paragraph 10 of the Convention.

58. The Committee also considers that if the Mochovce NPP had been in operation since 1986 under the conditions set at the time, the changes of the activity required by the 2008 decisions would have met the criteria set out in annex I, paragraphs 1 and 22, of the Convention. In this context, the Committee wishes to stress that, while for many activities listed in annex 1 to the Convention there are certain criteria or thresholds envisaged below which the requirements of article 6 paragraph 1 (a) would not apply, for some of the activities listed (including nuclear power stations) the Convention does not establish any criteria or thresholds. This means that these activities, regardless of their size, are subject to article 6, paragraph 1 (a), and thus provisions of article 6 must be applied with respect to decisions of whether to permit such activities. By virtue of the first sentence of paragraph 22 of annex 1 the same applies to a change or extension of such activities. Thus, in principle, all changes or extensions to such activities are subject to article 6. However, bearing in mind that a change or extension to already permitted activities requires reconsideration or updating of the existing permit, the provisions of article 6 would apply "mutatis mutandis, and where appropriate", as stipulated in article 6, paragraph 10.

59. The Committee concludes that the Party concerned was obliged to ensure public participation in the decision-making process leading to the UJD decisions adopted in August 2008 for the Mochovce NPP.

Early public participation — article 6, paragraph 4

60. As stated in paragraph 39 above, there was no opportunity for the public to participate in the decision-making procedure leading to UJD decisions 246/2008, 266/2008 or 267/2008. Thus, rather than further examining this procedure, the Committee considers whether the Party concerned provided for early and effective public participation through other procedures relating to the decisions for Mochovce NPP, in particular through the EIA procedure launched in February 2009.

61. It follows from article 6, paragraph 4, of the Convention that a core criterion for public participation in decisions on specific activities is that it is provided at an early stage "when all options are open and effective public participation can take place". While there was no opportunity for public participation in the decision-making leading to the three UJD decisions of August 2008, the EIA procedure that provided for public participation was carried out before the permit was given to put the Mochovce NPP into operation. In this context, the Committee recalls that under Slovak law, the EIA procedure is not a permitting procedure in itself, although the results of the EIA should be considered in the subsequent permitting procedures. The question is thus whether the opportunity for public participation in the EIA procedure after the construction permit was issued, but before the operation was permitted, was sufficient to meet the requirements of the Convention.

62. Each Party to the Convention has certain discretion to design the decision-making procedures covered by article 6 of the Convention. Also, in tiered decision-making procedures, each Party can decide which range of options is to be discussed at each stage of the decision-making. Yet, within each and every such procedure where public participation is required, it should be provided early in the procedure so as to ensure that indeed all options are open and effective participation can take place (ACCC/C/2006/16 (Lithuania) ECE/MP.PP/2008/5/Add.6, paras. 57 and 71).

63. Providing for public participation after the construction permit can only be compatible with the requirements of the Convention if the construction permit does not preclude that all issues decided in the construction permit can be questioned in subsequent or related decision-making so as to ensure that all options remain open. Yet, a mere formal possibility, de jure, to turn down an application at the stage of the operation permit, when the installation is constructed, is not sufficient to meet the criteria of the Convention if, de facto, that would never or hardly ever happen (ACCC/C/2007/22 (France) ECE/MP.PP/2009/4/Add.1, para. 39). The risk is obvious that providing for public participation only after the construction permit precludes early and effective public participation when all options are open. Rather, it is likely that once an installation has been constructed in accordance with a construction permit, political and commercial pressures, as well as notions of legal certainty, effectively foreclose discussions concerning the construction itself, as well as options with regard to technology and infrastructure (ACCC/C/2006/16 (Lithuania) ECE/MP.PP/2008/5/Add.6, paras. 74–75).

64. In the present case, the Committee is convinced that, once the construction of the Mochovce NPP Units 3 and 4 is carried out, many of the conditions set in the construction permit are such that they can no longer be challenged by the public. Although the permit to commence the operation and the permit to continue the operation are to be given before the activity starts, there is a considerable risk that once the installation is constructed it is no longer a politically realistic option for the authority to block the operation on the basis of issues relating to the construction, to technology or to infrastructure. Moreover, it is not sufficient to provide for public participation only at the stage of the EIA procedure unless it is also part of the permitting procedure. For these reasons, the Party concerned failed to comply with article 6, paragraph 4, of the Convention in the decision-making for Mochovce NPP Units 3 and 4.

65. Having found that the Party concerned failed to comply with article 6, paragraph 4, of the Convention in the case of Mochovce NPP, the implied question is whether this is due to a systemic failure or whether it refers only to this particular case. Slovakia has a legal framework in place to provide for public participation in environmental decision-making. There are rules on public participation in the Code of Administrative Procedure, but also in the Building Act and the EIA Act. The Committee notes that the communicant's argument has centred on the lack of opportunities for public participation with regard to Mochovce NPP, rather than a lack of such opportunities in general. Indeed, in the original communication, the communicant states that:

> [t]he approach of having the EIA after the permitting procedure is not usual in Slovakia. The Slovak EIA procedure is not a permitting procedure by itself. However, the results of the EIA have to be considered in the following permitting procedures, among others to comply with international and European law. The regular EIA-approach in Slovakia is therefore to firstly carry out the EIA and only as second step to permit the activity in order to safeguard that the results of EIA and public participation procedures are legally reflected in the permits.

According to the Party concerned, the Mochovce NPP is a "non standard case".

66. The Committee nevertheless considers that the decision-making for the 2008 decisions on the Mochovce NPP appears to have been in accordance with Slovak national law. Yet, the case was a special case, where the obligation to provide for public participation under the Convention stems from the reconsideration and update of the operating conditions, as well as the change to and extension of the activity as compared to the one permitted in 1986. For that reason, on the basis of the information provided in this case, the Committee cannot conclude that Slovak law on public participation and EIA in general also fails to comply with article 6 of the Convention.

67. During the discussions, the Committee was informed that current legislation may also fail to ensure public participation when old permits are reconsidered or updated or the activities are changed or extended compared to previous conditions. Not having examined the new legislation, the Committee notes that the legal framework the Party concerned should ensure that early and effective public participation is provided also in these cases in accordance with article 6, paragraph 4, of the Convention.

IV. Conclusions and recommendations

68. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

69. The Committee finds that by failing to provide for early and effective public participation in the decision-making leading to the 2008 UJD decisions 246/2008, 266/2008 and 267/2008 of 14 August 2008 concerning Mochovce NPP, the Party concerned failed to comply with article 6, paragraphs 4 and 10, of the Convention (para. 64).

B. Recommendations

70. The Committee, pursuant to paragraph 35 of the annex to decision I/7, and taking into account the cause and degree of non-compliance, recommends the Meeting of the Parties to:

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned to review its legal framework so as to ensure that early and effective public participation is provided for in decision-making when old permits are reconsidered or updated or the activities are changed or extended compared to previous conditions, in accordance with the Convention;

(b) Invite Slovakia to submit to the Committee a progress report on 1 December 2011 and an implementation report on 1 December 2012 on achieving the recommendation above.

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Fourth session
Chisinau, 29 June–1 July 2011
Item 5 (b) of the provisional agenda
Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee

Addendum

Findings and recommendations with regard to communication ACCC/C/2009/43 concerning compliance by Armenia (adopted by the Compliance Committee on 17 December 2010)

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I. Introduction

1. On 23 September 2009, the Armenian non-governmental organization (NGO) Transparency International Anti-corruption Centre, in collaboration with the associations Ecodar and Helsinki Citizens' Assembly of Vanadzor (hereinafter, collectively, the "communicant"), submitted a communication to the Compliance Committee alleging failure by Armenia to comply with its obligations under article 6, paragraphs 2, 4, 8, 9 and 10, and article 9, paragraph 2, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication concerns the issuance and renewal of licences to a developer for the exploitation of copper and molybdenum deposits in the Lori region of Armenia. It alleges that the Party concerned failed to comply with article 6, paragraphs 2, 4, 8, 9, and 10, of the Convention by (a) not informing the public concerned early in the licensing decision-making; (b) not providing for early and effective public participation; (c) not taking into account the outcome of public participation in the decision-making; and (d) not informing the public at all about the decision to renew the licences or informing it only after their issuance. Also, the communication alleges that by not recognizing the interest of the communicants to challenge the legality of the licences in the Armenian courts, and dismissing their application, the Party concerned failed to comply with article 9, paragraph 2, of the Convention.

3. At its twenty-fifth meeting (22–25 September 2009), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 29 October 2009 along with a number of questions put forward by the Committee soliciting additional information from the Party on matters relating, inter alia, to the applicable legal framework and the decision-making procedures for the project. Also on 29 October 2009, the secretariat forwarded to the communicant a number of questions put forward by the Committee.

5. On 9 December 2009, the communicant addressed the questions raised by the Committee. On 16 December 2009, the Party concerned sent its considerations on the communication.

6. At its twenty-sixth meeting (15–18 December 2009), the Committee agreed to discuss the content of the communication at its twenty-seventh meeting (16–19 March 2010).

7. On 23 February 2010, the Party concerned addressed the questions raised by the Committee and commented on the allegations of the communication.

8. The Committee discussed the communication at its twenty-seventh meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. The Party concerned submitted additional information to the Committee on 19 and 20 May 2010; and the communicant on 16 May 2010. On 7 June 2010 the communicant sent additional information to the communication and the Party concerned responded on 2 August 2010. The Committee took note of these letters at its twenty-eighth and twenty-ninth meetings (15–18 June and 21–24 September 2010, respectively), and decided to consider the points raised only to the extent that they related to the scope of the communication, as discussed with the parties at the Committee's twenty-seventh meeting.

9. The Committee prepared draft findings at its twenty-ninth meeting, and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 11 October 2010. Both were invited to provide comments by 8 November 2010.

10. The communicant and the Party concerned provided comments on the 8 and 9 November, respectively.

11. At its thirtieth meeting (14–17 December 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

A. Legal framework

12. The 2002 Law on Concessions of the Entrails[2] for Prospecting and Extraction with the Purpose of Exploitation of Minerals (translation provided by the parties; hereinafter, the "2002 Law on Concessions"), provides that only holders of mining rights may undertake prospecting/mining activities (art. 10). Rights for industrial exploitation of deposits of mineral resources are awarded through a multiphase process: a licence (for prospecting/mining); a licence agreement between the relevant authority and the licensee, determining the terms of the mining rights; and the project document, after the carrying out of an environmental impact assessment (EIA) procedure and the issuance of a positive expertise.[3] The 2002 Law on Concessions also distinguishes between a mining licence and a special mining licence. According to article 3 of the Law on Concessions, a special licence is a written permit to carry out mining activities on a certain site and it can be issued for a period from 12 to 25 years. Compared to a simple mining licence, a special licence is of a longer duration, while it provides the possibility for the licensee to sign a concession agreement with the Government.

13. A licence becomes valid from the date of signing of the licence agreement (art. 10, para. 6, of the 2002 Law on Concessions), which defines the conditions of mining and the rights and obligations of the parties. In case of a special mining licence, the licence agreement should be signed within nine months from the date of licence issuance (art. 10, para. 6.3, of the 2002 Law on Concessions).

14. Armenian legislation does not explicitly determine the stage at which the EIA procedure should take place during the permitting procedure for mining activities. The 2002 Law on Concessions (art. 60) provides that the mining authority, when it grants mining rights, should take into account the expertise on environmental assessment; this provision implies that the EIA procedure, as detailed in the EIA Law (see below), should be carried out before signing of the licence agreement.

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

[2] I.e., underground natural resources.

[3] The environmental assessment systems in the former Soviet countries in Eastern Europe are largely based on the "State environmental review" or "ecological expertise" mechanism formally established in the Soviet Union in the second half of the 1980s.

15. The 1995 Law on Expertise on Environmental Assessment (hereinafter, the "EIA Law") provides for a list of activities that are subject to an EIA procedure and gives the Government the discretion to set thresholds for these activities (art. 4). The Law applies to mining activities and provides for public participation opportunities during the decision-making on three occasions: (a) upon the developer's notification of the planned activity; (b) upon preparation of the EIA documentation by the developer; and (c) upon issuance of the expertise opinion by the competent authorities (articles 6, 8 and 10 respectively).[4]

16. Upon receipt of the EIA documentation (under (b) above), the Ministry of Nature Protection has to forward the documentation to the local authorities, other relevant Government bodies and the affected population. The local authorities inform the affected population through the mass media about where and when the documentation can be accessed. The public may submit their comments to the local authorities or directly to the Ministry during the 30-day public comment period. Within 30 calendar days from the receipt of the documentation, the Ministry, the local authorities and the developer have to make arrangements for possibilities for the documents to be studied and for public hearings about the EIA documentation (art. 8 of the EIA Law).

17. Upon receipt of the expertise opinion (under (c) in para. 15 above), the Ministry has to ensure the organization of public hearings within 30 days. The public notice, including information about the location and the timing, is addressed to the developer, the local authorities, the affected population, relevant Government bodies and the persons involved in the expertise, and must be issued by the Ministry at least seven days before the hearings (art. 10 of the EIA Law).

18. Apart from public participation in decisions on planned activities, the EIA Law provides for public participation concerning "concepts", defined by the law as proposals, programmes, complex designs and master plans. The concept submitter organizes the public hearings and has to take their outcome into consideration. The submitter and the competent authorities ensure that the concept and the related EIA documentation are publicly available at least 30 days before the public hearings (art. 15).

19. According to the provisions of the Administrative Procedural Code (art. 3.1) and of the Law on Non-Governmental Organizations (art. 15.1), NGOs have locus standi to challenge administrative acts in court, if they consider, inter alia, that such acts have violated or may directly violate their rights, as these are guaranteed by the Constitution, international treaties and other laws.

20. Also, according to article 52 of the Civil Code "a legal person may have civil rights corresponding to its purposes of activity provided in its founding document and bear the duties connected with this activity".

21. Further to the amendments to the Armenian Constitution in 2005 and to the Judicial Code in 2007, the Court of Cassation has the mandate to ensure the uniform application of the laws in the country.

[4] According to Armenian law, the EIA process is undertaken by the developer and the related documentation is reviewed by experts who comment on it; the public authorities issue the expertise on the basis of the experts' review and a project may be implemented only if the expertise conclusions are positive.

B. Facts

22. The Lori region of Armenia is rich in biodiversity. In the 1970's, deposits of copper and molybdenum (hereinafter, referred to only as "deposits") were found near to the rural settlements of Teghout and Shnogh.

23. On 8 April 2001, the Armenian Government issued a licence to the Manex & Vallex CJSC, the predecessor of the developer Armenian Copper Programme (ACP), to exploit the deposits for 25 years. In 2004, due to changes in Armenian legislation introduced by the 2002 Law on Concessions, the form of the special mining licence with ACP had to be renewed, but its terms and duration remained the same.

24. By decision of the Prime Minister, an inter-agency commission was established with the mandate to consider and coordinate activities that would support the Teghout development programme. On 30 September 2005, the commission approved the concept for the exploitation of the deposits. In general, Armenian legislation (i.e., the 1992 Subsoil Code and the 2002 Law on Concessions), does not require the issuance of a concept in this respect.

25. In 2006, the developer proceeded with the carrying out of the EIA procedure. The decision-making process, coordinated by the Ministry of Nature Protection, involved two stages in the EIA procedure where public hearings took place. For the EIA documentation, the public notice for the hearing was issued in the newspaper *Republic of Armenia* on17 March 2006; the public hearing took place on 23 March 2006; and the positive expertise conclusions were issued on 3 April 2006. For the review of the project working document, the public notice for the hearing was issued in the newspapers *Republic of Armenia* and *The Right* on 28 and 29 September 2006; the public hearing took place on 12 October 2006; and the positive expertise conclusion was issued on 7 November 2006.

26. On 1 November 2007, the Government adopted a decision allocating 735 hectares of land to the developer for a term of 50 years, with the objective to construct a mine, including the right to log in a forest area of 357 ha. According to the communicant, the decision was taken without competition. The licence agreement between the Government and the developer was concluded on 8 October 2007.

C. Use of domestic remedies

27. The communicant challenged the legality of several administrative acts relating to this project in the administrative court (see also excerpts of the application to the administrative court, translated in English by the communicant). Among these acts are the positive expertise conclusions of 3 April 2006 concerning the EIA study; the positive expertise conclusion of 7 November 2006 concerning the project working document; the decision of 1 November 2007 to allocate land to the developer for the project; and the licence contract of 8 October 2007, for violation of several provisions of Armenian legislation relating to the EIA procedure, land, water, mineral resources, concessions, flora and fauna.[5] In their application, the communicant referred also to non-compliance with the Convention on Environmental Impact Assessment in Transboundary Context (Espoo

[5] See annex 1 to the communication for the excerpts of the relevant legislation as provided by the communicant.

Convention)[6] and the Aarhus Convention, in particular its articles 6, paragraphs 2, 4, 8, 9 and 10.

28. On 9 July 2009, the administrative court rejected the application as inadmissible on the grounds that "[a] person cannot apply to the court with any or an abstract demand, but may make a claim only if he/she is a person concerned, i.e., if the administrative body has violated his/her public subjective rights." On 28 July 2009, the communicant appealed against this decision, but the court at the second instance confirmed the first instance decision.

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

30. On 24 March 2010, the administrative court rejected Ecodar's application on the grounds that Ecodar may not question environmental decisions issued by institutions. On 26 April 2010, Ecodar appealed against the decision and on 29 May 2010 it was notified that the case had been determined admissible. No date has been determined for the hearing yet.

D. Substantive issues

31. The communicant alleges that the public participation provisions of article 6 of the Convention apply in all decisions that have been challenged before the Armenian courts (see para. 27 above), on the basis of article 6, paragraph 1 (a), in conjunction with paragraph 16 of the annex to the Convention. However, according to the communicant, the Party concerned failed to comply with the public participation requirements of the Convention when it issued these decisions.

32. The communicant alleges that under Armenian legislation the concept adopted by the inter-agency commission on 30 September 2005 (see para. 24 above) should have been subject to an EIA procedure.

33. Further, the communicant alleges that the public concerned was not informed early enough in the decision-making process, and it was not provided with any information about the elements specified under article 6, paragraphs 2 (a), (b), (d) and (e), that would enable it to prepare for the public hearings organized on 23 March and on 12 October 2006. In this regard, the communicant alleges that the public hearing of 23 March 2006 was organized after a special licence for exploitation of the deposit had already been issued to the developer; that at both public hearings the information presented to the public concerned was not comprehensive; and that the public was never notified about and involved in the decision-making relating to the land allocation (decision of 1 November 2007) and the related agreement (8 October 2007) between the Government and the developer.

34. The communicant alleges that the public hearings in 2006 were organized at a time when critical decisions (special licence for exploitation by the developer in 2004 and review of the project by the inter-agency commission in 2005) had already been taken by the competent authorities, and thus that the public concerned was not given any opportunity

[6] The deposits are located in the watershed of the Debed River, which originates in Armenia and ends in Georgia.

to participate in an effective manner in the decision-making, as required in article 6, paragraph 4, of the Convention.

35. The communicant alleges that the Party concerned failed to consider the outcome of public participation in the decision-making and that the public was informed about the decisions after their adoption. For this reason, the communicant alleges that the Party concerned failed to comply with article 6, paragraphs 8 and 9. The communicant also alleges that the Party concerned, by failing to notify the public concerned about the 2004 renewal of the 2001 mining licence to the developer, failed to comply with article 6, paragraph 10, of the Convention.

36. The communicant alleges that because the administrative court rejected its application for review of the procedure on grounds that the administrative proceedings in question have not affected its rights and interests, and also because the Court of Cassation has rejected the complaint to the extent submitted by Transparency International, the Party concerned failed to comply with article 9, paragraph 2, of the Convention.

37. Finally, the communicant alleges that in its view little progress has taken place in Armenia after the recommendations of the Committee in ACCC/C/2004/08, as endorsed by decision III/6b of the Meeting of the Parties.

38. The Party concerned in general argues that the facts and the legality of the allegations of the communication are not substantiated and that the communicant is not well informed about the Armenian legislative framework.

39. The Party concerned argues that the 2001 licence was issued before the entry into force of the Convention in Armenia and that its renewal was only a formality that did not affect the actual content of the licence. The Party concerned also explains that, under Armenian legislation, a mining licence does not award the right to undertake mining operations, but only initiates a multiphase process for the establishment of such a right (see para. 12 above); the law clearly provides that the mining rights arise from the conclusion of the mining agreement. Public participation rights are guaranteed in mining activities in the context of the EIA procedure, and they were not violated in the case of the licence.

40. The Party concerned claims that the concept of 30 September 2005 was not subject to an EIA procedure, including public participation, because the inter-agency commission discussed the concept but did not adopt it; the minutes of the inter-agency commission session of 30 September 2005 uses the terms “programme” and “concept” in a conditional sense. Later, on 20 June 2008 the Government (including the Ministries of Nature Protection, Economy and Energy) met with a number of stakeholders, including Transparency International. According to the Party concerned, at this meeting participants approved a number of elements of the concept and the programme, as evidenced in the minutes of that discussion. The communicant disagrees and claims that at this meeting it had the possibility to discuss the concerns raised by NGOs and experts about the impact of the mining project, and not elements of the concept or programme.

41. With regard to the alleged non-compliance with article 6, paragraph 2, the Party concerned argues that Armenian legislation regulating the form of public notice is in full compliance with the Convention. Public notice is given through the Internet, the press and television. In its view, the public hearings of 23 March 2006 and 12 October 2006 took place in a timely and effective manner, and according to the minutes the communicant neither participated nor submitted any comments. In the view of the Party concerned, earlier public participation, namely from the time that the decision-making for the licence took place, was not necessary, since the licence only initiates the formation of a mining right, but does not establish the right.

42. With regard to the alleged non-compliance with article 6, paragraph 8, the Party concerned argues that a number of comments were submitted by the public concerned at the public hearings and that, further to one comment suggesting the establishment of a public monitoring mechanism during the carrying out of the EIA procedure, the developer collaborated with an NGO on the "Environmental Management Plan".

43. With regard to the alleged non-compliance with article 6, paragraph 9, the Party concerned argues that no final decision has been adopted that should be communicated to the public, as required by the Convention and Armenian law, but only a draft.

44. About the allegations of non-compliance with article 9, paragraph 2, the Party concerned argues that the decision of the Court of Cassation accepting the application by Ecodar and denying locus standi to Transparency International Anti-corruption Center was substantiated and justified: Ecodar has the objective of promoting environmental interests enshrined in its statute, whereas the statute of Transparency International does not reflect such an objective. In this respect, the Party concerned points to the distinction between the definitions of the "public concerned" (art. 2, para. 5) and the "public having sufficient interest" (art. 9, para. 2 (a)), and to the broad discretion given to the Parties in implementing article 9, paragraph 2(a). Accordingly, Armenian law has defined that the criterion to identify whether an NGO has sufficient interest rests with the statute of the organization.

45. The Party concerned also mentions the trend in Armenian judicial practice to interpret broadly the criteria for *actio popularis*. For instance, in the present case, the Court of Cassation construed the legal standing criteria of the legislation in such a way as to accept the application submitted by Ecodar, which under Armenian law is not an NGO, but a "societal amalgamation".

46. While the Party concerned discards the allegations of the communication, it acknowledges that in general there are drawbacks and gaps in Armenian legislation and practice, but steps are being taken to improve implementation.

III. Consideration and evaluation by the Committee

47. Armenia deposited its instrument of ratification of the Convention on 1 August 2001. The Convention entered into force for Armenia on 30 October 2001.

48. The subject of the present communication and the allegations of non-compliance with the provisions of article 6 are the subject of the pending procedure before the administrative court (see para. 30 above). The Committee recalls that in some cases it has decided to suspend consideration of a communication pending national review procedures. However, the allegations of non-compliance in the present communication reflect similar legal issues upon which the Committee has already deliberated in another communication concerning Armenia (ACCC/C/2004/08, ECE/MP.PP/C.1/2006/2/Add.1), and the findings and recommendations with regard to this communication were endorsed by decision III/6b of the Meeting of the Parties (ECE/MP.PP/2008/2/Add.10). While the Party concerned regularly reports to the Committee on its progress in implementing the recommendations of decision III/6b, the Committee decides to consider the present communication in order to examine the actual impact of decision III/6b in Armenian practice, especially with respect to public participation. The Committee, however, does not look at the argumentation of the administrative court in its decision of 24 March 2010, currently under appeal.

Clear, transparent and consistent framework — article 3, paragraph 1

49. The Committee notes that the EIA Law subjects decisions for planned activities and "concepts" (see paras. 15–18 above) to an EIA procedure. The distinction between a planned activity and a concept in the EIA Law appears to reflect the distinction between decisions for specific activities under article 6 of the Convention, and plans and programmes under article 7 of the Convention. The Convention does not clearly define what the plans, programmes and policies of article 7 encompass, and leaves it to the national legislature to detail the specificities of the decisions within the general framework of the Convention.

50. The EIA Law subjects "planned activities" to a public participation process on three occasions during the decision-making process and lists the activities for which the EIA procedure is necessary to be carried out (art. 4), while thresholds for each activity are to be determined by the Government (see also para. 15 above). The Committee has not been provided with information on whether any threshold is applicable in the mining activity in question. It notes that the EIA Law appears to defer broad discretion to the executive and the administration on the setting of such thresholds without giving any further guidance, and that therefore there is a risk that the setting of thresholds may be arbitrary and decided on a case-by-case basis.

51. With respect to plans and programmes, article 7 of the Convention establishes a set of obligations for Parties to meet on public participation during the preparation of plans and programmes "relating to" the environment.

52. The Concept for the exploitation of the Teghout deposits may be considered a regional development strategy and sectoral planning which falls under article 15 of the EIA Law and article 7 of the Convention, as a plan relating to the environment; or it may be the first phase (expressed as an "intention") for a planned activity under article 6 of the EIA Law and article 6 of the Convention. While Armenian law provides for public participation in different phases of an activity and as early as possible, it does not indicate with precision the particular features of an "intention to carry out a planned activity", a "planned activity" or a "concept". It is further not clear what the legal effects of the approval of the concept on 30 September 2005 by the inter-agency commission were. As already observed in the past, it is sometimes difficult to determine prima facie whether a decision falls under article 6 or 7 of the Convention, but in all cases the requirements of paragraphs 3, 4 and 8 of article 6 apply (see ACCC/C/2005/12, (Albania), ECE/MP.PP/C.1/2007/4/Add.1, para. 70) for plans and programmes. However, it is important to identify what the legal effects of an act are — whether an act constitutes a decision under article 7 or a first phase/intention for a planned activity under article 6, because only some of the public participation provisions of article 6 apply to decisions under article 7.

53. The Committee also observes that the EIA Law lacks clarity. The distribution of tasks between the public authorities and the developer with respect to public participation (information from the Ministry channelled to the authorities for further distribution to the public, distribution of the documentation, organization of the hearings, etc.) may create duplication of effort or a confusion on the responsibilities to be borne by each actor. Also, the determination of the deadlines for the public authorities and/or the developer to organize hearings and give public notice are not consistent.

54. For the intention to carry out a planned activity (art. 6 of the EIA Law) and the EIA documentation (art. 8 of the EIA Law), the law does not specify how many days in advance of the public hearings, organized by the public authorities/developer, the public notice should take place, whereas for the public hearings organized for the expertise conclusions (art. 10 of the EIA Law), the law specifies that the public notice should be in written form,

should indicate the date and place and should be given at least seven days before the meetings.

55. The Committee also notes the lack of clarity in Armenian legislation with respect to the exact stage of the mining permitting procedure at which the EIA procedure should be carried out (see para. 14 above). The 2002 Law on Concessions (art. 60) implies that the EIA procedure should be carried out before the issuance of the licence. However, the facts of the present case indicate that the EIA procedure was carried out by the developer in 2005 after the issuance of the licence in 2001 (as renewed in 2004). In addition, according to Armenian legislation, any licence becomes valid from the date of signing of the licence agreement and the agreement should be signed within nine months after the issuance of the licence (see also para. 13 above). According to the facts presented by the parties, the licence (renewal) was issued on 23 March 2004 and the licence agreement was signed on 8 October 2007, which means that the agreement was actually signed almost two-and-a-half years after the licence was issued. If the law defines that "a special licence is a written permit to carry out mining activities on a certain site" (art. 3 of the Law on Concessions), this implies that the special licence already is a permit to carry out activities. However, it is not clear what the consequences are if the licence agreement is never signed. These features of Armenian legislation and practice create uncertainty as to when the public participation process would take place.

56. For these reasons, the Committee, while it notes with appreciation the progress inferred in the Armenian legislation further to the recommendation of decision III/6b of the Meeting of the Parties, finds the Party concerned failed to maintain a clear, transparent and consistent framework for implementation of the public participation provisions of the Convention, as required by article 3, paragraph 1.

Applicability of article 6

57. The following decisions are at issue in the present case: (a) the licence of February 2001; (b) the renewal of the licence in 2004, further to formal amendment of the law; (c) the approval of the concept for exploitation by the inter-agency commission on 30 September 2006; (d) the positive expertise conclusion of 3 April 2006 concerning the EIA documentation for the mining activities; (e) the positive conclusion of 7 November 2006 concerning the project working document; (f) the licence agreement of 8 October 2007; and (g) the decision for allocation of land on 1 November 2007.

58. The licence of February 2001 was issued before the Convention entered into force. However, with its 2004 renewal the 2001 licence became a special licence under the 2002 Law on Concessions and this had a impact on the operating conditions of the activity as a special mining licence has a longer duration and it provides for the possibility of a concession agreement, while the law (art. 53, para. 1 of the 2002 Law of Concessions) sets out a number of operational conditions that can be established by a concession agreement on the basis of a special mining licence, such as the possibility of limited liability on environmental matters. Therefore, the Committee concludes that the 2004 renewal was not a mere formality and falls under article 6, paragraph 10, of the Convention. Thus, the Party concerned had to ensure that the public participation provisions of article 6, paragraphs 2 to 9, be applied, mutatis mutandis, and where appropriate for the renewal.

59. For the concept of 30 September 2006, it is not clear to the Committee whether this was an early stage of an activity under article 6 or a plan or programme under article 7 of the Convention (see also para. 52 above). While some of the public participation provisions of article 6 apply for plans and programmes under article 7, the Committee has not received sufficient information to examine this decision.

60. The Committee will only consider the 2004 licence renewal, the expertise conclusion of 3 April 2006, the expertise conclusion of 7 November 2006 and the licence agreement of 8 October 2007. The decision for allocation of land on 1 November 2007 is a decision derivative of the licence agreement of 8 October 2007, as it operationalizes the latter, and is thus not examined separately by the Committee.

61. The expertise conclusion of 3 April 2006 and concerning the EIA documentation for the exploitation of the Teghout deposits is a type of decision which, according to the Armenian EIA Law (art. 4, para. 1 (b), relating to mining activities) is subject to public participation. Hence, this decision falls within the scope of article 6, paragraph 1 (a), of the Convention, in conjunction with paragraph 20 of annex I.

62. The exploitation of the Teghout deposits is an activity listed in paragraph 16 of annex I to the Convention (quarries and opencast mining where the surface of the site exceeds 25 hectares), and falls within the scope of article 6, paragraph 1 (a), of the Convention, in conjunction with paragraph 16 of annex I.

Notification of the public about the decision-making — article 6, paragraph 2

63. The public concerned may be informed through public or individual notice. In the present case, the notice was made by means of, inter alia, national press, the Internet and local television programmes (three times).

64. The first hearing of 23 March 2006 was organized on the basis of article 8 of the EIA Law, which does not define the timing of the notice, and the public notice was announced on 17 March 2006, that is, six days in advance of the hearing. The second hearing of 12 October 2006 was organized on the basis of article 10 of the EIA Law, which defines that the public notice should be given at least seven days in advance, and was indeed announced two weeks before the hearing, on 28 September 2006.

65. The requirement for early public notice in the environmental decision-making procedure is not detailed in article 6, paragraph 2, of the Convention. Article 6, paragraph 4, points to the purpose of giving notice early in the environmental decision-making procedure, that is, that the public has the possibility to participate when all options are open and participation may be effective. The timing needed from the moment of the notification until the hearing, in which the public concerned would be expected to participate in an informed manner, namely, after having had the opportunity to duly examined the project documentation, depends on the size and the complexity of the case.

66. The Committee has already observed in the past that: "[t]he requirement for the public to be informed in an 'effective manner' means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate" (ACCC/C/2006/16 (Lithuania), ECE/MP.PP/C.1/2006/2/Add.1, para. 67).

67. The Committee considers that one week to examine the EIA documentation relating to a mining project (first hearing) is not early notice in the meaning of article 6, paragraph 2, because it does not allow enough time to the public concerned to get acquainted with voluminous documentation of a technical nature and to participate in an effective manner. In general, the two-week public notice in the second hearing, after the expertise opinion, could be considered early public notice, mainly because a lot of the project-related documentation for the environmental decision-making is the same or is based on the documentation necessary to be consulted for the first meeting. However, through their comments to the draft findings, the Party concerned and the communicant informed the Committee that the project material under consideration for the second meeting was more voluminous than for the first hearing. The Party concerned added that the public did not

raise the issue that the time was not sufficient to examine the project-related material. The Committee took note of the information submitted at a very late stage of the process for its attention, but observes that the fact that no objection was made in respect of the time to examine project-related documentation is not material as to whether the requirements on early and effective public participation have been met.

68. With regard to the timing of the public notice and in relation also to the finding of non-compliance with article 3, paragraph 1, (see para. 56 above), the Committee finds that there is a systemic failure in the Armenian EIA law, as it does not provide for any indication on when the public notice for the EIA documentation hearing should be given, and thus the implementation of its article 8 may be arbitrary.

69. For these reasons, the Committee finds that the Party concerned failed to inform the public early in the environmental decision-making process and in a timely manner, as required by article 6, paragraph 2, of the Convention.

70. Whether the notification is effective depends on the particular means employed, which in this case include the national press, local TV and the Internet (websites of the Ministry and the Aarhus Centre). Sometimes, it may also be necessary to have repeated notifications so as to ensure that the public concerned has been notified. The Committee notes that the Teghout is one of the rural communities of the Lori region, close to the border with Georgia, approximately 180 km north from the capital Yerevan, while the nearest urban centre is at approximately 30 km. These circumstances make it obvious that the rural population in the area would not possibly have regular access to the Internet, while local newspapers may be more popular than national newspapers. However, the use of local television may be a useful tool to inform the public concerned in an appropriate manner. Hence, the Committee does not find here that the Party concerned failed to give effective public notice.

71. The Committee may assess the adequacy of the public notice on the basis of the information it received (public notices in the national newspapers, translation provided by the Party concerned). The notice is brief and not very clear about which public authority is responsible for the decision-making, but includes most elements of article 6, paragraph 2. Consequently, and since the Committee cannot assess the notice given through the TV and the Internet, there is not enough evidence to assert that the Party concerned failed to provide public notice reflecting the minimum features as provided in article 6, paragraph 2, of the Convention.

Reasonable time frames for public participation — article 6, paragraph 3

72. Under Armenian EIA legislation, the public may submit their comments to the EIA documentation during a 30-day public comment period (para. 16 above) and have a possibility to consult the expertise opinion at least seven days before the public hearings (para. 17 above). There were no specific allegations in this respect by the communicant and the Committee refrains from making any finding.

73. The requirement to provide “reasonable time frames” implies that the public should have sufficient time to get acquainted with the documentation and to submit comments, taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project. (ACCC/C/2006/16, paras. 69–70 and ACCC/C/2007/22 (France), ECE/MP.PP/C.1/2009/4/Add.1, para. 44)

Early public participation when all options are open — article 6, paragraph 4

74. The mining licence of 2001 was issued before the entry into force of the Convention, while the 2004 renewal, as a special mining licence, was issued after the entry into force of

the Convention. However, the EIA procedure, including public participation, was conducted in 2006, and after decisions on the mining activity, such as the concept and the 2004 renewal of the licence, had taken place.

75. As mentioned above (see para. 59), the Committee is not clear about the nature of the concept of 30 September 2006, i.e., whether it is an article 6 or article 7 decision. For that reason, the Committee decides to focus on those aspects of the case where the obligations of the Party concerned are most clear-cut: regardless of whether the decisions are considered to fall under article 6 or article 7, the requirement of paragraph 4 of article 6 applies (ACCC/C/2005/12, para. 70).

76. In this case, a special mining licence was issued for the developer to exploit deposits in the Teghout region in 2004, and the developer organized public participation in the framework of the EIA procedure in 2006. Providing for public participation only after the licence has been issued reduced the public's input to only commenting on how the environmental impact of the mining activity could be mitigated, but precluded the public from having input on the decision on whether the mining activity should be pursued in the first place, as that decision had already been taken. Once a decision to permit a proposed activity has been taken without public involvement, providing for such involvement in the other subsequent decision-making stages can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide "early public participation when all options are open". This is the case even if a full EIA is going to be carried out (ACCC/C/2005/12, para. 79). Therefore, the Committee finds that the Party concerned failed to provide for early public participation as required in article 6, paragraph 4, of the Convention.

Due account of the outcome of public participation — article 6, paragraph 8

77. According to the EIA Law (art. 11.1), the Ministry of Nature Protection must take into account the minutes of the public hearings on the EIA documentation (conducted further to art. 9 of the EIA Law), before it issues the environmental expertise. The Committee has not received any evidence that the outcome of the public hearings of 23 March and 12 October 2006, documented in the minutes provided to the Committee by the Party concerned, were not taken into account by the public authorities for issuing the expertise. The text from the excerpts of the public hearings provided to the Committee does not show strong opposition to the project, and one of the outcomes of the hearings was the preparation of the "Environmental Management Plan" by the developer and an NGO to deal with environmental concerns.

Prompt information on the final decision — article 6, paragraph 9

78. According to the EIA Law (art. 11.8), the environmental expertise conclusions should be published and interested parties should be notified. There is no factual evidence that the positive conclusion of 3 April 2006 concerning the EIA documentation or the one of 7 November 2006 concerning the project working document have been published or that the public concerned has been notified accordingly, as required by Armenian law and by the Convention. The Ministry's website includes notifications relating to the taking place of public hearings, but no information on decisions taken by the Ministry. In the view of the Committee, the Party concerned failed to comply with article 6, paragraph 9, of the Convention.

Review procedures, including standing requirements, relating to public participation — article 9, paragraph 2, in conjunction with article 2, paragraph 5

79. In respect of the case referred to paragraph 29 above, Transparency International was refused standing on the grounds that environmental protection is not among its statutory objectives.

80. The communicant has clarified that its statutes do not explicitly refer to "environmental protection" as such. However, its objectives comprise the promotion of democratic principles, including human rights and public participation. Based strictly on the objectives of the organization stipulated in its statutes, the court refused standing.

81. The Committee does not look at the argumentation of the administrative court in its decision of 24 March 2010, currently under appeal (see also para. 48 above). It notes that, according to the Convention, NGOs promoting environmental protection and meeting any requirements under national law have sufficient interest to pursue an action under article 9, paragraph 2. Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, including, but not limited to, the provisions of its statutes and its activities. Parties may set requirements under national law, but such requirements should not be inconsistent with the principles of the Convention. Despite the fact that Transparency International was not granted standing, the information given to the Committee does not demonstrate that the criteria that only organizations with explicitly mentioning environmental protection have standing, has been applied in a way that the Party concerned would be in non compliance with the Convention. In this context the Committee notes that Ecodar was granted standing.

IV. Conclusions and recommendations

82. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

83. While acknowledging the continuous efforts of the Party concerned in implementing decision III6/b, the Committee finds that there are still shortcomings in Armenian law and practice and, due to these shortcomings in the present case, the Party concerned failed to comply with article 3, paragraph 1, of the Convention (para. 56); and article 6, paragraphs 2, 4 and 9, of the Convention (paras. , and , respectively).

B. Recommendations

84. The Committee, pursuant to paragraph 35 of the annex to decision I/7, and taking into account the cause and degree of non-compliance, recommends the Meeting of the Parties to:

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned to take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(i) Thresholds for activities subject to an EIA procedure, including public participation, are set in a clear manner;

(ii) The public is informed as early as possible in the decision-making procedure, when all options are open, and that reasonable time frames are set for the public to consult and comment on project-related documentation;

(iii) The responsibilities of different actors (public authorities, local authorities, developer) on the organization of public participation procedures are defined as clearly as possible;

(iv) A system of prompt notification of the public concerned on final conclusions of environmental expertise is arranged, e.g., through the website of the Ministry of Nature Protection;

(b) Pursuant to paragraph 37 (c) of the annex to decision I/7, invite the Party concerned to:

(i) Draw up an action plan for implementing the above recommendations with a view to submitting an initial progress report to the Committee by 1 December 2011, and the action plan by 1 April 2012;

(ii) Provide information to the Committee at the latest six months in advance of the fifth Meeting of the Parties on the measures taken and the results achieved in implementation of the above recommendations.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Thirty-third meeting
Chisinau, 27 and 28 June 2011

Report of the Compliance Committee on its thirty-third meeting

Addendum

Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2009/44 concerning compliance by Belarus

Adopted on 28 June 2011

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I. Introduction

1. On 10 December 2009, European ECO Forum (hereinafter the communicant), a coalition of citizens' organizations and non-governmental organizations (NGOs), submitted a communication to the Compliance Committee alleging that Belarus had failed to comply with its obligations under article 3, paragraphs 1 and 8, article 4, paragraph 1, article 6, paragraphs 2, 4, 6 and 7, article 7 and article 8 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in relation to a project to construct a nuclear power plant (NPP).

2. Prior to the submission of its communication, on 8 October 2009, the communicant had sent the information contained in the present communication in the form of an amicus memorandum in the context of communication ACCC/C/2009/37, concerning compliance by Belarus in relation to a hydropower project. During consideration of communication ACCC/C/2009/37, the Committee had noted that some elements of the amicus memorandum went beyond the scope of the communication at issue, in that, for instance, one of the main allegations of the amicus memorandum concerned the inadequate national legislation on public participation in decision-making on nuclear issues, and the substantial transboundary character of the NPP. The Committee decided through its electronic decision-making procedure not to expand the consideration of communication ACCC/C/2009/37 to any new facts or allegations brought about by the amicus memorandum that fell out side the scope of or were not directly relevant to that communication. The findings of communication ACCC/C/2009/37 were adopted by the Committee at its twenty-ninth meeting (21–24 September 2010).

3. Communication ACCC/C/2009/44 alleges that the Party concerned, by not providing complete and accurate information to citizens and NGOs that had requested information relating to an NPP, failed to comply with article 4, paragraph 1, of the Convention. The communication further alleges that the Party concerned by (a) not properly informing the public about the decision authorizing the construction of the NPP, (b) not ensuring early public participation, (c) not providing all information relevant to the decision-making and (d) not allowing NGOs and the public concerned to submit their comments and views during the organized hearings, failed to comply with the provisions of article 6, paragraphs 2, 4, 6 and 7 of the Convention. It further alleges that the Party concerned, by not taking any steps to provide for the public to participate in the adoption of generally applicable rules on public participation in the field of nuclear energy, failed to comply with articles 7 and 8 of the Convention. The communication also alleges that the Party concerned put pressure on activists trying to promote their views on nuclear energy issues in Belarus, and as a result it failed to comply with its obligation under article 3, paragraph 8, of the Convention.

4. Also, the communication contains a general allegation that the Party concerned, by not taking the necessary legislative and regulatory measures to implement the provisions of article 6, paragraphs 2, 3, 8 and 9, failed to comply with article 3, paragraph 1, of the Convention.

5. At its twenty-sixth meeting (15–18 December 2009), the Committee determined on a preliminary basis that the communication was admissible.

6. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention (ECE/MP.PP/2/Add.8), the communication was forwarded to the Party concerned on 18 December 2009. On 7 April 2010, the secretariat sent to the Party concerned and the communicant a number of questions raised by Committee members regarding the communication.

7. At its twenty-seventh meeting (16–19 March 2010), the Committee agreed to discuss the content of the communication at its twenty-ninth meeting.

8. The communicant and the Party concerned addressed the questions raised by the Committee on 16 July and 3 August 2010, respectively.

9. The Committee discussed the communication at its twenty-ninth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. The Party concerned submitted additional information to the Committee on 20 October and 23 November 2010, and the communicant submitted information on 27 October 2010. In addition, the Party concerned sent a letter on 22 February 2011 in response to the Committee's letter of 7 January 2011, asking the Party concerned to comment on the Committee's recommendations on communication ACCC/C/2009/37 in the light of ongoing changes in legislation and practice during 2010.

10. The Committee prepared draft findings at its thirty-second meeting (11–14 April 2011), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 24 May 2011. Both were invited to provide comments by 21 June 2011.

11. The communicant provided comments on 21 June 2011. The Party concerned did not provide specific comments on the draft, but on 20 June 2011, it informed the Committee about the recently adopted amendments to the environmental impact assessment (EIA) procedure (Resolution of the Cabinet of Ministers of the Republic of Belarus No. 689 of 1 June 2011).

12. At its thirty-third meeting (27–28 June 2011), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the meeting report. It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of legal framework, facts and issues[1]

A. National legal framework

Access to information

13. The rights the citizens of Belarus to receive, store and disseminate information are guaranteed by the Constitution and the Law "On information, informatization and the protection of information". In addition, the Law of 26 November 1992 on Environmental Protection (as amended in 2007) provides more details on environmental information, its types and the procedures for its provision including the grounds for restricting access (see the findings on communication ACCC/C/2009/37, ECE/MP.PP/C.1/2010/6/Add.4, paras. 16–17).

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

Public participation in decision-making

14. Law No. 407-XIII of 6 June 2006 on Applications by Citizens (where applications are defined as individual or collective proposals, statements, or complaints by citizens to officials of a public authority or other agency, in verbal or written form), details the time frames and procedure for the authorities to treat citizens' requests. The relevant regulatory framework for public participation in decision-making in relation to activities subjected to EIA procedures (general EIA legislation), at the time that the activities subject to the communication took place, was as follows:[2]

(a) Law on State Environmental Expertiza[3] of 18 June 1993 (the new Law on State Environmental Expertiza of 9 November 2009 entered into force on 21 May 2010, i.e., after the NPP-related decision-making took place);

(b) Instructions on the Procedures for State Environmental Expertiza, adopted through Decision No. 8 of 11 May 2001 by the Ministry of Environmental Protection;

(c) Instructions on the Procedures for Environmental Impact Assessment of Planned Economic and Other Activities in the Republic of Belarus (OVOS Instructions)[4] and the List of Types and Objects of Economic and Other Activities which are Subject to Compulsory EIA, adopted through Decision No. 30 of 17 June 2005 by the Ministry of Environmental Protection.

15. In addition, the following instruments are relevant with respect to nuclear energy law:

(a) Law on the Use of Nuclear Energy of 30 July 2008, with provisions relating to the location, design, construction and operation of nuclear facilities (art. 2) and to the rights and obligations of the citizens on access to information in the nuclear field (arts. 3 and 39) and public participation (arts. 5, 6, 8 and 40);

(b) "Regulation on the procedures for discussion of the issues in the area of the use of nuclear energy with participation of citizens' associations, other organizations and citizens", adopted through Decision No. 571 of 4 May 2009 by the Council of Ministers (the 2009 Regulation). The 2009 Regulation introduces special rules for public participation in decision-making on nuclear issues: it sets out the procedures for the discussion with citizens, their associations and other organizations, as well as with citizens of other States who might be affected by planned activities in this area (para. 1 of the Regulation), but it does not apply to activities relating to the use of nuclear energy which are classified as a State secret (para. 1, part 2, of the Regulation). The 2009 Regulation explicitly refers to the Aarhus Convention and the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

[2] Description of this framework may be found in the findings of the Committee with respect to communication ACCC/C/2009/37 concerning non-compliance by Belarus in the construction of the hydropower project.

[3] The environmental assessment systems in the former Soviet countries in Eastern Europe are largely based on the "State environmental review" or "ecological expertise" (i.e., expertiza) mechanism formally established in the Soviet Union in the second half of the 1980s.

[4] "OVOS" is an acronym whose terms, in direct translation, can be rendered as "assessment of impact upon the environment". The OVOS, however, should be distinguished from what is generally understood as EIA; the two terms are not exactly synonymous.

B. Facts

Background and relevant decisions

16. The development of nuclear energy in Belarus was first considered in the 1970s and 1980s. In 1998, the Commission for Examining the Feasibility of the Development of Nuclear Energy, a body of qualified experts established by Order No. 88 of the Prime Minister on 31 March 1998, carried out an evaluation and concluded that it would be essential for the country to build nuclear power stations.

17. In 2005 the Party concerned adopted the Energy Security and Self-Sufficiency Strategy (Presidential Decree No. 399 of 25 August 2005). The Strategy examined and analysed a number of factors and found that building a nuclear power station with a total capacity of 2,000 megawatts (MW) would be the optimal solution to diversify the energy supply in demand in the country.

18. The following decisions have been taken by the Party concerned to complete the NPP by 2016:

(a) Directive No. 3 of the President of Belarus "Economy and Saving — Key Factors for Economic Security of the State" of 14 June 2007, which in its paragraph 1.3.1 calls on the Council of Ministers and the National Academy of sciences to speed up efforts to construct the NPP;

(b) Decree No. 565 of the President of Belarus "On Some Measures to Construct the Nuclear Power Plant" of 12 November 2007. The Decree sets up State bodies responsible for the construction of the NPP, including the Directorate for the Construction of the Nuclear Power Plant, which is the main body for the development of the project, and the Nuclear Safety Authority within the Ministry of Emergency Situations;

(c) Decision of the National Security Council No. 1 "On the development of Nuclear Energy in the Republic of Belarus" of 15 January 2008, approved by the President of Belarus on 31 January 2008. The decision includes the plan of the Government to construct two nuclear reactors with a capacity of 1,000 MW each, one until 2016 and one until 2018.

Access to information

19. The communication refers to the following requests for information about the NPP:

(a) On 14 May 2007, the Ecohome Citizens Association submitted a request to the Ministry of Energy (annex 1 to the communication) for information about the NPP (phase of the project, location, public participation). The Ministry replied on 1 June 2007 (annex 2 to the communication);

(b) In April 2008, a member of the public submitted a request to the Ministry of Energy for information about how public participation would be ensured, in particular as defined in article 6 of the Aarhus Convention. The Ministry replied on 8 May 2008 (annex 3 to the communication);

(c) On 18 December 2008, a member of the public submitted a request to the Council of Ministers for information about the choice of location for the NPP in the Ostrovets district ("rayon"). Several Ministries responded that the Ministry of Energy was the relevant authority. Indeed, the Ministry of Energy replied on 13 January 2009 (annex 4 to the communication);

(d) In 2009, the Ecohome Citizens Association took the initiative to carry out a public environmental expertiza.[5] For this purpose, on 30 December 2009 Ecohome requested access to the full EIA Report of the NPP in paper and electronic form from the Directorate for the Construction of the Nuclear Power Plant. On 17 February 2010, the Directorate replied that the EIA Report could be accessed at its premises only and during working hours, from 22 February to 22 March 2010. The communicant obtained an electronic copy of the EIA Report from a different source.

Public participation

20. With respect to the steps undertaken to ensure public participation, the following information was submitted:

(a) On 31 July 2009, the websites of the Ministry of Energy, the Ministry of Environment and the Directorate for the Construction of the Nuclear Power Plant issued the public notice (in Russian and English) about the commencement of public consultations (annex 5 to the Communication);

(b) On 9 September 2009, the websites of the three authorities mentioned above published the EIA documents in Russian and English, including:

(i) A "Brief Overview of the Environmental Impact Assessment during the Construction and Operation of the NPP in the Republic of Belarus" (hereinafter Brief EIA Overview);

(ii) A Preliminary Report/statement on possible environmental impact of NPP (hereinafter Preliminary EIA Report);

(c) On 9 September 2009, the public notice (in Belarusian) and the Brief EIA Overview (in Russian) were published in the Ostrovetskaya Pravda newspaper (annex 6 to the communication);

(d) On 9 October 2009, public hearings were held in the city of Ostrovets. In the view of the communicant the public hearings "were held with unprecedented security and logistics arrangements".

21. According to the communication, the construction of the road to the NPP site had already started in summer 2009 (photos in annex 8 to the communication).

Environmental activists obstructed by the authorities

22. The following facts concerning incidents of defamation, detention and house search and arrest related to environmental activists carrying out awareness-raising activities on the potential effects of the NPP were brought to the attention of the Committee:

(a) *Defamation.* On the night of 8 to 9 January 2009 unidentified individuals disseminated leaflets (annex 7 to the communication) in the Ostrovets and Smorgon districts. The leaflets included statements about the effects of nuclear energy, invited citizens to some "gay" (i.e., homosexual) events and included the contact details (home address and telephone numbers) of two environmental activists. One of the activists filed a complaint with local police alleging that the leaflets were prepared and disseminated by State agencies. Different leaflets were also distributed allegedly on behalf of a local opposition activist discussing in a manifestly unreasonable manner the negative aspects of NPP construction;

[5] See also the Committee's findings on communication ACCC/C/2009/37 (ECE/MP.PP/C.1/2010/6/Add.4, para. 32).

(b) *Detention and house search.* An environmental activist was detained on 5 March 2009 and his apartment was searched on 6 and 12 March 2009 by the police, upon a warrant from the prosecutor, searching for leaflets and printing materials;

(c) *Arrest*. On 9 October 2009, a Russian expert was detained and then arrested when he tried to bring copies of the *NGO Critique of the EIA* to the public hearings in Ostrovets. He was sentenced by the local court to seven days' administrative arrest and released on 16 October 2009.

C. Substantive issues

Allegations concerning the general legal framework

23. The communicant alleges that the Party concerned is not in compliance with the Convention, for the following reasons:

(a) The distinction between nuclear activities of "national" and "local" character (para. 11 of the 2009 Regulation) and the organization of "national" or "local" hearings is not clear and may limit public participation;

(b) The law provides that the public notice for planned nuclear activities is given to the public in the area of the activity (para. 15 of the 2009 Regulation) and the use of this "location" criterion substantially limits the scope of the "public concerned";

(c) The Party concerned fails to implement correctly article 6, paragraph 2, of the Convention, because the developer and the local authorities are responsible for making the public notice through the publication of the environmental impact statement (OVOS Statement) by distributing flyers, mail, e-mail, etc. (paras. 14, 17 and 18 of the 2009 Regulation) and there is no requirement to publish the OVOS Statement, except when organizing nationwide public hearings;

(d) The Party concerned fails to implement article 6, paragraph 3, because of the relation between the time frames set for public notice, for public consultations and for making available the information relevant for decision-making. According to the law (para. 19 of the 2009 Regulation), public consultations should not be held earlier than 30 days after the public notice, while the OVOS Statement should be made available during these 30 days before the start of public consultations period, which itself can not exceed one month. In practice, the combined provisions provide for unreasonably short time frames for the public to prepare and participate;

(e) The Party concerned fails to implement article 6, paragraph 8, of the Convention since the 2009 Regulation (paras. 25–26) requires only that the developer include the records of the public consultations and grounds for accepting/rejecting any comments in the EIA (OVOS) Report. Since the EIA Report is a document prepared by the developer and further submitted to the public authority for approval (State environmental expertiza) it cannot be qualified as a "decision". This contradicts the requirement of article 6, paragraph 8, of the Convention;

(f) The Party concerned fails to implement article 6, paragraph 9, because the EIA (OVOS) process carried out by the developer cannot be considered a national decision-making procedure, and there is no requirement that the public be informed about the expertiza conclusion, as required for a decision under article 6;

(g) Generally, the national legislation does not provide other possibilities to participate in decision-making on nuclear issues except during the OVOS (EIA) process carried out by the developer, and is not consistent. For example, the 2009 Regulation includes the requirement to publish the EIA (OVOS) Report (para. 28) together with a note

on the comments rejected and the grounds for their rejection. At the same time, the EIA legislation and the 2009 Regulation require that the EIA (OVOS) Report include a full list of comments and proposals received from the public and explanations for accepting or rejecting them (paras. 25–26). Another contradictory point relates to paragraph 4 of the 2009 Regulation, which provides that the EIA Report is subject to public consultations, while the EIA legislation clearly states that the EIA (OVOS) Report is the final stage of the OVOS process. Neither the EIA legislation, nor the 2009 Regulation provide for any procedures to discuss the EIA (OVOS) Report.

24. With respect to the specific points raised by the communicant about alleged non-compliance with article 3, paragraph 1, the Party concerned maintains that:

(a) The Convention does not include any requirement or recommendation regarding the local or national level of the public hearings;

(b) Paragraph 15 of the 2009 Regulation on public notice is not in breach of the Convention;

(c) The law is clear (paras. 14, 17, 18 and 19 of the 2009 Regulation) on how the developer should inform the public in advance of the hearings. The public participation procedure commences with the public notice and the hearings cannot take place until 30 days after the public notice is given, so as to allow for distribution of the relevant documentation and inspection by the public;

(d) The Convention does not detail how the outcomes of public participation are to be taken into account, and in this respect maintaining detailed records of the public participation procedure is optimal, while comments received are summarized with an explanation given for their rejection or approval (para. 28 of the 2009 Regulation);

(e) Project documentation is finalized to reflect the outcome of public consultations and then is made publicly available on the Internet;

(f) The expertiza conclusion is not a decision but an essential condition for taking a decision;

(g) The public, under the EIA legislation, is entitled to undertake its own “public environmental expertiza”.

25. The Party concerned informs the Committee that recently significant amendments have been made to national law and that further amendments are envisaged to strengthen the public’s right to participate in public discussions and hearings of environmental impact assessment (EIA) reports in compliance the Espoo Convention. In addition, legislation on the use of nuclear energy has been developed to include provisions regarding discussion of a project with public associations, other organizations and citizens.

26. The communicant alleges that the new regulatory framework that entered into force in May 2010 continues to be in non-compliance with the Aarhus Convention and that at the moment there is confusion with regard to public participation in decision-making for nuclear projects.

Harassment (art. 3, para. 8)

27. The communicant alleges that the Party concerned failed to comply with article 3, paragraph 8, of the Convention because it has put pressure on activists trying to promote their views on the NPP (see para. 22 above).

28. The Party concerned denies these allegations and submits that the environmental activists had every opportunity to actively participate to the discussions according to the same rules as other participants. As regards the alleged detention and arrest (see para. 22 (c)

above), the Party concerned submits that the Russian expert was arrested for breach of the peace during the meeting, while the charges for distribution of material had been dropped. With respect to the defamation allegation, an investigation was initiated but the responsible parties were never found. The Party concerned provided an explanation in this respect, in consultation with its Ministry of Internal Affairs.

Access to information (art. 4)

29. The communicant alleges that, in its reply of 1 June 2007 (see para. 19 (a) above), the Ministry of Environment: (a) did not acknowledge that the Government planned to speed up works related to the construction of the NPP (as reflected in the decision taken shortly after (see para. 18 (a) above)); (b) did not adequately explain how public participation would be ensured; and (c) did not provide any information about important measures that were later adopted, such as the establishment of special State bodies for the construction and for nuclear safety, as reflected in Decree No. 565 (see para. 18 (b) above).

30. The communicant further alleges that, in its reply of 8 May 2008 (see para. 19 (b) above) the Ministry of Energy: (a) similarly did not acknowledge that a decision to construct the NPP had already been taken by the Security Council on 15 January 2008 (see para. 18 (c) above); (b) did not provide information about measures on public participation; (c) provided misleading information about the identification of the public to be involved in the context of the decision-making according to article 6 of the Convention; (d) did not acknowledge the need to consult with the public early enough, by stating that the public would be consulted after the choice of the location and the technology was made; and (e) provided misleading information about the requirements of the Aarhus Convention for informing the public concerned, because according to the reply, at the time no decision falling under article 6 of the Convention had been made.

31. The communicant further alleges that, in its reply of 13 January 2009 (see para. 19 (c) above), the Ministry of Energy provided misleading and premature information about the effects of the NPP to human health and the environment, by stating that "no negative effects would take place" and that "the absence of such effects would be explained in the EIA report".

32. The communicant also alleges that in response to the request for the full EIA Report the Directorate replied that the EIA Report could be accessed at its premises only and during working hours from 22 February to 22 March 2010.

33. In the view of the communicant, all the information requested was environmental information within the meaning of article 2, paragraph 3 (b), of the Convention and the Party concerned failed to comply with article 4, paragraph 1, by providing incomplete and misleading information.

34. The Party concerned argues that public authorities provided timely and exhaustive replies to all requests, based on the knowledge available at the time. The requesters could have submitted additional requests with specific questions, if they were not satisfied.

35. The Party concerned points out that information about the NPP was publicly available from the earliest stages of the project through media coverage and the Internet: the 2005 Strategy, Decree No. 565 of 2007, Security Council Decision No. 1 of 2008 (see paras. 17–18 above) and the Law on the Use of Nuclear Energy (see para. 15 (a) above) were widely publicized. A study carried out by the Belarus Aarhus Centre in 2008 showed that citizens who were interested in nuclear energy could get a full picture of the developments. In 2008, the National Academy of Sciences' Institute of Sociology carried out a study on public opinion on nuclear energy and how to increase public trust; the study showed that the public's attitude towards nuclear energy and the construction of NPPs had changed positively over recent years and that the "Chernobyl syndrome" had been replaced

by a rational approach, taking into consideration immediate energy needs and international trends and experience.

Adequate, timely and effective public notice (art, 6, para. 2)

36. The communicant alleges that public notice for the commencement of public consultations concerning a big project of national concern published only on the Internet and in a local newspaper (the *Ostrovetskaya Pravda*) with about 5,500 issues is not adequate, as required by article 6, paragraph 2, of the Convention. The communicant submits that only approximately 29 per cent of the population of the country have access to the Internet. In addition, while the public notice included the date and location of public discussions on the NPP EIA, brief information about the EIA (on pp. 3–5 of the local newspaper) and instructions about where and when the full EIA Report could be obtained, there was no information about where the public could submit comments or which authority would be responsible for taking the decision.

37. The Party concerned maintains that the public notice for the planned activity, the EIA process and the participation and consultation process were published on the Internet on 17 June 2005 and that the Internet is widely used in the country. Furthermore, the notice was published not only in the local *Ostrovetskaya Pravda* paper but also in national newspapers (*Respublika* and *Sovietskaya Belorussia*) and a regional newspaper (*Grodnenskaya Pravda*). The notice contained all the information as per the requirements of the Convention.

38. In addition, on 9 September 2009, the Brief EIA Overview and the Preliminary EIA Report on the NPP (see para. 20 (b) above) were available on the Internet. Most project-related documents were available on the websites of the relevant authorities. Hence, the public notice and the relevant documentation were made available to the public at the national, regional and local levels.

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

39. The communicant alleges that the public consultations began at a late stage when most options were closed, and that the Party concerned failed to comply with article 6, paragraph 4: the public was not given any possibility to discuss the non-NPP alternative, the choice of technology or the choice of location.

40. According to the Party concerned the allegations of non-compliance with article 6, paragraph 4, are not valid. The Brief EIA Overview and the Preliminary EIA Report contained full information about alternative sources of energy, alternative nuclear technologies, alternative locations, etc. The proposals were made after consideration of all options and on the basis of natural, technogenic and public safety considerations. In particular, the proposal for the location, which was not a final decision, was the outcome of a thorough consideration of 74 locations. Also, the road currently under construction (annex 7 to the communication, see para. 21 above) is not part of the NPP, but part of a different transport project in the area.

Access to information relevant to decision-making (art. 6, para. 6)

41. The communicant alleges that the Party concerned failed to comply with article 6, paragraph 6, of the Convention, because the Brief EIA Overview, as a basic document for the general public to understand the project, focused on two issues only (the location alternatives and the socio-economic benefits); and the EIA Report provided to the public was much shorter (about 135 pages) than the so-called full EIA Report (about 1,000 pages), which was never available to the public.

42. The Party concerned disagrees with the allegations of non-compliance with this provision because the full Preliminary EIA Report was a very large document and the public was therefore advised to consult it in Minsk and Ostrovets, while the Brief EIA Overview anyway contained the same sections as the Preliminary EIA Report. In addition, the Party concerned noted that the studies carried for the selection of the project site and the full EIA Report were classified according to national legislation, because they were carried out by private entities and it was an expensive assignment. For this reason, when the project was discussed with officials from neighbouring countries, only the electronic version of the full report was shown during the consultations, but no copies were allowed to be made.

Possibility to submit comments (art. 6, para. 7)

43. The communicant alleges that the procedures for public participation did not comply with article 6, paragraph 7, of the Convention, for the following reasons:

(a) There was only one public hearing, which was organized in a small town and national NGOs and individuals from Minsk were not able to participate. The hearing was initially announced as "local" and then as "national" a few days before it took place;

(b) The public hearing was organized on a work-day (Friday) and during working hours (10 a.m.–5 p.m.) and many people were not able to attend;

(c) The registration process was scheduled from 10 a.m. to 12 p.m., but at 10:10 a.m. the room was already full with representatives of employees' collectives, who had been registered in advance. This impeded and effectively limited NGO participation;

(d) NGOs that registered were not allowed to express their views or disseminate material. For example, NGOs had prepared about 100 copies of the *NGO Critique of the EIA*, but all copies were confiscated at the meeting. Also, NGOs were given only three minutes to speak.

44. The Party concerned disagrees with the allegations of non-compliance with article 6, paragraph 7, and maintains that everyone who was interested was able to participate and express their views. It adds that apart from the Ostrovets hearing on 9 October 2009 (see para. 20 (d) above), where approximately 800 people participated, the Preliminary EIA Report was discussed with staff from over 1,670 companies and institutions and 70 public organizations at meetings in which a total of about 182,670 people participated; and that the Public Coordination Committee on the Environment (within the Ministry of Environment involving representatives of the 18 largest public environmental associations and organizations in Belarus) also examined the EIA on 17 September 2009.

45. According to the Party concerned, the Ostrovets hearing in particular was organized as per the provisions of the Convention:

(a) The location was chosen to allow for maximum involvement of the local population;

(b) In practice, in many countries public hearings take place during working hours;

(c) Upon registration, participants had to fill out a form (appendix 1 to the response of the Party concerned) indicating comments and whether they would like to speak;

(d) Seats had been reserved for public environmental organizations, and ministries' officials were also affected by the high attendance rate;

(e) Large screens, which broadcast the proceedings, were placed in the foyer and outside the building;

(f) Under Belarusian legislation the developer is responsible for the public participation process and it is at his discretion whether written material should be distributed during the hearing. In this case, the developer did not want any material to be disseminated at the Ostrovets hearing. In any event, the *NGO Critique of the EIA* was already a public document;

(g) There was limited time to accommodate everyone who had requested to speak. The hearing was extended by two hours to fit in as many speakers as possible;

(h) Due to the importance of the project and the interest it attracted, the period for submission of comments was extended. Any comments from the public will be considered by the authorities at the expertiza phase;

(i) Public drop-in sessions run by the Aarhus Centre have been regularly scheduled at the Ministry of Environment since October 2009.

Public participation concerning plans, programmes and policies (art. 7)

46. The communicant alleges that the Party concerned failed to comply with article 7 of the Convention, because it did not take any steps to provide for public participation in adopting plans, programmes and policies in the field of nuclear energy. In particular, the communicant considers that the 2005 Energy Security Strategy is a policy and that Directive No. 3 of 14 June 2007, Decree No. 565 of 12 November 2007 and Decision No. 1 of the Security Council of 15 January 2008, signed by the President on 31 January 2008, were all plans or programmes in the meaning of article 7 (see paras. 17–18 above), irrespective of the fact that they were not called "policy", "plan" or "programme". These acts were adopted by the highest executive bodies for the purpose of future nuclear projects and the public was never informed about their adoption.

47. The Party concerned disagrees with the communicant's allegations: the public was adequately informed about these acts through printed and digital media and actively involved in any decision relating to future plans for the country's energy sector. Sociological surveys had been conducted to analyse public opinion in that regard and meetings with staff from the public and private sector and with local authorities had been organized. In particular, for Decision No. 1 of 2008, which dealt with preparatory work for the NPP, a large-scale public information campaign had been organized and due account had been given to public opinion (see also appendix 2 to the response of the Party concerned with a list of comments and questions received).

48. In addition, according to the Constitution and the relevant legislation, it is possible for the public at any time to initiate a referendum on the NPP and the nuclear energy strategy.

Public participation concerning normative acts (art. 8)

49. The communicant alleges that the 2009 Regulation (see para. 15 (b) above) is a decision within the meaning of article 8 of the Convention, and that by not publishing the draft of the 2009 Regulation and not giving any opportunity to the public to comment, the Party concerned failed to comply with article 8 of the Convention.

50. The Party concerned disagrees with these assertions. First of all, it considers that such normative legal instruments dealing with procedural matters do not have any impact on the environment and therefore are not covered by article 8 of the Convention. Nevertheless, the Party concerned maintains that, as a rule, all draft normative instruments are posted on the websites of public authorities and of the National Centre for Legal Information with the purpose of informing the public and taking into account the views of the public concerned.

Use of domestic remedies

51. The communicant submits that national courts do not provide adequate protection of public rights in the country.

52. The refusal by an authority to provide environmental information may be appealed to a higher public authority or to the court (art. 74.4 of the Law on Environmental Protection). The first option is not available when a request for information is submitted to the highest unit within the authority. The second option involves two possibilities depending on the parties or the subject: general jurisdiction courts consider lawsuits concerning the illegal refusal by the authorities to provide information, and commercial courts consider lawsuits concerning the illegal refusal by commercial or other private interest entities to provide information.

53. The communicant did not use any of the above review procedures for access to information because, at the time the correspondence took place (see para. 19 above), it was not aware that the information provided was misleading. In any event, obtaining judicial remedies takes a long time and the project would already be at an advanced implementation phase before then.

54. In addition, the NGO Ecohome filed a lawsuit in the Ostrovets court of general jurisdiction for failure of the Directorate for the Construction of the Nuclear Power Plant to provide the requested full EIA Report (see para. 19 (d) above). In its application, Ecohome referred to the relevant provisions of the Convention (art. 4) and petitioned the Court to order the Directorate to provide the requested full EIA Report. On 22 March 2010, the Court refused to accept the case on the grounds that the dispute between the Directorate and the NGO was of an economic nature and should be addressed by the commercial courts. Ecohome appealed this decision at the Grodno regional court; the appeal was subsequently rejected.

55. On 29 April 2010, Ecohome and an individual member of the public filed a lawsuit in the Ostrovets court of general jurisdiction on the same subject. On 16 June 2010, the Court refused to accept the case based on the same reasoning as in its decision of March 2010. With respect to the standing of the individual, the Court found that that person had not submitted its own claims and no separate decision was necessary. The applicants appealed this decision to the Grodno regional court. The hearing was scheduled to take place on 21 July 2010. No additional information was submitted to the Committee in this respect.

56. The NPP issue was brought to the attention of the Espoo Convention Implementation Committee by the Ukrainian NGO Ecoclub on 1 July 2009.

III. Consideration and evaluation by the Committee

Legal basis and scope of consideration of the Committee

57. The Aarhus Convention was signed by Belarus on 16 December 1998 and entered into force for Belarus on 30 October 2001.

58. The requests for information reported in the communication related to “environmental information” in the meaning of article 2, paragraph 3 of the Convention, and the procedure for authorization of NPP is subject to the public participation provisions of article 6 of the Convention as an activity referred to in article 6, paragraph 1(a) (in conjunction with annex I to the Convention).

59. The communication includes allegations related both to specific instances of non-compliance and to general non-compliance. As for the allegations related to general

non-compliance, the Committee notes that, while it has considered non-compliance of the Belarusian system applicable in 2009 with article 3, paragraph 1, in conjunction with several other provisions of the Convention in its findings and recommendations for communication ACCC/C/2009/37, it was informed during the formal discussions about ongoing amendments in Belarusian law with respect to public participation. The Committee finds that it would be premature and not relevant for the present case concerning the NPP to examine in detail the ongoing regulatory amendments.

60. For the above reasons, the Committee decides to focus its attention on the allegations related to specific instances of non-compliance. Nevertheless, it finds useful to make some general observations relating to the applicable legal framework in general.

61. In addition, the communication contains allegations of non-compliance with articles 6, 7 and 8 of the Convention. The Committee decides to focus its considerations on article 6. However, the Committee stresses that the scope of obligations under article 8 relate to any normative acts that may have a significant effect on the environment, which should be considered as including acts dealing with procedural matters related to authorization of activities subject to environmental assessment, as well as to public participation in environmental matters.

Observations concerning the general legal framework

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.

63. Furthermore, bearing in mind its findings and recommendations for communication ACCC/C/2009/37, the Committee notes that there is considerable uncertainty as to the participatory procedures applicable in cases involving nuclear activities. In this respect, it is of the outmost importance that in amending its legislative, regulatory and other measures the Party concerned ensure the compatibility of and coherence between the general framework for public participation in decisions on specific activities and the framework for public participation applicable to nuclear activities. Moreover, the Party concerned should ensure that the amended legal framework clearly designates which decision is considered to be the final decision permitting the activity in terms of article 6, paragraph 9, of the Convention.

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.

Harassment (art. 3, para. 8)

65. The allegations concerning harassment are serious, and the alleged facts, if sufficiently substantiated, would amount to harassment in the sense of article 3, paragraph 8, and would therefore constitute non-compliance with the provisions of the Convention. However, on the basis of the information provided, the Committee could not assess with

sufficient certainty what happened exactly and therefore the Committee refrains from making a finding on this issue.

Access to information (art. 4)

66. The allegations concerning non-compliance by the Party concerned with article 4, paragraph 1 (see paras. 29–33 above), are related to the accuracy of the information provided and the form in which information was provided. The Committee notes that in all instances the authorities duly replied within one month.

67. The Committee acknowledges that not all information provided concerning the facts and the interpretation of the Convention were accurate and complete. Nevertheless, the information provided might have reflected the current knowledge of the authorities. The requests were formulated in a manner that assumed a certain level of interpretation of facts, and the replies reflected this interpretation. Thus the authorities provided the information that was held by them at that time and there is no evidence that they knowingly provided inaccurate or incomplete information. Therefore, in these instances, the Committee does not find that the Party concerned failed to comply with article 4, paragraph 1.

Access to information in the form requested (art. 4, para. 1 (b), in conjunction with art. 6, para. 6)

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.

Adequate, timely and effective public notice (art. 6, para. 2)

70. In its findings concerning communication ACCC/C/2009/37 (paras. 83–86 and para. 104 (b)), the Committee found that Belarusian legislation does not adequately regulate the public notice requirements and does not allow for adequate, timely and effective public participation, as required by article 6, paragraph 2, of the Convention.

71. Regarding the NPP project, on 31 July 2009, an advance public notice was issued on the website of three public authorities (see paras. 20 (a) and (b) above), for the public hearings which were to take place in fall 2009. Later that year, on 9 September 2009, the public notice was published in printed media at the national and local level and on the Internet (on websites of the relevant public authorities, such as ministries responsible for

the environment and for energy) and it was announced that the public hearing would take place on 9 October 2009.

72. The Committee examined the public notices (see annexes 5 and 6 to the communication) and finds that they contained most of the elements prescribed in article 6, paragraph 2, of the Convention, including a brief description of the planned activity (location, potential transboundary impact, schedule of implementation, time frame for the preparation of the EIA documentation and for the public discussions), the communication point for public participation (where the public concerned could send their comments), and information on the participation process (time frame for participation, consultations and submission of the comments, and where the EIA documents could be accessed by the public (i.e., on the websites of public authorities and at the Power Plant Construction Office in Ostrovets)).

73. The Committee notes that the public notice was published on the Internet and also in the national (*Respublika* and *Sovietskaya Belorussia*) and local printed media (*Ostrovetskaya Pravda* and *Grodnenskaya Pravda*). As for the use of Internet, according to statistic data, as of June 2010 there was a 46.2 per cent Internet penetration in the country,[6] considered to be the highest level of penetration in the Commonwealth of Independent States, after the Russian Federation. In addition, Internet access is widespread in the urban areas, where 75 per cent (2010) of the total population is concentrated.[7] The fact that public notice was published in the local press and the project-related documentation could be accessed in Ostrovets compensates for the fact that Internet access is not widespread in rural areas. For these reasons, the Committee is not convinced that the Party concerned failed to comply with article 6, paragraph 2.

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.

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

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.

[6] Internet World Stats at http://www.internetworldstats.com (last viewed on 12 May 2011).

[7] CIA World Factbook at https://www.cia.gov/library/publications/the-world-factbook/geos/bo.html (last viewed on 12 May 2011).

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.

Access to information relevant to decision-making (art. 6, para. 6)

79. Article 6, paragraph 6 of the Convention aims at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore effective. While active dissemination of certain documents by publishing them in newspapers (e.g., in the present case publishing a Brief EIA Overview, which is a non-technical summary of the EIA Report) is certainly a good practice, only by ensuring access to all documents relevant to the decision-making for examination can the requirement of this provision be fulfilled.

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.

Possibility to submit comments (art. 6, para. 7)

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.

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.

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.

85. For these reasons, the Committee finds that the Party concerned failed to comply with article 6, paragraph 7, of the Convention in the NPP case and that this has mainly to do with the systemic issues relating to the prior legislation, as identified in the findings for communication ACCC/C/2009/37.

Access to justice (art. 9, para. 1)

86. While there were no specific allegations concerning access to justice, in the light of the information regarding the use of domestic remedies (paras. 51–56), the Committee observes that qualifying redress procedures regarding access to justice as being of an economic nature, and therefore subject to rules for commercial disputes, may well lead to limiting effective access to justice as required under article 9, paragraph 1, of the Convention, and therefore would like to draw the attention of the Party to the situation for monitoring.

IV. Conclusions and recommendations

87. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

88. In relation to the general legal framework, the Committee recalls its findings on communication ACCC/C/2009/37 and observes that:

(a) There is considerable uncertainty as to the participatory procedures applicable in case of nuclear activities (para. 63);

(b) There is lack of clarity as to the decision which is considered to be the final decision permitting an activity in terms of article 6, paragraph 9 (para. 63);

(c) Concerning the role of the project developer, it is not in compliance with the Convention that the authority responsible for taking the decision (including the authorities responsible for the expertiza conclusions) are provided only with the summary of the comments submitted by the public (para. 64).

89. In relation to the NPP, the Committee finds that the Party concerned:

(a) By restricting access to the full version of the EIA Report to the premises of the Directorate of the NPP in Minsk only and by not allowing any copies to be made, it failed to comply with article 6, paragraph 6, and article 4, paragraph 1 (b), of the Convention (para. 69);

(b) By not duly informing the public that, in addition to the publicly available 100-page EIA report, there was a full version of the EIA Report (more than 1,000 pages long), it failed to comply with article 6, paragraph 2 (d) (vi), of the Convention (para. 74);

(c) By providing for public participation only at the stage of the EIA for the NPP, with one hearing on 9 October 2009, and effectively reducing the public's input to only commenting on how the environmental impact could be mitigated, and precluding 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), it failed to comply with article 6, paragraph 4, of the Convention (para. 78);

(d) By not informing the public in due time of the possibility of examining the full EIA Report, it failed to comply with article 6, paragraph 6, of the Convention (para. 80);

(e) By limiting the possibility for members of the public to submit comments, it failed to comply with article 6, paragraph 7, of the Convention (para. 85).

B. Recommendations

90. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, and noting the agreement of the Party concerned that the Committee take the measure referred in paragraph 37 (b) of the annex to decision I/7, recommends to the Party concerned that it:

(a) In amending its legislative, regulatory and other measures, take note of the Committee recommendations on communication ACCC/C/2009/37 with respect to the general legal framework, and ensure the compatibility of and coherence between the general framework for public participation in decisions on specific activities (the general EIA legislation) and the framework for public participation in nuclear activities;

(b) Ensure that the amended legal framework clearly designates which decision is considered to be the final decision permitting the activity and that this decision is made public, as required under article 6, paragraph 9, of the Convention;

(c) Ensure that the full content of all the comments made by the public (whether claimed to be accommodated by the developer or those which are not accepted) is submitted to the responsible authorities for taking the decision (including those responsible for the expertiza conclusion);

(d) Make appropriate practical and other provisions for the public to participate during the preparation of plans and programmes relating to the environment;

(e) Organize training of public officials to raise awareness with regard to the Convention and ensure that public officials are adequately informed so as to prevent the dissemination of inaccurate information.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

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

Findings and recommendations with regard to communications ACCC/C/2010/45 and ACCC/C/2011/60 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*

Adopted by the Compliance Committee on 28 June 2013

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

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I. Introduction

A. Communication ACCC/C/2010/45

1. On 10 September 2010, the Kent Environment and Community Network (the ACCC/C/2010/45 communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the United Kingdom of Great Britain and Northern Ireland had failed to comply with several obligations under the Convention (communication ACCC/C/2010/45).

2. The communication had initially been submitted on 15 January 2010, and subsequently resubmitted, further to the Committee's request for clarification, before the determination of preliminary admissibility of the communication. The communication originally alleged a general failure of the United Kingdom to properly implement the provisions of article 9, paragraphs 2 (b), 3, 4 and 5, of the Convention. To illustrate this failure, the communication referred to the example of the planning application for the Sainsbury's superstore in Hythe, Kent (the superstore).

3. At its twenty-ninth meeting (21–24 September 2010), the Committee determined on a preliminary basis that the communication was admissible. At that meeting, the Committee also identified that legal issues raised by the communication had already been dealt with by the Committee in its deliberations on previous communications concerning compliance by the United Kingdom (i.e., ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33), and decided that summary proceedings would apply, according to the procedural decision adopted at its twenty-eighth meeting (ECE/MP.PP/C.1/2010/4, para. 46).

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention (ECE/MP.PP/2/Add.8), the communication was forwarded to the Party concerned on 28 October 2010, requesting it to provide information, as appropriate, on the progress achieved on the Committee's recommendations relating to the above-mentioned three communications, and inviting it to comment on the allegations, if it so wished. On the same date, a letter was sent to the ACCC/C/2010/45 communicant inviting it to consider its allegations in the light of the findings and recommendations in respect of the three communications. Additional information relating to the communication was forwarded to the Party concerned on 10 November 2010.

5. At its thirty-first meeting (22–25 February 2011), the Committee agreed to consider the communication according to summary proceedings at its thirty-second meeting (11–14 April 2011).

6. In response to the Committee's letters of 28 October 2010, the communicant and the Party concerned provided their responses on 27 March and 11 April 2011, respectively.

7. At its thirty-second meeting, the Committee noted that the communicant in its written submissions had challenged the decision of the Committee to consider the communication according to the summary proceedings procedure. After considering the communicant's response of 27 March 2011 and the letter of the Party concerned of 11 April 2011, the Committee decided to affirm its decision at its twenty-ninth meeting to apply summary proceedings in respect of those issues already dealt with in its deliberations in

previous communications concerning compliance by the United Kingdom (i.e., ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33). The Committee requested the secretariat to inform the ACCC/C/2010/45 communicant that its letter of 27 March 2011 had been forwarded to the Party concerned and that the Party concerned would be invited to consider that letter when preparing its report in respect of the Committee's findings in ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33. In respect of those issues raised in the communicant's letter of 27 March that were not already dealt with in the three above-mentioned communications, the Committee requested the secretariat to ask the communicant to substantiate its allegations by reference both to the substantive provisions of the Convention alleged to have been breached and concrete examples from the current system in the United Kingdom within the scope of the Convention demonstrating those breaches. Otherwise, the Committee might decide to conclude the case.

8. On 12 June 2011, the ACCC/C/2010/45 communicant submitted additional information to the Committee in response to the Committee's request, including new allegations of non-compliance by the United Kingdom with article 6, paragraphs 1 (b), 2, 3, 4, 6, 8, 9, and 10, article 7 and article 9, paragraphs 2 and 3, of the Convention.

9. At its thirty-third meeting (27–28 June 2011), the Committee took note of the communicant's submissions of 12 June 2011. It noted that the breaches of the Convention alleged by the communicant in those additional submission had considerably expanded upon those breaches alleged in the original communication ACCC/C/2010/45 that concerned article 9, paragraphs 2 (b), 3, 4 and 5. The Committee expressed its disapproval of such a "moving targets" approach, inter alia, because such an approach raised procedural issues with regard to admissibility and fairness to the Party concerned.

10. At the same meeting, the Committee confirmed that by applying summary proceedings the Committee would not deal with any of the issues already dealt with in the scope of its findings on communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33, in particular those relating to costs. With respect to the new allegations made in the ACCC/C/2010/45 communicant's letter of 12 June 2011, the Committee observed that a new communication ACCC/C/2011/60 (United Kingdom) (see below), submitted on 24 June 2011, raised some similar issues regarding the planning policy in the Party concerned. The Committee agreed that it would decide how to proceed with respect to the new allegations, and which issues to address, after the Party concerned had been provided with an opportunity to respond to both the new allegations in communication ACCC/C/2010/45 and the related issues raised in communication ACCC/C/2011/60, in accordance with paragraph 23 of the annex to decision I/7 of the Meeting of the Parties.

11. On 27 July 2011, a letter was sent to the Party concerned and the ACCC/C/2010/45 communicant informing them about the outcome of the Committee's thirty-third meeting.

B. Communication ACCC/C/2011/60

12. On 28 March 2011, a member of the public, Mr. Terence Ewing (the ACCC/C/2011/60 communicant), submitted a communication to the Committee alleging that the United Kingdom had failed to comply with its obligations under the Convention (communication ACCC/C/2011/60).

13. In particular, the communication alleged that the Party concerned, by not providing the right for oral presentations to third party objectors at planning committee hearings of local authorities, was not in compliance with article 3, paragraphs 1 and 9, and article 6, paragraph 7, of the Convention. The communication also alleged that only applicants whose applications were refused had the right of appeal before the Planning Inspector; and that third party objectors had only the possibility to apply for judicial review to the High Court, an avenue that was not adequate, effective, fair or equitable, and which might be

prohibitively expensive. For these reasons, the communication alleged that the Party concerned failed to comply with article 3, paragraph 1, and article 9, paragraphs 2, 3 and 4, of the Convention.

14. At its thirty-third meeting, the Committee determined on a preliminary basis that the communication was admissible. At that meeting, the Committee also noted that the allegations made by the ACCC/C/2011/60 communicant presented similarities to the new allegations made by the ACCC/C/2010/45 communicant (see above).

15. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 27 July 2011. The Party concerned was asked to respond to the allegations of communication ACCC/C/2011/60 and also to the new allegations of communication ACCC/C/2010/45. The Committee would decide on how to proceed with those two communications after it had received the response of the Party concerned.

16. In September 2011, the ACCC/C/2011/60 communicant submitted a considerable amount of additional information, some of which constituted amended versions of previously submitted documents. At its thirty-fifth meeting, the Committee, further to the proposal of the Chair, decided that it would not consider the additional submissions.

C. Joint consideration of the two communications

17. On 22 December 2011, the Party concerned provided its response to communication ACCC/C/2011/60 and the new allegations in ACCC/C/2010/45. On 5 March 2012, the ACCC/C/2010/45 communicant responded to the submissions of the Party concerned.

18. Further submissions by the ACCC/C/2011/60 communicant were made on 4 March and 1 June 2012. The Committee instructed the secretariat to process only those parts of the communicant's submissions of 1 June 2012 that related to the original submission.

19. At its thirty-sixth meeting (27–30 March 2012), the Committee considered the responses received and discussed how to proceed with communications ACCC/C/2010/45 and ACCC/C/2011/60. It decided that it would deal with the following issues:

(a) Whether the planning laws and procedures of the Party concerned, limited to England and Wales, met the standards regarding public participation in articles 6 and 7 of the Convention (ACCC/C/2010/45), including whether the fact that oral presentations allegedly might not be made at meetings of planning committees was contrary to the Convention (ACCC/C/2011/60);

(b) Whether the review procedures mentioned in the communication, to the extent that they did not cover issues considered by the Committee in ACCC/C/2008/33, met the requirements of article 9 of the Convention (ACCC/C/2010/45).

20. The Committee also decided that it would apply its summary proceedings procedure to the following issues raised by the two communications:

(a) Whether the procedure for judicial review available in the courts of the Party concerned met the standards of substantive legality set out in article 9 of the Convention, because the Committee had already dealt with that matter in its findings on communication ACCC/C/2008/33 (ECE/MP.PP/C.1/2010/6/Add.3, paras. 123–127), and no new information had been submitted to the Committee which would trigger reconsideration of its findings;

(b) Whether the cost of judicial review procedures in the Party concerned were prohibitively expensive, because the Committee had already dealt with that matter in its findings on communications ACCC/C/2008/27 (ECE/MP.PP/C.1/2010/6/Add.2) and

ACCC/C/2008/33, and no new information had been submitted to the Committee which would trigger reconsideration of its findings. The Committee recalled that it would continue to closely monitor the progress by the Party concerned on that issue through its follow-up on the implementation of decision IV/9i (United Kingdom), adopted by the Meeting of the Parties at its fourth session (Chisinau, 29 June–1 July 2011).

21. At the same meeting, the Committee also decided that it would discuss the substance of the two communications jointly at its thirty-seventh meeting (26–29 June 2012). With regard to the allegations that were admissible on a preliminary basis, but for which the Committee had decided to apply its summary proceedings procedure because it had already considered the legal issues raised by the communication in its findings on communications ACCC/C/2008/27 and ACCC/C/2008/33, and because it was following up on the implementation by the Party concerned of the relevant recommendations of decision IV/9i, the Committee instructed the secretariat to inform the communicants about the process to be followed and to advise them to take note of the Committee's follow-up on the implementation by the Party concerned of decision IV/9i. The Committee also instructed the secretariat to remind the Party concerned of the previous findings on communications ACCC/C/2008/27 and ACCC/C/2008/33 and the related recommendations of the Meeting of the Parties in decision IV/9i, and to request it to provide information on the progress achieved.

22. The Committee discussed the communications at its thirty-seventh meeting, with the participation of representatives of the communicants and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communications. After the discussion, the parties were invited to address several questions.

23. The Party concerned addressed the Committee's questions on 31 July 2012; the ACCC/C/2011/60 communicant on 2 August 2012 and the ACCC/C/2010/45 communicant on 13 August 2012. Additional information was submitted by the ACCC/C/2011/60 communicant on 15 and 28 September 2012. The ACCC/C/2011/60 communicant also submitted information on 22 March 2013, which was not considered by the Committee.

24. The Committee prepared joint draft findings at its fortieth meeting (25–28 March 2013) and, in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicants on 1 May 2013. All were invited to provide comments by 29 May 2013.

25. The Party concerned and the communicants provided comments on 29 May 2013. A revised version of the comments by the ACCC/C/2011/60 communicant was received on 29 June 2013.

26. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the Committee's forty-third meeting. It requested the secretariat to send the findings to the Party concerned and the communicants.

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

A. Legal framework

Environmental information

27. In the United Kingdom, the Environmental Information Regulations 2004 implement European Union (EU) Directive 2003/4/EC on public access to environmental information, providing for the dissemination of information to the public and requiring for public authorities to make available information in response to a request within 20 working days (which deadline may be extended to 40 working days depending on the volume or complexity of the information requested).

Local planning decisions

28. The present communication pertains to the planning system in England and Wales, where the main act currently consolidating planning legislation is the Town and Country Planning Act 1990. Another three acts complement the Town and Country Planning Act: the Planning (Listed Buildings and Conservation Areas) Act 1990; the Planning (Hazardous Substances) Act 1990; and the Planning (Consequential Provisions) Act 1990. Most of the provisions of these three acts have been repealed or amended by the provisions of the Planning and Compulsory Purchase Act 2004.

29. The Planning and Compulsory Purchase Act 2004 requires local authorities to produce a number of documents, such as the Local Development Framework and the Statement of Community Involvement describing how the local planning authority will involve interested parties in the exercise of its functions. Sustainability Appraisals and Strategic Environmental Assessments supplement the documentation.

30. A number of other statutory instruments govern planning law in England,[2] while the planning policy underwent reform in 2012, with the main objective to consign increased power to local authorities.

31. Concerning the right of oral submissions at local planning decision-making meetings, the Local Government (Access to information) Act 1985 provides for public access to a local authority's meeting. Accordingly, all documents related to the meeting are publicly available at least three days in advance. Whether a member of the public can speak during the meeting depends on the local planning authority. Some authorities, including the Shepway District Council, have introduced a right to speak at planning committee meetings for applicants and objectors. In addition, the Freedom of Information Act 2000 allows access to information held by public authorities and the Environmental Information Regulations 2004 allow access to environmental information.

Local investment plans

32. Local investment plans prioritize development goals.[3] They were introduced by the Homes and Communities Agency (a non-departmental public body of the Department of

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

[2] For a list on the statutory instruments applicable in England, see http://www.planningportal.gov.uk/planning/planningpolicyandlegislation/currentlegislation/statutoryinstruments (last accessed on 21 October 2013). Among them the Town and Country Planning (Local Development) (England) Regulations 2004 as amended; the Town and Country Planning (Development Management procedure) (England) Order 2010.

Communities and Local Government) as a way to help local authorities implement their plans for places and communities. There is no statutory requirement to produce a local investment plan. Adopted local investment plans may be included in Local Development Framework documentation, even if they are not part of the Framework itself.

33. Local investment plans are adopted by what are often referred to as Local Strategic Partnerships, which may involve Local Enterprise Partnerships. A Local Strategic Partnership is a non-statutory body that brings together the different parts of the public, private, voluntary and community sectors, working at a local level. Local Enterprise Partnerships are composed of representatives of the public sector, private sector and civil society; they are led by local authorities and businesses across natural economic areas and provide the vision, knowledge and strategic leadership needed to drive sustainable private sector growth and job creation in their area.

Environmental impact assessment and screening (EU legislation)

34. The EU EIA Directive[4] has been transposed into United Kingdom law through a number of domestic instruments, including the Town and Country Planning Regulations 2011 (EIA Regulations) in England. Accordingly, the competent authority determines on a case-by-case basis if a project falling under annex II of the EIA Directive requires an environmental impact assessment (EIA) to be carried out.

Review of local planning decisions

35. The appeal of the applicant whose application for planning permission is refused is heard by the Planning Inspectorate (in England and Wales).

36. Most planning applications are decided locally by the local planning authority. However, the Secretary of State can direct the local planning authority to refer an application for decision to the Secretary of State, the so called “call-in procedure”, to determine whether the application ought to be decided by the local planning authority or the Secretary of State.

37. In both the statutory appeal and the call-in procedure, a planning inspector is appointed to write the report. The procedure may be carried out through written representations, informal hearings or an inquiry.

38. Third parties may pursue judicial review of the decision taken by a local council at the High Court, where the procedural legality of a decision is reviewed. The procedure at the High Court may involve considerable expenses. Alternatively, third parties may complain before the Local Government Ombudsman about maladministration causing injustice.

39. With respect to EIA screening, a party can ask the Secretary of State to consider undertaking a Screening Direction upon a particular proposal to determine whether an EIA is required or not.

[3] See also http://www.homesandcommunities.co.uk/hca-local-investment-planning (last accessed on 21 October 2013).

[4] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended. (See Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification).)

B. Facts

ACCC/C/2010/45

40. The facts of this communication are based on planning application Y09/0627/SH concerning the proposed construction of the superstore, submitted to Shepway District Council on 24 June 2009. The communication at issue aims to exemplify the situation where third parties aggrieved about the environmental impacts of a planning proposal have limited third party rights of appeal. The communication also raises general concerns of non-compliance by the Party concerned with the public participation requirements under the Convention.

41. On 29 June 2009, the Shepway District Council provided a screening opinion that the proposal to build the superstore was not subject to EIA procedures.

42. On 15 December 2009, the Development Control Committee resolved to grant planning permission for the building of the superstore with parking for some 270 cars on a site of 1.83 hectares. Members of the public concerned, including the ACCC/C/2010/45 communicant, sought to persuade the Development Control Committee to refuse planning permission through written and oral representations before the Committee and other campaign activities.

43. On 4 January 2010, the communicant sent a letter to the Secretary of State requesting a call-in procedure, among others raising the issues of the potential harm to the viability and vitality of the historic town of Hythe, and to the adjacent conservation area of the nearby listed buildings. The Secretary of State decided not to call the application in for his own decision.

44. During the same time period, on 27 December 2009, the communicant asked for a Screening Direction from the Secretary of State to determine whether the proposal should be subjected to an EIA. That was done on the basis of concerns for traffic, air pollution and the overall carbon footprint of the proposal. The Secretary of State in response to this request also found that the proposal did not require an EIA.

45. The communicant then contemplated judicial review of the planning decision.

46. On 12 February 2010, the Shepway District Council formally granted the planning permission.

47. On 13 February 2010, the communicant, not being aware of the permission already granted, sent a letter to the Shepway District Council with a view to forcing the Council to bring the matter back to the Development Control Committee for failure to consider new guidance issued by the Government on the planning approach to be given to superstores. No response was received. The communicant sent similar letters thereafter with the hope that the Council would review its decision, but the Council refused to do so.

48. The communicant admits that one of the reasons it decided to submit a communication before the Compliance Committee was to persuade the Government to call-in the proposal so that a public inquiry could be held, to change its restrictive practice on call-ins based on the Caborn Statement[5] generally, and to introduce a better system for third party appeals in environmental planning cases.

[5] A statement by Richard Caborn, Minister of State for the Regions, Regeneration and Planning, made on 11 February 1999, addressing the circumstances in which planning authorities, when considering planning applications for retail and leisure developments, should take into account the need for the development.

ACCC/C/2011/60

49. The ACCC/C/2011/60 communicant provides examples from his personal experience in the discussion of planning applications at Westminster Council and Wandsworth, and Camden, about the right of members of the public to make oral submissions and the time they are granted to comment.

C. Substantive issues

ACCC/C/2010/45

50. The following paragraphs summarize the main allegations by the ACCC/C/2010/45 communicant and the counter-arguments of the Party concerned.

Public participation in specific activities — article 6

51. The ACCC/C/2010/45 communicant alleges that public participation should take place not only in the context of EIA and strategic environmental assessment procedures, but for any project, such as the superstore, unless the possibility of harm is excluded. Therefore, the Party concerned fails to comply with article 6, paragraph 1 (b), of the Convention. The communicant points to a number of elements in planning law in England that significantly impact on the effectiveness of the public participation procedure, and further alleges that the Party concerned fails to comply with the requirements of article 6, paragraphs 2, 3, 4, 6, 8 and 9, of the Convention.

52. The Party concerned refutes all the ACCC/C/2010/45 communicant's allegations. In particular, the Party concerned stresses that whether an EIA is required or not is determined by the competent authority through thresholds on a case-by-case basis, according to the criteria set by EU and United Kingdom law.

53. The Party concerned explains that, in general, according to statutory requirements, members of the public have a number of opportunities to participate in the decision-making process, according to the minimum standards provided under article 6, of the Convention, and that, in the superstore case, enhanced consultations, exceeding the minimum requirements set by planning law and ordinary practice, were organized, despite the fact that the project did not require an EIA.

Public participation in plans and programmes — article 7

54. The ACCC/C/2010/45 communicant alleges that local investment plans substantially predetermine the future policies in Local Development Frameworks, especially when activities have received financial endorsement by developers. However, there is no public participation, while environmental concerns may be undermined. In addition, according to the communicant, the new Local Enterprise Partnerships will also impede public participation in the adoption of plans and programmes. Therefore, the communicant alleges that the Party concerned fails to comply with article 7 of the Convention.

55. The Party concerned contends that public participation for the preparation of Local Development Frameworks is fully in compliance with the Convention. The Party concerned also contends that local investment plans do not allocate land for development, nor set the framework for future development consent, while there is neither a statutory requirement to produce a local investment plan nor a requirement that a project included in the local investment plan automatically receive planning permission. As such, local investment plans do not fall within the ambit of article 7.

56. The Party concerned also contends that Local Enterprise Partnerships are not corporate bodies, but instead operate as a partnership. It furthermore submits that Local

Enterprise Partnerships may choose a number of roles. These roles may include leading on the preparation of policies related to economic development or producing evidence and technical assessments to inform others' decision-making. In so doing Local Enterprise Partnerships support local planning authorities in their statutory roles. As such these Partnerships, like local investment plans, do not fall within the ambit of article 7.

Access to review procedures — article 9

57. The ACCC/C/2010/45 communicant alleges that since the Party concerned does not provide a third party the right of appeal to projects listed in annex I to the Convention or other proposals which may have a significant effect on the environment, it fails to comply with article 9, paragraph 2 (b), of the Convention.

58. The communicant also alleges that most third parties do not have access to a review procedure for the legal substance of the matter, because very few applications are actually called in by the Secretary of State every year — and the superstore application was not. The communicant adds that judicial review does not allow for review of the legal substance of the matter; and that the Local Government Ombudsman looks at the substance of the matter, but rarely provides a suitable review in environmental planning matters. Therefore, the Party concerned fails to comply with article 9, paragraphs 2 (b) and 3, of the Convention.

59. The communicant further alleges that judicial review — practically the only avenue for any party to challenge a decision — is limited to procedural legality, and thus ineffective; and that judicial review involves high-costs risk by the claimant, and thus is inadequate. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

60. Finally, the ACCC/C/2010/45 communicant alleges that the Party concerned does not provide information to the public regarding the potential administrative review procedure by the Secretary of State in the screening decision and, therefore, the Party concerned fails to comply with article 9, paragraph 5, of the Convention.

61. The Party concerned refutes these allegations of the communicant, because there is the possibility for judicial review and for a complaint before the Local Government Ombudsman, even if there is no obligation under the Convention for the provision of administrative and judicial review procedures. On planning conditions, the Party concerned explains that upon notification about breaches in planning control, the competent authority may act if it considers it expedient in the context of the overall enforcement policy.

ACCC/C/2011/60

Public participation in specific activities

62. The ACCC/C/2011/60 communicant alleges that by not giving statutory rights to third party objectors to make oral presentations to a planning committee, the Party concerned fails to comply with article 3, paragraphs 1 and 9, and article 6, paragraph 7, of the Convention.

63. The Party concerned contends that no such obligation exists under the provisions of the Convention and refers to the ample opportunities in general for public participation under its law and practice.

Access to justice

64. The ACCC/C/2011/60 communicant alleges that by not giving statutory rights of appeal before the Planning Inspector to third party objectors, the Party concerned fails to comply with article 3, paragraph 1, and article 9, paragraphs 2, 3 and 4, of the Convention.

65. The Party concerned refutes the communicant's allegations and refers to its arguments on access to justice, already explained in relation to communication ACCC/C/2010/45.

D. Domestic remedies

66. The ACCC/C/2010/45 communicant did not pursue its complaint before the Local Government Ombudsman for the following reasons: (a) the Local Government Ombudsman would normally refuse jurisdiction, if legal remedies were still available (i.e., judicial review); (b) the remedy is not effective, as it may take longer than six months for a full investigation, and the implementation of a challenged planning permission may have already started; (c) the Ombudsman's remit is maladministration in local authorities and other bodies, rather than substantive aspects of decision; and (d) the Ombudsman has no power to overturn or override a decision.

67. The only option left according to the ACCC/C/2010/45 communicant was to pursue judicial review on the basis of legal procedural grounds. But it decided not to do so, due to the very high costs associated with this procedure. It also decided not to apply for a Protective Costs Order because of the restrictive and difficult rules that apply to such applications (see *R (Corner House Research) v. Secretary of State for Trade and Industry*).[6]

68. The ACCC/C/2010/45 communicant made a complaint to the European Commission with respect to the alleged failure of the Party concerned to inform members of the public about the EIA procedure, and in particular the possibilities to challenge the screening outcome; and a complaint with respect to the fact that local investment plans are not subject to strategic environmental assessment, while they substantially predetermine the Local Development Frameworks.

III. Consideration and evaluation by the Committee

69. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

70. As mentioned above (paras. 19–20), the Committee decided at its thirty-sixth meeting to consider communications ACCC/C/2010/45 and ACCC/C/2011/60 jointly and to apply its summary proceedings to those aspects of the communications that it had already considered in its findings on communications ACCC/C/2008/27 and ACCC/C/2008/33.

71. The Committee, after the discussion with representatives of the parties at its thirty-seventh meeting, decided to further focus its considerations on the allegations regarding screening decisions subject to article 6, paragraph 1 (b), of the Convention, the procedure at public planning meetings and the Party concerned's compliance with article 6, paragraph 7, of the Convention. It would also look at the role of local investment plans, adopted by local public-private partnerships, including Local Strategic Partnerships, in the planning process and their relationship to article 7 of the Convention, as well as any issues that, in conjunction with the above, might arise in relation to article 9 of the Convention.

72. The Committee decides not to examine the general compatibility of the planning laws of the Party concerned with the Convention due to the fact that the communications remain vague as to how these laws fail to comply with the Convention; while the Party concerned has provided sufficient prima facie information to illustrate that there are

[6] *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

numerous opportunities for public participation during the planning process. The Committee therefore does not reach any conclusion regarding compliance by the Party concerned on this matter.

73. The Committee also decides not to consider the role of Local Enterprise Partnerships, because the allegations of non-compliance concerning them were submitted very late in the proceedings and these instruments are currently in the process of being implemented.

Decisions on specific activities — article 6

74. The activities referred to in communications ACCC/C/2010/45 and ACCC/C/2011/60 do not come within the ambit of article 6, paragraph 1 (a), of the Convention.

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.

76. Communication ACCC/C/2010/45 refers to the EIA screening decision of 2 June 2009 by the Shepway District Council regarding the superstore. On the basis of the information before it in relation to the store, as well as other situations raised in communications ACCC/C/2010/45 and ACCC/C/2011/60, the Committee finds that the communicants fail to substantiate that the authorities misapplied their discretionary power under article 6, paragraph 1 (b), of the Convention.

77. Therefore, the Committee does not further examine whether the Party concerned in relation to these activities is in compliance with article 6, paragraph 2 to 9, of the Convention.

78. Nevertheless, the Committee notes that article 6, paragraph 7, of the Convention gives any member of the public the right to submit comments, information, analyses or opinions during public participation procedures, either in writing or, as appropriate, orally at a public hearing or inquiry with the applicant. The fact that some local authorities only provide for participation of members of the public at planning meetings via written submissions, as stressed in communication ACCC/C/2011/60, is not as such in non-compliance with article 6, paragraph 7, of the Convention.

Plans and programmes — article 7

79. The Committee considers that local investment plans, and possibly also Local Strategic Partnerships or Local Enterprise Partnerships, may well be part of the decision on plans or programmes within the purview of article 7 of the Convention. While there is no statutory requirement for the authorities to prepare local investment plans and these plans are not part of a statutory development plan, there appears to be a growing trend for local authorities in the United Kingdom to set their local planning priorities framework through local investment plans. The Homes and Communities Agency has developed a Good Practice for local investment planning[7] that encourages integration of community

[7] See http://www.homesandcommunities.co.uk/sites/default/files/aboutus/plan-good-practice.pdf, available from http://www.homesandcommunities.co.uk/hca-local-investment-planning (last accessed on 21 October 2013).

involvement. Still this remains guidance for good practice, and authorities have some discretion whether to engage all stakeholders, and not only prospective developers.

80. Therefore, in order to ensure investment flow for future projects, there is a risk that in preparing the local investment plans, authorities consult only with potential developers and do not involve other members of the public. In addition, although local investment plans are not material to the actual planning decisions and they may be included in the Local Development Framework documentation, they seem to be evolving into a de facto element of planning. It is thus highly unlikely that local investment plans have no effect at all on subsequent planning decisions, if consultations have already been carried out with prospective investors.

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.

Review procedures — article 9, paragraph 2, in conjunction with article 6, paragraph 1 (b)

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."

84. The Committee notes that the right of an applicant to appeal to the Secretary of State for Communities and Local Government or to the Secretary of State's Planning Inspectors are not procedures under article 9, paragraph 2, of the Convention. They are instead procedures by way of which an applicant whose planning decision has been refused may appeal that decision before an executive body, not constituting a court of law or independent and impartial body established by law. This is so even though in the course of such an appeal members of the public concerned may be heard. If the procedure results in a retaking of the decision at stake, then, depending on the proposed activity under consideration, it engages article 6 of the Convention. Similarly, the latter would be the case if the Secretary of State calls in an application for its own determination.

85. The Committee notes that the communicants in communication ACCC/C/2010/45 did not pursue judicial review of the screening decision at stake in the communication for

reasons of the expenses probably involved in such a review procedure, as well as the likelihood that only the procedural legality of the screening decision could be raised in such a review.

86. The Committee has addressed the issue of the costs involved in procedures for judicial review with respect to the Party concerned in ACCC/C/2008/33, and has found the Party concerned not to comply with article 9, paragraph 4, of the Convention. Thus, the Committee maintains its findings on that communication regarding costs (ECE/MP.PP/C.1/2010/6/Add.3, para. 136). As to the possibility to obtain a review of substantive legality in a procedure for judicial review, which was also addressed in findings in ACCC/C/2008/33, no new facts have been brought before the Committee. Therefore, the Committee, while maintaining its concerns regarding substantive review expressed in paragraph 127 of communication ACCC/C/2008/33, does not conclude that the Party concerned fails to comply with article 9, paragraph 2 in this respect.

IV. Conclusion

87. Having considered the above in the context of communications ACCC/C/2010/45 and ACCC/C/2011/60, the Committee does not find the Party concerned to be in non-compliance with articles 6, 7 or 9 of the Convention and makes no recommendations.

88. In view of the finding in paragraphs 85 and 86, the Committee points the Party concerned to its findings and recommendations in communications ACCC/C/2008/27 and ACCC/C/2008/33 and decision IV/9i (United Kingdom), adopted by the Meeting of the Parties to the Convention at its fourth session.

United Nations ECE/MP.PP/C.1/2012/4

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Thirty-seventh meeting
Geneva, 26–29 June 2012
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2010/48 concerning compliance by Austria

Adopted by the Compliance Committee on 16 December 2011

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I. Introduction

1. On 13 March 2010 the Coordination Office of Austrian Environmental Organizations (Oekobuero) (hereinafter, the communicant) submitted a communication to the Committee alleging the failure of Austria to comply with its obligations under article 3, paragraph 1, article 4, paragraphs 2 and 7, and article 9, paragraphs 1, 2, 3 and 4 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). On 2 June 2010, the communicant submitted a revised version of the communication.

2. The communication alleges that the Austrian legal system lacks a clear, transparent and consistent framework implementing the access to justice provisions of the Convention; hence, according to the communication, the Party concerned fails to comply with article 3, paragraph 1, of the Convention. The communication also alleges a failure of Austrian law to comply with the time limits in article 4, paragraph 2. In conjunction with this, the communication alleges non-compliance with article 9, paragraph 1, of the Convention. The communication further alleges non-compliance with article 9, paragraph 2, of the Convention, asserting that members of the public concerned do not have access to justice through the procedures on environmental impact assessment and on integrated pollution prevention and control to challenge breaches of public participation procedures under article 6. The communication focuses on alleged non-compliance by the Party concerned with article 9, paragraph 3, of the Convention, asserting that members of the public do not have access to justice regarding acts and omissions from private persons and public authorities in environmental matters, due to the impairment of rights doctrine in Austrian administrative law. The communication also alleges non-compliance with article 9, paragraph 4, on the ground that in many cases access to justice is not adequate and effective, injunctions are not granted, procedures may be prohibitively expensive or not fair, and with regard to requests for information under article 4, access to justice is not timely.

3. At its twenty-seventh meeting (16–19 March 2010), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 8 April 2010. On the same date, the communicant was sent a letter with questions by the Committee seeking clarification on several points of the communication. The communicant submitted a revised version of the communication on 2 June 2010, which was forwarded to the Party concerned, on 23 June 2010, together with additional questions by the Committee to be addressed by the Party.

5. At its twenty-eighth meeting (15–18 June 2010), the Committee agreed to discuss the content of the communication at its twenty-ninth meeting (21–24 September 2010). Further to a request by the Party concerned for deferral of the discussion after the Committee's twenty-ninth meeting and the agreement by the communicant, the Committee, using its electronic decision-making procedure, agreed to discuss the content of the communication at its thirtieth meeting (14–17 December 2010).

6. The Party concerned responded to the allegations of the communication and the questions of the Committee on 6 October 2010. The communicant provided additional submissions on 8 October 2010. The Party concerned submitted additional arguments on 30 November 2010.

7. The Committee discussed the communication at its thirtieth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. On 15 February

2011, after the discussion of the communication and further to the Committee's request and the parties' agreement, the parties provided a common answer to the questions of the Committee. The communicant submitted additional information on 6 April 2011.

8. The Committee prepared draft findings at its thirty-third meeting (27–28 June 2011), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 19 August 2011. Both were invited to provide comments by 16 September 2011.

9. The Party concerned and the communicant provided comments on 7 September 2011 and 16 September 2011, respectively.

10. At its thirty-fourth meeting (20–23 September 2011), the Committee noted that the comments received by both parties shed light on several aspects of the facts, which had been insufficiently represented by the communicant in its communication and subsequently in its written and oral submissions, and were incorrectly reflected in the Committee's draft findings. Due to the substantive changes introduced in the text of its findings, the Committee requested the secretariat to send the new draft to the Party concerned and to the communicant for comment. The Committee would take into account any comments in finalizing the findings at its thirty-fifth meeting. In deciding to take the unprecedented step of circulating a new set of draft findings, the Committee stressed that that was an extraordinary event in light of the particular circumstances.

11. The draft findings were then forwarded to the Party concerned and the communicant on 10 November 2011. Both were invited to provide comments by 10 December 2011. The Party concerned provided comments on 7 December 2011 and the communicant provided comments on 9 December 2011.

12. At its thirty-fifth meeting (13–16 December 2011), the Committee proceeded to finalize its findings in closed session, taking account of the comments received from the parties. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document for its thirty-seventh meeting (26–29 June 2012). It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of facts, legal framework and issues[1]

A. Legal framework

Refusal of a request for information and judicial remedies

13. According to the Environmental Information Act (*Umweltinformationsgesetz* (UIG), art. 8, para. 1), if an authority does not provide the requested information or the information it provides is not satisfactory, the applicant must ask the authority to issue an official notification (an individual administrative decision) on the refusal in order to make an appeal, since a refusal letter alone that is not accompanied by this official notification is

[1] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee. Most of the documents and translations of legal acts referred to in this section are available on the Committee website from http://www.unece.org.unecedev.colo.iway.ch/env/pp/compliance/Compliancecommittee/48TableAT.html.

insufficient for an applicant to pursue an appeal.[2] The issuing of an official notification does not constitute a reconsideration of the request.

14. After receiving this "official notification", the applicant may initiate appeal proceedings. If, however, the authority does not issue the official notification within six months, the applicant seeking to initiate appeal proceedings must first proceed with a "devolution request" to the administrative tribunal of the province (which becomes the "competent higher authority"), requesting the tribunal to issue such an official notification of refusal, according to the Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz* (AVG), art. 73).

Legal interest in administrative proceedings and sectoral environmental laws

15. According to the general principle of administrative law in Austria (deriving from the so-called "impairment of rights doctrine" and "theory of standard protection" (*Schutznormtheorie*)), parties may claim the rights awarded to them by law, in other words their "legal interests". Parties can file a complaint — and thus have locus standi — when according to article 8 of the Administrative Procedure Act they are involved in an activity of an authority by way of a legal title or legal interest. In addition, some laws, such as the Acts on Environmental Impact Assessment (EIA) and on Integrated Pollution Prevention and Control (IPPC), specify the "parties" — natural and legal persons, whose legal interests are recognized by law and are considered "parties".

16. This principle is reflected in the provisions defining locus standi in different environmental, federal or provincial, laws, such as the Industrial Code (GewO) (art. 74, para. 2 and art. 359b, para. 1), the Federal Waste Management Act (AWG) (art. 42, para. 1), the Mining Act (MinRoG) (art. 116, para. 3, and art. 119, para. 6), the Forestry Act (Forstgesetz) (art. 19, para. 4), the Water Act (WRG) (art. 102, para. 1), the nature protection laws of the provinces (various provisions according to which neighbours or non-governmental organizations (NGOs) do not have standing) and references to provincial IPPC provisions (for example, art. 5, para. 1 of the IPPC Procedure in the Province of Salzburg provides for standing of neighbours in case of nuisance from smell, noise, smoke, dust, vibrations, etc., and to NGOs with regard to environmental protection). Many of these laws grant locus standi to "neighbours", on the basis of their impaired rights, but it is mainly the EIA and IPPC laws that grant standing to NGOs.

Ombudsman for the Environment

17. The Ombudsman for the Environment (*Volksanwaltschaft*) is an independent institution in every province in Austria. Its mandate is to be a contact point for citizens on environmental issues, to ensure environmental protection and nature conservation interests in administrative proceedings, to provide its views on draft laws and regulations relating to the environment and to provide expert information to citizens and the administration. The Ombudsmen for the Environment can also participate in procedures relating to nature conservation as envisaged by provincial laws; in all provinces, with the exception of Tyrol, they have standing before the administrative courts. At the federal level, the Ombudsmen for the Environment can participate in EIA procedures, in IPPC procedures (with respect to waste), in environmental liability laws and in nature conservation matters. In EIA

[2] UIG, art. 8, para. 1: "If the environmental information requested (whether in full or in part) is not provided, an official notification of the refusal shall be issued if the applicant so requests. The competent body for issuing the notification shall be the information providing body, providing it performs public authority functions. Equivalent requests may be dealt with in one notification" (translation provided by the communicant).

procedures, the Ombudsmen for the Environment have access to the highest courts; in federal IPPC procedures (under the Industrial Code, the Mining Law or the Waste Act, among others) and under the Federal Environmental Liability Act, they have access to the highest courts only for procedural rights concerning their interests.[3]

The Environmental Impact Assessment Act

18. The Environmental Impact Assessment Act (EIA Act, art. 19) provides for individuals and/or entities that are recognized as parties to the EIA process and thus have the right to appeal. Accordingly, this right is provided to:

(a) "Neighbours", namely persons who may be threatened or disturbed through the construction, the operation or the existence of a project, or whose in rem rights, inside the country and abroad, could be put at risk, including the owners of facilities where other people temporarily reside, but not the persons that temporarily stay in the vicinity of the project and do not have any in rem rights; the law in the definition of neighbours includes foreign persons;

(b) Parties stipulated by the applicable administrative provisions unless they already have locus standi according to subparagraph (a) above;

(c) The Ombudsman for the Environment;

(d) The water management planning body;

(e) The host municipality and the directly adjoining Austrian municipalities;

(f) Local citizens' groups;

(g) Environmental organizations.

19. If a comment submitted during the submission period "is supported by 200 persons or more who have the right to vote in municipal elections in the host municipality or in a directly adjoining municipality at the time of expressing their support, this group of persons (citizens' group) shall have locus standi in the development consent procedure for the project and in the procedure according to article 20 or shall be considered to be a party involved" (EIA Act, art. 9, para. 5).

20. The criteria for and rights of environmental organizations are described in article 19 of the EIA Act, inter alia, in paragraphs 6, 7, 8 and 10. Accordingly,

(6) An environmental organization is an association or a foundation:

1. Whose primary objective is the protection of the environment according to the association's statutes or the foundation's charter,

2. That is non-profit oriented under the terms of articles 35 and 36 of the *Bundesabgabenordnung* (BAO) (Federal Fiscal Code), BGBl. No. 194/1961, and

3. That has been in existence and has pursued the objective identified in number 1 for at least three years before submitting the application pursuant to paragraph 7.

(7) (Constitutional provision) In agreement with the Federal Minister for Economic Affairs and Labour, the Federal Minister of Agriculture and Forestry,

[3] http://www.umweltanwaltschaft.gv.at/. See also table submitted by the communicant on 15 February 2011 and agreed by the Party concerned (additional information on standing for the public in Austrian legislation, annex)

Environment and Water Management shall decide upon request by administrative order whether an environmental organization meets the criteria of paragraph 6 and in which Laender the environmental organization is entitled to exercise the rights related to locus standi. Complaints against the decision may also be filed with the Constitutional Court.

(8) The request pursuant to paragraph 7 shall be supported by suitable documents that prove that the criteria of paragraph 6 are met and that indicate the Land/Laender covered by the activities of the environmental organization. The rights related to locus standi can be exercised in procedures on projects to be implemented in this Land/in these Laender or in directly neighbouring Laender. The Federal Minister of Agriculture and Forestry, Environment and Water Management shall make public a list of the environmental organizations recognized by administrative order pursuant to paragraph 7 on the Internet site of Federal Minister of Agriculture and Forestry, Environment and Water Management. This list shall specify the Laender in which the environmental organizations are entitled to exercise rights related to locus standi.

(10) An environmental organization recognized pursuant to paragraph 7 shall have locus standi and be entitled to claim the observance of environmental provisions in the procedure insofar as it has filed written complaints during the period for public inspection according to article 9 (1). It shall also be entitled to complain to the Administrative Court.[4]

21. All parties to a regular EIA procedure have the right to appeal to the Environmental Senate. In addition, there is the possibility to appeal to the Administrative Court, while neighbours, the water management planning body and citizens' groups have the right to appeal to the Constitutional Court as well.

22. Apart from the regular EIA procedure, a simplified EIA procedure was introduced in 2000 and applies to projects with potentially less significant environmental impact. It mainly applies to industrial installations for which the IPPC law already applies. The rights of the parties in the simplified EIA procedure are the same as for the regular EIA procedure (EIA Act, art. 19), with the exception of citizens' groups who may participate in the simplified procedure as parties involved with the right to inspect the files, but have no right of appeal.[5]

23. Section 3 of the EIA Act provides for the carrying out of EIA for federal roads and high-speed railroads, while article 24f, paragraph 8, provides for the rights of the parties identified under article 19 of the Act. These rights are similar but not identical. While according to the Act (art. 24, para. 1), the competent authority in the first and last instance is the Federal Ministry of Transport, Innovation and Technology, all parties are entitled to complain directly to the Administrative Court and citizens' groups and neighbours can also address their concerns to the Constitutional Court. It should be noted that in simplified EIA procedures for transport infrastructure the rights of the citizens are limited to inspecting the files, but do not extend to the right of appeal.

The rule of concentration/consolidation

24. The rule of concentration under Austrian law allows for the integration of multiple sectoral laws' procedures into a single procedure, such as the IPPC and the EIA procedures. As a result, persons who under sectoral laws might not have been considered "parties" to

[4] English translation provided by the Party concerned.

[5] Schedule B of the additional information submitted by the Party on 15 February 2011 and agreed by the communicant.

the procedure and might have been denied standing, may be automatically granted standing for all sectoral laws' issues on the basis of the rule of concentration/consolidation in the context of the EIA, the IPPC, the Industrial or the Federal Waste Management procedures.

B. Substantive issues and arguments of the parties

25. The communication raises a number of issues with regard to access to justice in Austrian legislation. Some allegations are very broad and general and, with respect to a number of issues, the Committee was invited to consult academic writings. As stated in paragraph 52 below, the Committee decided to focus its considerations on selected issues, such as standing and the availability of administrative and/or judicial remedies against acts or omissions of public authorities and private persons. The paragraphs below summarize the main allegations and arguments of the Parties on these selected issues.

Time limits for public authorities to respond to requests for information (art. 4, para. 2)

26. The communicant alleges that the law of the Party concerned according to which the authorities are not obliged to provide an "official notification" when a request for information is refused and, as a consequence, the applicant has to specifically request the authority to issue such official notification on the refusal, is not in compliance with article 4, paragraph 2, of the Convention. It is only with an "official notification" that the applicant can seek remedies (see also para. 13 above).

27. The communicant also points out that, according to the law of the Party concerned, if the authority does not issue the official notification within 6 months, then the applicant can obtain one only if it proceeds with a "devolution request" (see para. 13 above); this implies that it may actually take up to one year until the applicant, whose request for information has been refused, receives an official notification of the refusal, and this is not in compliance with article 4, paragraph 2, in connection with article 9, paragraphs 1 and 4. The communication referred to some examples to illustrate its allegations with regard to access to information.

28. The Party concerned stresses that Austrian legislation (Environmental Information Act, art. 5, para. 7) requires authorities that do not provide the information requested to provide a written reasoned response to the applicant and to inform him/her about the possibility of remedies, although such a written response is not, in itself, sufficient for the applicant to seek remedies. The Party concerned also contends, however, that information requesters can avoid unnecessary lengthy procedures by making separate requests for "official notification" of refusal at the same time that they submit their requests for information. In support of this suggestion, the Party concerned states that the Environmental Information Act would not stand in the way of such an ad hoc procedure.

29. The Party concerned also argues that a competent authority could provide its refusal in less than six months, that there is no rule requiring the authority to take the full six months, and that this provision of the Administrative Procedure Act (AVG) can be interpreted and applied "in the light of the Convention's objectives" to require its refusal in less than six months. Therefore, in the view of the Party concerned, the six-month period "is assumed" to be in compliance with the provisions of the Aarhus Convention. In addition, in its oral submissions during the discussion of the case, the Party concerned stated that some cases, such as those described by the communicant, may have been due to confusion within the authorities on how to address requests for environmental information. The Party concerned also submits that the difficulty of balancing the right of the public to request information against the obligation of the competent authority to maintain

confidentiality in given cases may have led to delays in some cases, such as those described by the communicant.

Timeliness of review procedures relating to requests for information (art. 9, paras. 1 and 4)

30. The communicant alleges that it may take over one year (13 or 14 months) until the applicant, whose request for information has been refused, has a formal decision on the refusal and can then submit an appeal against the refusal at the court (one or two months after the request for information; six months after the separate request for refusal; and another six months after the "devolution request" at the administrative tribunal of the province) (see also para. 13 above). According to the communicant, this is not in compliance with the timely procedures as required by article 9, paragraphs 1 and 4, of the Convention.

31. While the Party concerned does not contest the communicant's presentation of the law and practice in this respect in some cases, the Party concerned asserts that article 73 of the AVG is open to interpretation in the light of the Convention (see also para. 29 above).

Locus standi for individuals to challenge decisions subject to article 6 and scope of reviewable claims (art. 9, para. 2)

32. The communicant alleges that the scope of standing for individuals to challenge a permit (in the context of the EIA and IPPC procedures) under article 6 is limited to grounds related to "legal interest" and that "neighbours" may challenge the permitting procedure only to the extent that the activities affect their "private well-being" or their property, but "not the environment as such" and not the "correct application of environmental law". According to the communicant, such a limitation to claims involving their private well-being exceeds the discretion of the Party concerned under article 9 because it conflicts with the "objective of giving the public concerned wide access to justice".

33. The communicant alleges, for instance, that the refusal of the Party concerned to consider claims relating to the environment in general, such as considerations relating to air quality, nature protection or climate change in EIA procedures, denies members of the public the opportunity to "challenge the substantive and procedural legality" of such a decision. In support of its allegation, the communicant refers to a recent decision by the Administrative Court (Case 2010/06/0262–10, Automobile Testing Centre Voitsberg).[6] According to the communicant, these features of Austrian law are not in compliance with the requirements of article 9, paragraph 2, of the Convention.

34. With respect to climate change considerations, the Party concerned states that:

> [Q]uestions relating to 'natural persons' who own property nearby or whose health is affected" do not straightforwardly apply to the issue of climate change. Greenhouse gases are not local pollutants, but global ones. No single source of greenhouse gas emissions is directly responsible for specific local effects of climate change. Also, greenhouse gases as such do not pose any direct health hazards.

35. The Party concerned argues that, despite the lack of standing exclusively on the basis of climate change arguments, if a natural person has standing as a "neighbour" under the EIA Act, because, for instance, his property, health or private well-being may be affected, the person would be able to raise issues concerning climate change during the judicial process under the "rule of concentration".

[6] Communicant's submission of 6 April 2011, annex.

36. The Party concerned argues that the EIA Act is in accordance with the general rule in administrative proceedings (and therefore in any subsequent court proceedings), that natural persons need to claim a "legal title or interest" to be able to become parties. However, a person may alternatively become a "party" through a representative, such as by addressing its concerns to the Ombudsman, asking an NGO to file a lawsuit, or joining a "citizens' group" when the EIA procedure is carried out (a minimum of 200 signatures is necessary) (see also para. 19 above). The communicant replies that the latter is not possible in the case of a simplified EIA procedure or an IPPC procedure.

Locus standi for individuals to challenge acts and omissions by public authorities (art. 9, para. 3)

37. The communicant alleges that Austrian law provides standing for challenging acts and omissions of public authorities in environmental matters only for those natural persons who have a "legal title or interest" according to the "impairment of rights doctrine" (see para. 15 above). The communication alleges that the requirement for "legal title or interest" prevents standing from being granted to persons to advocate a general public interest. According to the communicant, the limitations on standing provided by Austrian legislation exceeds Austria's discretion under article 9, paragraph 3, of the Convention, because it conflicts with the "objective of giving the public concerned wide access to justice", and thus the Party concerned is not in compliance with this provision of the Convention.

38. The Party concerned agrees that standing is restricted to "legal interest". It does not disagree that the restriction to "legal title or interest" in Austria prevents a person that wants to advocate a general public interest from having standing. For instance, the Party concerned agrees with the communicant that only "neighbours" have standing under a number of procedures stipulated in sectoral environmental laws (e.g., the Industrial Code — regular procedure and update/changes of permits; the Waste Management Act; the Mining Act; the Forestry Act; and the Water Act, etc.).[7] However, the Party concerned points out that certain legislation "effectively entitles the party to claim a certain level of environmental quality pertaining to the area of living, of the work place or the business place".

39. The Party concerned argues that the limitations on standing under Austrian legislation are not in non-compliance with article 9, paragraph 3, of the Convention, because the Convention does not pre-define certain criteria, and argues that the paragraph permits a Party to limit standing by any "criteria according to national legislation" that it wishes, as long as the criteria are "reasonable and comply with the principles of the Convention". According to the Party concerned, this margin of discretion has been correctly used and applied by Austria.

40. In addition, the Party concerned asserts that there are "alternative ways" for individuals to "gain legal standing". For instance, persons living nearby can form "an ad hoc citizen group" of 200 persons under the EIA legislation or can ask the Ombudsman (who has standing under some laws) or an NGO to represent their interests.

[7] See table submitted by the communicant on 15 February 2011 and agreed by the Party concerned (additional information on standing for the public in Austrian legislation, annex)

Locus standi for non-governmental organizations to challenge acts and omissions by public authorities (art. 9, para. 3)

41. The communicant alleges that Austrian law does not in general grant standing to NGOs to challenge acts or omissions in environmental matters. The Party concerned agrees that NGOs are not in general granted standing under the Administrative Procedure Act.

42. The communicant concedes that standing is granted to NGOs to some extent under some procedures, such as the EIA and the IPPC procedures or the Federal Environmental Liability Act following European Union (EU) Directive 2004/35/EC. However, most of the sectoral laws — such as the Industrial Code, regular and simplified procedure; the Waste Management Act; the Mining Act; the Forestry Act; the Water Act; the Prevention Procedure; and nature protection laws of the provinces — do not provide for NGO standing. This is supported by the table provided by the communicant and agreed by the Party concerned.

43. The communicant adds that a number of acts and omissions concerning permitting, planning and programming, and relating to the environment, are not subject to legal review at all. In support of its allegation, the communicant mentions, for example, that nobody, neither neighbours nor NGOs, may challenge permitting procedures concerning railways, roads, shipping, nature conservation, most aspects of water permitting and building permits; local and spatial planning procedures, waste management plans, air quality plans, strategic noise maps or actions plans; strategic environmental assessment procedures on federal transport plans; environmental quality standards infringements; or EIA screening decisions. In this connection, the communicant also stresses that civil law remedies are not suitable for NGO or public interest litigation, referring in this regard to the PM_{10} air quality case of Graz. In that case, a citizen of Graz lodged a civil lawsuit against the authorities for allowing levels of fine particles in the atmosphere that exceeded the values set by European and national law, but the case was dismissed, because the applicant was not able to prove that the omission of the authorities to comply with the standards had caused personal damage.

44. For all these reasons the communicant alleges that the Party concerned is not in compliance with article 9, paragraph 3, of the Convention.

45. The Party concerned does not deny that NGOs lack standing in the various sectoral laws, but it asserts that the “rule of concentration” enabling NGOs who have standing in EIA or IPPC procedures — which cover a very broad spectrum of projects — to raise issues also under other laws, ensures compliance with the Convention. In addition, the Party concerned argues that NGOs have full legal standing in environmental complaints under the laws transposing the EU Environmental Liability Directive and draws the attention of the Committee to the fact that in the absence of locus standi, NGOs may request legal representation through the Ombudsman for the Environment.

46. According to the Party concerned there is the possibility for members of the public in general, such as neighbours and anybody covered by the impaired rights doctrine, to challenge any permitting procedure and seek injunctive relief. There is also the possibility for NGOs, the Ombudsman for the Environment and ad hoc citizen groups, which are all vested with special participatory rights under the EIA or the IPPC procedure, to do so. The Party concerned also contends that where administrative law does not provide sufficient protection, persons affected by a project have rights to preventive action under civil law. The Party concerned also refers to the institution of the Ombudsman for the Environment, which deals with citizens’ complaints in the case of misconduct by an authority according to the Federal Constitutional Law (Art 148a B-VG). For all these reasons, the Party concerned argues that the remedies provided under the Austrian system are in compliance with article 9, paragraph 3, of the Convention and are effective.

Right to have acts and omissions of private persons reviewed (art. 9, para. 3)

47. In its communication, the communicant alleges that "it is also not possible to initiate permitting procedures against third parties, e.g., against an operator of an industrial facility without permit. To be more specific, there is no right to initiate administrative or judicial review procedures on acts and omissions of private persons." In addition, the communicant alleges that persons, including neighbours, have no right "to protect themselves" in the event that an operator produces "emissions [that] are higher than permitted".

48. The Party concerned claims that Austrian law entitles natural and legal persons to several remedies against private persons: there are administrative remedies (such as the possibility to have special orders issued against the operator of a plant under the Industrial Code, the Environmental Liability Act or the Water Rights Act) and also civil law remedies, such as preventive action and injunctive relief. Also, the Party concerned contends that "anybody who is or fears to be endangered by pollution is entitled to file a civil lawsuit against the polluter and to seek an injunction" if the pollution is 'detrimental to health', based on article 16 of the Civil Code" and cites relevant jurisprudence.

Lack of a clear, transparent and consistent framework (art. 3, para. 1)

49. The communicant alleges that the Party concerned has not taken the necessary legislative, regulatory and other measures to implement the provisions of article 9 of the Convention, and that it lacks a clear, transparent and consistent framework required by article 3, paragraph 1. As a result, Austria is not in compliance with this provision of the Convention.

50. The Party Concerned has not responded to this allegation.

III. Consideration and evaluation by the Committee

51. Austria ratified the Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.

52. The communication contains a number of allegations of non-compliance by the Party concerned with several aspects of the access to justice provisions of the Convention. In the view of the Committee, some allegations are very broad and general (see also para. 25 above). Therefore, the Committee has decided to focus on selected issues, such as standing and the availability of administrative and/or judicial remedies against acts or omissions of public authorities and private persons. In addition, the Committee will not deal with the allegations of non-compliance with article 3, paragraph 1, as these were not adequately substantiated.

53. In view of the fact that many Parties, including the Party concerned in this case, and the communicants, in their submissions refer to the 2000 Aarhus Convention Implementation Guide,[8] the Committee stresses that the text of the Implementation Guide, while a tool to assist Parties in their implementation of the Convention, does not constitute an authoritative text for the Committee to follow in its deliberations.

[8] *The Aarhus Convention: An Implementation Guide*, United Nations publication, Sales No. E.00.II.E.3.

Time limits for public authorities to respond to requests for information and procedures for refusal (art. 4, paras. 2 and 7)

54. As noted above (see para. 26), the communicant alleges that Austrian legislation is not in compliance with article 4, paragraph 2, because when the authorities refuse to provide the requested information, they do so by way of simple letter that does not qualify as an "official notification" needed to seek remedies thereafter, and a separate written request for such official notification is therefore necessary. The communicant does not challenge that the simple letter of refusal is generally provided within the time limits prescribed by the Convention and in writing. Rather, it challenges the legal status of this written refusal.

55. Although the communicant asserts that this requirement for a separate request for refusal should be analysed under article 4, paragraph 2, in the view of the Committee this requirement of the Austrian legislation should be considered in the light of article 4, paragraph 7. If the original request for information is "in writing," or the applicant so requests, paragraph 7 requires that a refusal "shall be in writing". And this response in writing should be provided by the authorities "within one month after the request has been submitted", a period that given certain circumstances may be extended "up to two months after the request".

56. According to article 4, paragraph 7, of the Convention, a refusal in writing shall be made as soon as possible and at the latest within one month. It should also state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. It follows that one of the purposes of the refusal in writing is to provide the basis for a member of the public to have access to justice under article 9, paragraph 1, and to ensure that the applicants can do so on an "effective" and "timely" basis, as required by article 9, paragraph 4. The possibilities for a review procedure seem to be significantly delayed by the system envisaged under Austrian law, i.e., that a separate request is necessary to obtain an "official notification" that would enable the applicant to seek the remedies under article 9. Moreover, if this request is not satisfied due to failure of authorities to provide an official notification, a further request (devolution request) has to be submitted. The Committee finds that the Party concerned, by maintaining this system, where a specific form ("official notification") must be requested in order to be used before the courts, and where authorities may fail to comply with such a request, is not in compliance with article 4, paragraph 7, of the Convention.

Timeliness of review procedures relating to information requests (art. 9, para. 4)

57. The communicant alleges that the requirement for a second request for refusal, which can be made only after six months (devolution request) is not in compliance with article 9, paragraphs 1 and 4, while the Party concerned states that such a requirement for a second request "is assumed" to be "in compliance with the provisions the Convention" (see para. 29 above).

58. According to the Convention, Parties are required to ensure that any person has access to a review procedure when it believes that its request for information has not been properly dealt with in accordance with article 4. This is to be done "within the framework of national legislation". However, national legislation has to fulfil some minimum requirements set by the Convention, such as to ensure that a person has access to a "timely" procedure and an "effective remedy" (art. 9, para. 4).

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.

Locus standi for individuals to challenge decisions, acts and omissions (art. 9, paras. 2 and 3)

60. The communicant alleges that Austrian law provides for limited locus standi for individuals to challenge decisions subject to article 6 of the Convention, whereas the Party concerned disagrees with the communicant's position (see paras. 32–36).

61. In defining standing under article 9, paragraph 2, the Convention allows a Party to determine within the framework of its national legislation, whether members of the public have "sufficient interest" or whether they can maintain an "impairment of a right", where the administrative procedural law requires this as a precondition. While for NGOs the Convention provides some further guidance on how the "sufficient interest" should be interpreted, for persons, such as "individuals", the Convention requires that "sufficient interest" and "impairment of a right" be determined "in accordance with the requirements of national law". Parties, thus, retain some discretion in defining the scope of the public entitled to standing in these cases; but the Convention further sets the limitation that this determination must be consistent "with the objective of giving the public concerned wide access to justice within the scope of the Convention" (see ECE/MP.PP/C.1/2006/4/Add.2, para. 33). This means that the Parties in exercising their discretion may not interpret these criteria in a way that significantly narrows down standing and runs counter to its general obligations under articles 1, 3 and 9 of the Convention.

62. The Austrian legal system follows the impairment of a right criterion to determine standing rights for individuals. The question thus arises whether the impairment of rights under Austrian legislation meets the standards of the Convention. In other words, whether the definition of "neighbours" under article 19, paragraph 1, of the EIA Act (see para. 18 above) is consistent with the objective of giving wide access to justice.

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.

Scope of reviewable claims sought by the individuals (art. 9, para. 2)

64. The communicant alleges that the Party concerned refuses to consider claims relating to the environment in general, such as claims related to climate change, and that the EIA procedures deny members of the public the opportunity to "challenge the substantive and procedural legality" of a decision. The Party concerned contends that once an

individual is granted locus standi, it has the possibility to raise issues of general interest under the "rule of concentration".

65. As noted previously by the Committee in its findings on communication ACCC/C/2008/33 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.3, para. 123):

> Article 9, paragraph 2, of the Convention addresses both substantive and procedural legality. Hence, the Party concerned has to ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases.

66. The Committee understands that the Party concerned allows individuals to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraph 2, of the Convention, when their rights relating to property or well-being have been violated, and that in such situations, individuals may also raise issues of general environmental concern. However, the Committee understands that it is up to the courts to consider whether they will in fact take up such more general environmental issues. As an example, the communicant refers to the decision of the Administrative Court (Case 2010/06/0262–10, Automobile Testing Centre Voitsberg), which ruled that neighbours are not entitled to invoke environmental provisions that go beyond the impairment of rights doctrine.[9] However, the information provided does not sufficiently substantiate, e.g., by reference to recent case-law, that this indeed reflects the general court practice. Therefore, the Committee does not conclude whether the Party concerned is in a state of non-compliance with article 9, paragraph 2, of the Convention. The Committee nevertheless raises a concern with respect to the line of reasoning by the Administrative Court, and notes that if this was the line generally adopted by Austrian courts, this would amount to non-compliance with article 9, paragraph 2.

Locus standi for non-governmental organizations to challenge acts and omissions by public authorities (art. 9 para. 3)

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:

[9] English translation taken from the communicant's comments of 16 November 2011, para. 11.

> [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[10] 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

[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).

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 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.

Right to have acts and omissions of private persons reviewed (art. 9, para. 3)

76. As was stated in the table prepared by the communicant and agreed by the Party concerned,[11] in principle members of the public can only bring claims against private persons under Austrian legislation with respect to "nuisance from smell, noise, smoke, dust, vibrations or in other ways". As regards the scope of reviewable claims under article 9, paragraph 2, the Party concerned asserted that once locus standi has been established, members of the public may not only bring forward allegations relating to their property or well-being, but also raise issues of general environmental interest. From the information provided by the parties, it is not clear to the Committee, whether this would also be the case for claims under article 9, paragraph 3; namely, whether a member of the public that has obtained standing in a civil law/nuisance case for damages, may be in a position to argue in its submissions that the act or omission at issue also violates standards set by Austrian environmental law. The Committee is, therefore, not able to evaluate whether or not the Party concerned fails to comply with article 9, paragraph 3, of the Convention on this ground.

IV. Conclusions and recommendations

77. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

[11] Ibid.

A. Main findings with regard to non-compliance

78. The Committee finds that the requirement for a separate "official notification" as a precondition for an appeal of a denial of an information request is not in compliance with article 4, paragraph 7, of the Convention (see para. 56).

79. The Committee finds that the Party concerned, by not ensuring access to a timely review procedure for access to requests for information, is not in compliance with article 9, paragraph 4, of the Convention (see para. 59).

80. The Committee finds that the Party concerned, in not ensuring standing of environmental NGOs to challenge acts or omissions of a public authority or private person in many of its sectoral laws, is not in compliance with article 9, paragraph 3, of the Convention (see para. 75).

B. Recommendations

81. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties to the Convention, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned:

(a) Take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(i) The procedure for having a refusal of a request for information reviewed is simplified for the requester. This could preferably be done by requiring any written refusal of a request for information to have the legal status of an "official notification" and that any such refusal is to be made as soon as possible, and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request;

(ii) The available review procedures for persons who consider that their request for information under article 4 has been ignored, wrongfully refused or inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, are timely and expeditious;

(iii) Criteria for NGO standing to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention be revised and specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the EIA, IPPC, waste management or environmental liability laws.

(b) Develop a capacity-building programme and provide training on the implementation of the Aarhus Convention for federal and provincial authorities responsible for Aarhus-related issues, and for judges, prosecutors and lawyers.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Thirty-ninth meeting
Geneva, 11–14 December 2012
Item 7 (a) of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2010/50 concerning compliance by the Czech Republic

Prepared by the Compliance Committee and adopted on 29 June 2012

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I. Introduction

1. On 14 June 2009, the Czech organization Environmental Law Service (Ekologiský právní servis) (hereinafter, the communicant), submitted a communication to the Compliance Committee alleging a failure by the Czech Republic to comply with its obligations under article 3, paragraph 1, article 6, paragraphs 3 and 8, and article 9, paragraphs 2, 3 and 4, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication alleges that the law and practice of the Party concerned provides for a restrictive definition of who may be parties in environmental decision-making due to the so called "impairment of rights doctrine", thus restricting standing for individuals in a number of cases, relating, among others, to land-use and building permits. The communication further alleges that the Party concerned provides limited rights to non-governmental organizations (NGOs) to challenge the substantive and procedural legality of environmental permits falling under article 6 of the Convention; and that the Party concerned does not provide for review procedures with respect to administrative omissions regarding activities subject to article 6. For these reasons, the communication alleges that the Party concerned fails to comply with article 9, paragraph 2, of the Convention, especially with respect to the review of issues under article 6, paragraphs 3 and 8. The communicant also alleges that, in the light of the above, article 2, paragraph 5, is not properly transposed into Czech legislation.

3. The communication further alleges that because a considerable part of the members of the public, including NGOs, have no access to court procedures for the review of acts and omissions relating to the environment, including those relating to land-use plans, the Party concerned fails to comply with article 9, paragraph 3, of the Convention. It also alleges that because courts may order injunctive relief only in very few cases, remedies are ineffective in environmental matters and that the Party concerned thus fails to comply with article 9, paragraph 4, of the Convention. Finally, the communication alleges that the Party concerned in general fails to provide for a sufficiently clear, transparent and consistent framework on access to justice, as required by article 3, paragraph 1, of the Convention.

4. At its twenty-ninth meeting (21–24 September 2010), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 14 October 2011. On the same date, a number of questions were sent to the communicant soliciting clarification and additional information on a number of issues in the communication.

6. At its thirty-first meeting (22–25 February 2011), the Committee agreed to discuss the content of the communication at its thirty-second meeting (11–14 April 2011).

7. The Party concerned responded to the allegations of the communication on 14 March 2011.

8. The Committee discussed the communication at its thirty-second meeting, with the participation of representatives of the communicant and the Party concerned. At the start of the discussions, the Committee informed the parties that at the upcoming fourth session of the Meeting of the Parties the composition of the Committee would be altered. As a consequence, there was a high probability that consideration of the communication would not be concluded by the Committee in its current composition, but would continue after the fourth session with three of the Committee members replaced. At the same meeting, the Committee confirmed the admissibility of the communication.

9. The communicant provided a written version of its oral statement on 21 April 2011. Additional information was submitted to the Committee by the Party concerned on 31 May 2011 and by the communicant on 1 June 2011. By letter of 7 June 2011, the communicant reacted to the submissions of the Party concerned dated 31 May 2011.

10. The Committee prepared draft findings at its thirty-sixth meeting (27–30 March 2012), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 4 May 2012. Both were invited to provide comments by 1 June 2012.

11. The communicant and the Party concerned provided comments on 30 May and 22 June 2012, respectively.

12. At its thirty-seventh meeting (26–29 June 2012), the Committee adopted its findings and agreed that they should be published as a formal pre-session document for the Committee's thirty-ninth meeting (11–14 December 2012). It requested the secretariat to send the findings to the Party concerned and the communicant.

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

A. Legal framework

The Czech Constitution and the Convention

13. According to the Czech Constitution (art. 10), international agreements that have been approved by the Parliament and that are binding for the Czech Republic constitute a part of the legal order and in case of conflict with a national law, the international agreement will apply. However, the Czech courts have held that the provisions of the Aarhus Convention cannot be directly applicable, as they are not "sufficiently specific" or "self-executing", that the citizens cannot derive their rights directly from the Convention and that therefore there is a need for national implementing legislation.[2]

General rules on standing in administrative law

14. Under Czech law, standing criteria in civil and administrative procedural law are based on the so-called "infringement of rights doctrine". According to this doctrine, parties to a procedure should be able to prove that they have experienced a violation of their rights due to a situation subject to that procedure.

15. Under the Administrative Justice Code, Law No. 150/2002, section 65, the following persons have standing to initiate a review procedure of acts of administrative authorities: (a) persons whose rights or obligations were "created, changed, nullified or bindingly determined" by the act; and (b) other parties to administrative proceedings who assert that their rights have been infringed in these proceedings, which could lead to illegality of the final act.[3]

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

[2] See, for example, Constitutional Court decision No. I ÚS 2660/08 of 2 September 2010; and Supreme Administrative Court decisions No. 2 As 12/2006–111 of 27 March 2010 and No. 3 Ao 2/2007–42 of 24 January 2007.

[3] Translation by the communicant.

16. Such a right exists when a person has already participated in an administrative procedure (other than an environmental impact assessment (EIA) procedure, as to which see para. 26 below). Specifically, the Administrative Procedure Code, Law No. 500/2004, section 27, states that standing is granted to: (a) the person(s) who submitted the request/application for a permit (applicant/developer); (b) in procedures initiated ex officio, persons for whom a decision has established, changed or cancelled their rights or obligations; (c) other persons concerned "as far as their rights or obligations can be directly affected by the administrative decision"; and (d) persons who are determined as parties to a procedure, according to special laws.

17. In addition, Administrative Justice Code section 101a–101d provides the possibility to judicially review measures of a general nature, such as land-use plans.

Review of administrative omissions

18. Administrative Justice Code section 79 provides that "a person who has used to no effect all the remedies that the procedural regulation applicable to the proceedings before an administrative authority stipulates for his protection against inactivity of an administrative authority, may claim through an action that a court impose on the administrative authority the duty to render a decision in rem or issue a certificate".[4]

19. Administrative Procedure Code section 80, paragraph 2, stipulates that "measures aimed against inactivity shall be taken by the superior administrative authority also in the event that the competent administrative authority fails to commence proceedings within the deadline of 30 days of the date when it learned of facts substantiating the commencement of proceedings ex officio".[5]

Injunctive relief criteria

20. The Administrative Justice Code provides for two types of injunctive relief: suspensory effect (sect. 73) and preliminary injunction (sect. 38).

21. Suspensory effect means that the legal force and enforceability of the contested decision is suspended. An action against a contested act does not have suspensory effect unless otherwise provided by law, but the Court may suspend the act, at the request of the claimant, provided certain conditions are met.

22. A preliminary injunction is an order granted in response to a request by the applicant, lodged together with the action, for the court to impose on the parties the duty to perform something, to refrain from something or to tolerate something.

23. Suspensory effect means that the contested action is suspended entirely, while, in the case of a preliminary injunction, the court has greater flexibility. Namely, the contested action may be partially or entirely suspended and the court may also adopt a range of other measures to ensure that the requirements of the subsequent judgment can actually be implemented.

24. The relationship between suspensory effect and preliminary injunction is mutually exclusive: where suspensory effect can be granted to an action or where an action has suspensory effect on the basis of law, a preliminary injunction cannot apply.

[4] Translation by the Party concerned.

[5] Idem.

EIA procedure and standing

25. The EIA procedure is regulated by the EIA Act. The procedure is a self-contained process that is completed with the "EIA findings", which are not binding, but constitute an opinion on the basis of which the next step in the decision-making for a development consent takes place. For projects subject to annex II of the EIA procedure under the law of the European Union (EU),[6] the authorities examine whether it is necessary to carry out an EIA procedure ("screening") and issue a screening conclusion with the outcome of the examination.[7]

26. The EIA procedure is open to participation by the public. However, as it is considered to be a self-contained procedure, public participation opportunities may be limited to the EIA procedure only, with no possibility for the public to participate in the other parts of the decision-making process.

27. An amendment to the EIA Act was passed in December 2009. The new section 23, paragraph 10, states that environmental NGOs that submit comments during the EIA procedure have the right to initiate a review procedure before the court against the development consent decision issued after the EIA procedure. A lawsuit based on this provision does not have suspensory effect, but a preliminary injunction may be sought under administrative procedural law (Administrative Justice Code, sect. 38).

Other environmental decision-making processes and standing

28. Depending on the project, a number of permits may be required for its approval. Apart from carrying out the EIA procedure which will serve as a basis for the issuing of the permit for the activity itself (a building permit in most cases), the developer may need to acquire separate permits according to the laws regulating building, nature protection, water protection, air quality, integrated pollution prevention and control, mining, public health protection and nuclear activities. Those laws may also regulate standing.

29. For example, the Health Protection Act (sect. 31, para. 1) provides for the issuance of a permit from the authorities for an operator, under certain conditions. With respect to standing, according to the Act (sect. 94, para. 2), "the only party to the administrative procedure according to section 31, paragraph 1, of the act shall be the applicant".

30. Similarly, the Act on Peaceful Exploitation of Nuclear Energy (Nuclear Act) provides for the issuance of a number of decisions and on the subject of standing states that "the operator shall be the only party to the procedures according to this act" (sect. 14, para. 1).[8]

B. Substantive issues

31. The substantive issues raised by the communicant relate to provisions of Czech legislation in general and their interpretation by the courts.

[6] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

[7] The parties in their submissions refer to the "EIA findings" as EIA statements or final opinions and to the "screening conclusions" as EIA screening decisions.

[8] Translation provided by the communicant.

Article 3, paragraph 1

32. The communicant alleges that the Party concerned in general fails to comply with article 3, paragraph 1, of the Convention, because neither the law implementing article 9, paragraphs 3 and 4, nor court practice, demonstrate a clear, transparent and consistent framework to implement the latter provisions.

Article 6, paragraphs 3 and 8

33. Projects within the scope of article 6 of the Convention often require a multilayer permitting process, including an EIA procedure, a land-use permit and a building permit. According to the communicant, the public has a wide opportunity to participate in the EIA procedure, but not in the later stages of the permitting process. The Building Act provides for a limited scope of public participation to "persons, whose property rights or some other rights in rem to neighbouring land or structures thereon are likely to be directly affected" only.[9] The communicant alleges that this means that some categories of the public concerned, such as tenants, are excluded from public participation in land-use and building permitting processes. In support of its claim, the communicant submits that the Supreme Administrative Court has ruled that the Building Code defines the parties to the building procedure and it explicitly excludes tenants of flats and non-residential premises.[10] In addition, the EIA procedure is seen as a self-contained procedure and not as part of the decision-making procedure leading to a land-use or building permit. This means that members of the public who participate in the EIA procedure may not be able to participate in subsequent phases of the permitting process. Furthermore, the comments of the public during the EIA procedure are not necessarily taken into account in the subsequent phases of the process.

34. For these reasons, the communicant alleges that Czech legislation does not allow for effective public participation and that the comments of the public are not duly taken into account in the decision-making process, as required under article 6, paragraphs 3 and 8, of the Convention.

35. The Party concerned disagrees with the communicant's allegations. It submits that public participation opportunities are widely provided to members of the public at all stages of the EIA procedure. In addition, public participation opportunities are widely provided to individuals and environmental NGOs on the basis of the Administrative Procedure Code, section 27, and the special laws that grant NGOs the right to be a party to various decision-making procedures. The Building Act is one such special law. The Party concerned concedes that that Act defines as parties mainly persons whose property or in rem rights are likely to be directly affected, but submits that this law is currently being amended to include the possibility for members of the public in general to submit comments during the procedure. The Party concerned also clarifies that, according to the jurisprudence of the Constitutional Court, the "directly affected property/in rem rights" criterion is assessed by administrative authorities on the basis of the nature of the building structure, its impact on the environment and the given circumstances.[11] It submits that anyone may therefore have the status of a neighbour in proceedings — even the most distant neighbour, such as the owner of a very distant plot of land or structure.

[9] Translation provided by the parties.

[10] Supreme Administrative Court decision No. 2 As 1/2005–62 of 2 March 2005 (translation of relevant excerpts provided by the communicant).

[11] Constitutional Court File No. Pl. ÚS 19/99 of 22 March 2000.

Article 9, paragraph 2

36. The communicant alleges that the Party concerned fails to comply with article 9, paragraph 2, of the Convention, for the following reasons:

(a) Since the criteria in Czech law determining the parties to environmental decision-making procedures subject to article 6 of the Convention are restrictive, members of the public cannot access review procedures;

(b) NGOs have limited rights to seek review of the substantive legality of environmental permits;

(c) There is no possibility to seek judicial review of administrative omissions related to activities covered by annex I to the Convention.

Criteria for locus standi

37. The communicant alleges that since some members of the public concerned (i.e., individuals who are affected or likely to be affected by, or have an interest in, the environmental decision-making, but do not have "a real right to this land or the structure"), do not have a right to participate in the decision-making process beyond the EIA procedure, they accordingly have no standing under Czech law to seek a review of the decision, and the Party concerned thus fails to comply with article 9, paragraph 2, of the Convention.

38. In support of its allegation, the communicant submits that the Supreme Administrative Court has ruled that "the tenant of real property on the area regulated by the land-use plan does not have standing to sue for abolishing of the respective land-use plan or its part", because the rights of the tenants "are not related directly to the area (land) in question, but to the person (owner) who enabled them to use it on the base of contract".[12]

39. The Party concerned disagrees and maintains that Czech law is in compliance with the Convention. The Party concerned adds that, according to the explanatory memorandum of the Administrative Justice Code and related case law,[13] section 65 of the Administrative Justice Code (see para. 15 above) is to be applied in such a way that the rights of individuals to contest an administrative procedure are not conditional on previous participation and that an application for review of a decision may be brought by anyone who claims that his/her rights have been impaired by a decision of an administrative authority. The Party concerned cites jurisprudence that it alleges speaks for the ad hoc interpretation of the "directly affected rights" by the authorities and the rights of distant neighbours. In the case of NGOs, standing is granted to an organization that has submitted written comments on the EIA documentation or expert report within the deadlines prescribed by law (EIA Act, sect. 23 (10)), or if it was a party to a previous authorization procedure.

NGOs and the right to review substantive legality

40. According to the communicant, the impairment of rights doctrine substantially limits the position of NGOs before the courts. NGOs may seek court protection only with regard to their procedural rights in the decision-making procedure, because procedural rights are the only "subjective rights" that NGOs are granted. Such procedural rights arise, if for instance, NGOs participate in a hearing. However, NGOs cannot, for example, argue that a

[12] Supreme Administrative Court decision No. 1 Ao 1/2009–120 of July 2009 (translation of relevant excerpts provided by the communicant).

[13] Ibid., No. 6 A 25/2002–42 of 23 March 2005.

project not subject to an EIA procedure should have been. The communication claims that the amendment of the EIA Act (see para. 27 above) does not greatly improve the situation.

41. The communicant provides a list of decisions of the Supreme Administrative Court to support its submission that NGOs promoting environmental protection can only seek review with respect to their procedural rights.[14] It submits that this is because NGOs are not holders of substantive rights which could be affected by the authority's decision-making, and moreover cannot claim that their right to a favourable environment (either their own or that of their members) has been infringed. No jurisprudence issued after 2009 has been provided.

42. The Party concerned contends that, under Czech law, when locus standi is established, the review of the contested administrative decision concerns both the procedural and substantive legality of the act. However, while noting that the law does not make an explicit distinction in this regard, the Party concerned concedes that in practice jurisprudence may limit the scope of review of NGO claims to those claims relating to their procedural rights, and also the scope of review of the individuals' claims to those claims relating to their affected rights.

Judicial review of administrative omissions

43. The communicant alleges that the courts interpret Administrative Justice Code section 79 in such a way that in effect no person can initiate a review procedure in situations where an administrative authority fails to start a procedure ex officio where the law requires it to do so. This situation, according to the communicant, is not in compliance with article 9, paragraph 2.

44. In support of its allegation, the communicant cites two decisions of the Supreme Administrative Court[15] in which the Court ruled that the Court cannot order an administrative authority to start administrative proceedings when there is a suggestion that such proceedings should start; but can only order the authority to issue a decision in the context of administrative proceedings that have already started.

45. The Party concerned disagrees with the communicant's allegations and refers to Administrative Procedure Code section 80 (2) and Administrative Justice Code section 79 (see paras. 18 and 19 above).

Article 9, paragraph 3

46. The communicant alleges that since there has been no direct transposition of article 9, paragraph 3, into Czech law, the situations of non-compliance with article 9, paragraph 2, may also be considered under article 9, paragraph 3. The communicant brings the following issues in particular to the attention of the Committee:

(a) Czech legislation does not allow members of the public to participate in certain permitting procedures and excludes them from review procedures;

(b) Affected persons have limited rights to ask for review of land-use plans (including no access to the courts).

[14] Ibid.No. 7 A 139/2001–67 of 29 July 2004; No. 8 As 31/2006–78 of 30 January 2008; No. 8 As 35/2007–92 of 16 July 2008; No. 8 As 31/2008–72 of 11 December 2008; No. 6 As 18/2008–107 of 11 December 2008; No. 8 As 10/2009–58 of 31 March 2009; and No. 5 As 5As 53/2008–243 of 22 July 2009 (translation of relevant excerpts provided by the communicant).

[15] Ibid. No. 4 Ans 10/2006–59 of 26 June 2007; and No. 2 Ans 2/2008–57 of 29 May 2008 (translation of relevant excerpts provided by the communicant).

Exclusion of any possibility for court review in permitting procedures

47. The communicant alleges that members of the public, including individuals and NGOs, have no right to seek the review of permitting procedures under certain laws, such as the Public Health Protection Act (with respect to noise exceptions), the Nuclear Act and the Mining Act. Under these laws only the applicants for a permit may be parties to administrative procedures and have the right to seek review. The communicant submits this is not in compliance with article 9, paragraph 3, of the Convention.

48. With respect to noise and the Public Health Protection Act, the communicant cites a decision by the City Court of Prague which denied standing to a member of the public who asked the court to review a noise exception decision. The Court refused standing on the ground that she was not a party to the administrative procedure (she had asked to be, but had been refused). The Supreme Administrative Court subsequently annulled this decision, but for formal reasons and without commenting on the ruling of the City Court.[16]

49. With respect to the Nuclear Act, the communicant submits that the Supreme Administrative Court has ruled that "the procedures according to the Nuclear Act are concentrated to ensure safety of using the nuclear energy . . . Therefore, it is not necessary neither taking in mind the requirements of the Aarhus Convention, that the public concerned should necessarily have right to participate in all such procedures".[17] It has also ruled that: "Judicial review of the decisions issued according to section 14 of the Nuclear Act is possible, but the only possible plaintiff is the only party to the administrative procedure, i.e. the applicant. The plaintiff (an NGO) does not have standing to sue such decision."[18] The Constitutional Court has ruled that "NGOs cannot claim a right for a favourable environment, as it can self-evidently belong only to natural, not legal persons . . . In the administrative procedure concerning permission for starting the operations in the nuclear power plant, rights of an environmental NGO for protection of life, privacy or favourable environment could not be affected, because these rights cannot belong to legal persons. Therefore, they also cannot claim violation of the right for access to court (due process of law) with that respect."[19]

50. The Party concerned for the most part disagrees with the communicant. It contends that the authorization of a project under Czech law requires a series of administrative procedures and the most important of these (such as those under the Building or EIA Acts) are fully open to the public concerned, including tenants. It submits that this approach is in accordance with the Convention.

51. With respect to noise and nuclear matters, the Party concerned agrees with the communicant's account of the parties to those procedures. However, it notes that in the case of an application under the integrated pollution prevention and control procedure, "party" is defined more broadly to include, among others, the municipality in whose territory the facility is to be located, the regional authority, NGOs, public service companies, confederation employers and business chambers that aim to promote and protect professional or public interests.

[16] City Court of Prague decision No. 12 Ca 47/2006 of 26 September 2007 and Supreme Administrative Court decision No. 4 Ads 79/2008–61 of 29 April 2009.

[17] Supreme Administrative Court decision No. 2 As 13/2006–110 of 9 October 2007 (translation of relevant excerpts provided by the communicant).

[18] Ibid. No. 2 As 9/2011–154 of 19 May 2010 (translation of relevant excerpts provided by the communicant).

[19] Decision of the Constitutional Court No. I ÚS 2660/08 of 2 September 2010 (translation of relevant excerpts provided by the communicant).

Limited access of affected persons to review procedures for land-use plans

52. The communicant alleges that while Czech law provides for the possibility of judicial review of measures of a general nature (Administrative Justice Code, sects. 101a–101d), the courts have interpreted the law in a way that prevents members of the public, including NGOs, from seeking review of land-use plans. In this regard, the communicant refers to the decision by the Supreme Administrative Court that "the tenant of real property of the area regulated by the land-use plan does not have standing to sue for abolishing the respective land-use plan or its part."[20] The communicant alleges that the courts use the Building Act to interpret this provision of the Administrative Justice Code. As noted previously, the Building Act specifically limits parties to the procedure to the applicant and the "neighbours" (those who have in rem rights). According to the communicant, this constitutes non-compliance with article 9, paragraph 3, of the Convention and has particular relevance for plans and programmes under article 7 of the Convention.

53. The Party concerned refutes the communicant's allegation. It submits that a land-use plan is not a regulation or a decision, but an administrative act that is issued after a long and complicated process. In granting locus standi, the courts apply the impairment of rights doctrine, as set out in Administrative Justice Code section 101a (1), which is appropriate, as an application to cancel a land-use plan should not be made by just anyone, but rather only those who claim that their rights have been impaired by the plan. In this regard the Party concerned considers quite appropriate the obiter dictum by the Supreme Administrative Court, which can be seen as a guideline for the courts' future decision-making: "in view of the obligations following for the Czech Republic from international law and European Community law, it cannot be a priori ruled out that locus standi to lodge an application . . . could also be afforded to members of the 'public concerned' within the meaning of article 9, [paragraphs] 2 and 3, of the Aarhus Convention."[21] The Party concerned also submits that this supports its submission that the Czech courts tend to construe locus standi extensively, including potential direct application of the EU acquis. It cites a subsequent decision by the Supreme Administrative Court granting locus standi to an NGO to review the merits of a decision concerning visitor rules of the Sumava National Park in which the Court derived standing for the NGO directly from the Aarhus Convention provisions.[22] Moreover, the Party concerned states that, while that case concerned a general measure and not a land-use plan, the decision concerning the Sumava National Park can be viewed as a pioneering decision. It is not aware of any other cases that follow up or extend that decision.

54. The communicant, in response to the references made by the Party concerned to jurisprudence, contends that the Supreme Administrative Court repeatedly dismissed lawsuits lodged by environmental NGOs concerning land-use plans and mentions a 2011 decision in which the Court ruled that "it is necessary to insist on the requirement of infringement of right by the act of general measure which is subject to review . . . Only a person who has direct relation to the area, regulated by the land-use plan, can be infringement on his rights by adoption of the plan. Therefore, an environmental NGO is not entitled to file a lawsuit against the land-use plan."[23]

[20] Supreme Administrative Court decision No. 1 Ao 1/2009–120 of 21 July 2009 (translation of relevant excerpts provided by the communicant and the Party concerned).

[21] Ibid.

[22] Supreme Administrative Court decision No. 6 Ao 5/2010–43 of 13 October 2010 (translation of relevant excerpts provided by the communicant and the Party concerned).

[23] Ibid. No. 7 Ao 7/2010–33 of 27 January 2011 (translation of relevant excerpts provided by the communicant).

Article 9, paragraph 4

55. The communicant focuses its allegations on injunctive relief measures, as follows:

(a) The criteria for injunctive relief are too restrictive;

(b) EIA screening conclusions and EIA findings are excluded from the possibility of direct court review.

Criteria for injunctive relief

56. According to the communicant, the time to process a case before the courts is very lengthy, while the criteria for injunctive relief are interpreted and implemented in a very restrictive manner. It alleges that this constitutes non-compliance with article 9, paragraph 4, of the Convention, which requires effective remedies and access to injunctive relief.

57. The communicant alleges that, in particular, the condition that the requester has to prove "irreparable damage", is very difficult to fulfil and in practice is never met. The communicant also maintains that while the criteria for a preliminary injunction are less strict than for suspensory effect ("serious" instead of "irreparable" harm), the likelihood that either is actually granted is very rare. For NGOs, it is very difficult to prove harm is "irreparable" or "serious", because this is usually interpreted to require harm to subjective rights and not to public interest rights.

58. The communicant cites a 2004 decision of the District Court of Plzen, according to which "the nature of the land-use permit excludes, on the general level, to cause the 'irreparable harm' as supposed by Section 73 (2) of [the Administrative Justice Code], because such decision does not constitute the right of the investor to start with building of the project".[24] The communicant claims that this decision has been quoted in many other decisions of regional courts. Though some courts have opted for a more liberal interpretation, the communicant alleges that the typical line of argumentation is that "granting injunctive relief would in practice mean stopping the construction of works, which would cause 'delays in the timetable of constructions', extract costs with serious impacts on public budgets and would influence the protection of life and health of the inhabitants of the affected municipalities".[25]

59. The communicant concedes that, with respect to the review of EIA findings, the Supreme Administrative Court has ruled that the courts shall grant injunctive relief on the basis of article 9, paragraph 4, of the Convention, if the members of the public concerned ask for it in their lawsuit concerning environmental protection, so that it cannot happen that by the time of the hearing the project in question is already realized. In the view of the communicant, the Court's ruling is positive, but the practice of administrative courts is to interpret that ruling in a very restrictive way. While requests for suspensory effect have been granted in some cases, in many others it has been refused. In particular, the construction of highways is seen as a project of general public interest and injunctions are not granted.

60. The Party concerned contends that the Convention leaves it to Parties' discretion to decide the form and conditions of injunctive relief. The form of injunctive relief and its conditions must be such that the measure prevents irreversible damage to the environment.

[24] District Court of Plzen decision No. 57 Ca 14/2004 of 5 November 2004 (translation of relevant excerpts provided by the communicant).

[25] Decision of the City court of Prague No. 6 Ca 7/2008 of 2 July 2007 (translation of relevant excerpts provided by the communicant).

Hence, the Convention (and EU Directives 85/337/EEC[26] and 96/61/EC[27]), does not require that injunctive relief be granted automatically in the case of any action lodged by the public concerned; rather the courts have to examine whether the project for which the permits have been issued will have an irreversible impact on the environment. The courts evaluate whether an activity causes a particular risk to the environment and whether it is necessary to issue injunctive relief. The Party concerned maintains that the requirements of article 9, paragraph 4, of the Convention are adequately reflected in Czech legislation and this is further supported by the case-law of the administrative courts.[28]

No court review for EIA screening conclusions and EIA findings

61. The communicant alleges that since the EIA findings are not seen as binding under Czech law and thus are not considered to infringe the subjective rights of the members of the public, judicial review is not possible. The communicant notes that the Supreme Administrative Court has ruled that "article 9 of the Aarhus Convention shall not be interpreted in a way that it requires separate review of any decision, act or omission in the scope of permitting the activities subject to article 6 in a separate review procedure" and that "it is sufficient if such acts are subject to the review procedure at the stage when they can infringe the subjective rights of the affected persons."[29] In addition, the Court has stated that in general there is no need for the screening conclusion to be examined separately from the subsequent permits and that EU law leaves it to the discretion of its member States to decide at what stage the decisions, acts or omissions can be challenged.[30] The communicant alleges that the above has been the standard line of interpretation by the Ministry of Environment and the courts,[31] and that this constitutes non-compliance with the requirement in article 9, paragraph 4, for adequate, timely and effective remedies.

62. The Party concerned maintains that, in relation to the review of EIA findings and screening conclusions, Czech law fulfils the requirements of article 9, paragraph 4, of the Convention to a satisfactory level. Under Czech law, the EIA procedure is not integrated in the decision-making process, but is a separate process that serves as an expert basis for the final authorization of the activity. The review of acts of administrative authorities is allowed only at a stage when such acts may interfere with the legal sphere of natural and legal persons, and the EIA findings are not such an act. The Party concerned contends that this approach is in compliance with the Convention.

III. Consideration and evaluation by the Committee

63. The Czech Republic deposited its instrument of accession on 6 July 2004. The Convention entered into force for the Czech Republic on 4 October 2004.

64. The Committee decides not to deal with the allegations of non-compliance with article 3, paragraph 1, of the Convention, because there was a clear understanding by the

[26] See footnote 8 above.

[27] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

[28] In particular, Supreme Administrative Court decision No. 1 As 13/2007–63 of 29 August 2007.

[29] Supreme Administrative Court decision No. 1 As 13/2006–63 dated 29 August 2007 (translation of relevant excerpts provided by the communicant).

[30] Ibid. No. 1 As 13/2007–63 of 29 August 2007and No. 2 As 68/2007–50 of 5 September 2009 (translation of relevant excerpts provided by the communicant).

[31] Ibid. No.1 As 13/2007–63 of 29 August 2007.

parties and the Committee of the applicable law and thus the allegations of the communicant in this respect have not been substantiated.

The definition of "the public concerned" and tenants (art. 2, para. 5)

65. The public participation provisions in article 6 of the Convention mostly refer to the "public concerned", i.e., a subset of the public at large. The members of the public concerned are defined in article 2, paragraph 5, of the Convention on the basis of the criteria of "affected or likely to be affected by", or "having an interest in", the environmental decision-making. Hence, the definition of the Convention is partly based on the concept of "being affected" or "having an interest", concepts which are also found in the Czech legal system.

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 decision-making 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 short-term 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.

Effective public participation at each stage (art. 6, para. 3)

68. During the discussion of the communication at the Committee's thirty-second meeting, the Party concerned explained that in the multilayer decision-making process proscribed by Czech law, the building permit constitutes the final permit/decision in the context of article 6 of the Convention. The following elements were also clarified: that the EIA findings are not a decision in themselves, but a basis for the subsequent land-use and building permitting processes; that the EIA procedure is an open participatory process, whereas participation in the decision-making for the subsequent phases is limited to those members of the public that are recognized by law as "parties" to the land-use and building proceedings; that, consequently, members of the public concerned during the EIA procedure are not the same as the members of the public in the subsequent land-use and building permitting procedures; that NGOs have limited rights to participate after the conclusion of the EIA procedure; and that tenants, while they may be able to participate in the EIA procedure, are not able to participate in the subsequent stages, because the law does not recognize them as "parties" to those procedures, but usually limits parties to natural persons whose in rem rights are affected or likely to be affected.

69. Article 6, paragraph 3, of the Convention relates to "reasonable time frames" for the different phases of the decision-making, allowing sufficient time for the public to prepare and participate effectively during the environmental decision-making. By requiring "reasonable time frames" for effective public participation in the different phases of the decision-making, the Convention presupposes that in multi-phase environmental decision-making procedures, such as those provided for under Czech law, opportunities for the public to participate should be provided in each decision-making phase. With respect to tiered decision-making processes (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), the Committee has held that:

> [T]aking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain 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.[32]

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. 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. 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.

Authorities take due account of the outcome of public participation in the decision (art. 6, para. 8)

71. The communicant alleges that the comments provided by the public during the EIA procedure are not necessarily taken into account in the subsequent decision-making phases, because the EIA procedure does not constitute a binding decision-making act. The Party concerned disagrees that the comments are not taken into account. As set out in

[32] Findings on communication ACCC/C/2006/16 (Lithuania) (ECE/MP.PP/2008/5/Add.6, para. 71).

paragraph 70 above, the Committee finds that the Czech legal system fails to provide for effective public participation during all stages of the environmental decision-making process. Moreover, under article 6, paragraph 7, of the Convention, public participation must not be limited to the consideration of the environmental impact of a proposed activity, but entitles the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity, including its views on aspects of the activity's permissibility and its compliance with environmental law. 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.

Standing of individuals and NGOs to access review procedures relating to public participation under article 6 (art. 9, para. 2)

72. The communicant alleges that since members of the public are not recognized as parties to an administrative (land-use or building) permitting procedure, they cannot be granted locus standi to seek review of the procedure.

73. The communicant cited two decisions from the Supreme Administrative Court to substantiate its allegations concerning the rights of individuals, in particular with respect to "tenants".[33] Czech legislation and practice determines standing rights for individuals after the conclusion of the EIA procedure on the basis of whether their property rights have been infringed or not. This means that tenants cannot seek the review of a final building permit on the basis of their right or interests relating to the environment or health or their interest in the activity and the impact that this may have in their lives.

74. The Party concerned submits that the Administrative Justice Code permits an application for review of a decision to be brought by anyone who claims that his/her rights have been impaired by a decision of an administrative authority. The communicant argues that the Supreme Administrative Court jurisprudence has been very restrictive in applying the "infringement of rights" theory and that in effect standing is only granted to individuals whose property rights have been impaired by an authority. The communicant also submits that it is not able to provide the Committee with court decisions in this regard, because in practice, it is very rare that subjects who are explicitly excluded from being participants to a specific administrative procedure would file a lawsuit against the final decision issued in that procedure.

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

[33] Supreme Administrative Court decisions No. 2 As 1/2005–62 of 2 March 2005; and No. 1 Ao 1/2009–120 of July 2009 (translation of relevant excerpts provided by the communicant).

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.

Scope of review in procedures relating to public participation under article 6 (art. 9, para. 2)

79. There is a common understanding between the parties with respect to what can be reviewed by the courts of the Party concerned: in principle, any applicant has to prove that its rights have been affected. Individuals have procedural and substantive rights, and the latter may encompass rights or interests relating to the environment, but NGOs have only procedural rights which may be violated. This practice is not based on legislation, but has been developed by jurisprudence.

80. In this regard, the Committee held on communication ACCCC/2088/33 (United Kingdom) that "article 9, paragraph 2, of the Convention addresses both substantive and procedural legality. Hence, the Party concerned has to ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases" (ECE/MP.PP/C.1/2010/6/Add.3, para. 123).

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.

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). 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.

Review procedures with respect to acts and omissions of public authorities and private persons (art. 9, para. 3)

83. With respect to the possibility for members of the public to access administrative or judicial review procedures to challenge acts and omissions by private persons or private authorities, the communicant put forward examples relating specifically to health issues, nuclear matters and land-use plans.

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. 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.

86. The communicant also alleged non-compliance with article 9, paragraph 3, of the Convention with respect to nuclear matters, substantiating its allegations with excerpts from court jurisprudence. However, the Committee considers this jurisprudence as relating to standing to challenge operation permits under the Nuclear Act, and thus to be covered by article 9, paragraph 2. The Committee notes in particular the jurisprudence that excludes members of the public, including NGOs, from challenging operating permits on the ground; that it is not mandatory for the public to participate in nuclear safety matters; and the ruling which specifically excludes NGOs on the ground that they do not have rights to life, privacy or a favourable environment that could be affected. If indeed standing to challenge nuclear operation permits is limited because public participation is limited, then there are serious concerns of non-compliance not only with article 9, paragraph 2, of the Convention, but also with article 6 of the Convention. However, as decision-making for the construction and operation of nuclear installations is a much more complex procedure, the information submitted to the Committee does not sufficiently substantiate the allegations of non-compliance with article 9 of the Convention in this case.

Minimum standards applicable to access to justice procedures — suspensory effect and injunctions (art. 9, para. 4)

87. Regarding injunctive relief, the communicant referred to a 2004 ruling of the District Court of Plzen (not a supreme court) relating to land-use plans and injunctions, alleging that some courts continued to apply this argumentation. While the communicant conceded that some courts follow a different line, in its view it is "typical" that injunctive relief is not given. The communicant cited two other decisions to this effect.[34] However, from the oral and written submissions of both parties, it appears that there may be a shift in jurisprudence in granting suspensory effect or injunctive relief in environmental cases. The Committee considers that the communicant has not provided sufficient systematic jurisprudence to substantiate its allegations, that the criteria for injunctive relief are too restrictive. Therefore, the Committee cannot, in this case, conclude that the Party concerned fails to comply with the requirements in article 9, para. 4, for adequate and effective remedies and timely procedures in respect of injunctive relief in environmental cases.

IV. Conclusions and recommendations

88. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

89. The Committee finds that:

(a) 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 system of the Party concerned fails to provide for effective public

[34] Decision of District Court in Brno No. 31 Ca 156/2007 of 23 January 2008; decision of District Court in Usti nad Labem No. 15 Ca 91/2008 of 25 January 2010; decision of City Court of Prague No. 6 Ca 7/2008 of 2 July 2007.

participation during the whole decision-making process, and thus is not in compliance with article 6, paragraph 3 of the Convention (see para. 70 above);

(b) By failing to impose a mandatory requirement that the opinions of the public in the EIA procedure are taken into account in the subsequent stages of decision-making to permit an activity subject to article 6, and by not providing opportunity for all members of the public concerned to submit any comments, information, analyses or opinions relevant to the proposed activities in those subsequent phases, the Party concerned fails to comply with the requirement in article 6, paragraph 8, of the Convention to ensure that in the decision due account is taken of the outcome of the public participation (see para. 71 above);

(c) The rights of NGOs meeting the requirements of article 2, paragraph 5, to access review procedures regarding the final decisions permitting proposed activities, such as building permits, are too limited, to the extent that the Party concerned fails to comply with article 9, paragraph 2, of the Convention (see para. 78 above);

(d) By limiting the right of NGOs meeting the requirements of article 2, paragraph 5, to seek review only of the procedural legality of decisions under article 6, the Party concerned fails to comply with article 9, paragraph 2 of the Convention (see para. 81 above);

(e) To the extent that the EIA screening conclusions serve also as the determination required under article 6, paragraph 1 (b), members of the public should have access to a review procedure to challenge the legality of EIA screening conclusions. Since this is not the case under Czech law, the Party concerned fails to comply with article 9, paragraph 2, of the Convention (see para. 82 above);

(f) By not ensuring that members of the public are granted standing to challenge the act of an operator (private person) or the omission of the relevant authority to enforce the law when that operator exceeds some noise limits set by law, the Party concerned fails to comply with article 9, paragraph 3. Similarly, in cases of land-use planning, by not allowing members of the public to challenge an act, such as a land-use plan, issued by an authority in contravention of urban and land-planning standards or other environmental protection laws, the Party concerned fails to comply with article 9, paragraph 3, of the Convention (see para. 85 above).

B. Recommendations

90. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends the Party concerned to undertake the necessary legislative, regulatory, administrative and other measures to ensure that:

(a) Members of the public concerned, including tenants and NGOs fulfilling the requirements of article 2, paragraph 5, are allowed to effectively participate and submit comments throughout the decision-making procedure subject to article 6;

(b) Due account is taken of the outcome of public participation in all phases of the decision-making to permit activities subject to article 6;

(c) NGOs fulfilling the requirements of article 2, paragraph 5, have the right to access review procedures regarding any procedures subject to the requirements of article 6, and in this regard they have standing to seek the review of not only the procedural but also the substantive legality of those decisions;

(d) To the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1 (b), on whether a proposed

activity is subject to the provisions of article 6, the public concerned as defined in article 2, paragraph 5, is provided with access to a review procedure to challenge the procedural and substantive legality of those conclusions;

(e) Members of the public are provided with access to administrative or judicial procedures to challenge acts of private persons and omissions of authorities which contravene provisions of national law relating to noise and urban and land-planning environmental standards.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-sixth meeting
Geneva, 22–25 September 2014
Item of the provisional agenda
Communications from members of the public

Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2010/51 concerning compliance by Romania

Adopted by the Compliance Committee on 28 March 2014

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I. Introduction

1. On 2 September 2010, Greenpeace Central and Eastern Europe (Greenpeace CEE) Romania and the Romanian non-governmental organization (NGO) Centre for Legal Resources (collectively, the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The communication alleged the failure of Romania to comply with its obligations under article 3, paragraphs 2 and 9, article 4, paragraphs 1, 4 and 6, article 6, paragraphs 3, 4, 6, 7, 8 and 9, article 7 and article 9, paragraph 4, of the Convention in relation to Romania's energy strategy and the planned construction of a nuclear power plant (NPP).[1]

2. Specifically, the communication alleges non-compliance by the Party concerned with respect to three decisions: the decision to build a new NPP; the decision(s) regarding the location, technology, and other matters for the proposed construction of the NPP; and the adoption of the energy strategy.

3. Regarding the decisions relating to the NPP, the communication alleges that the Party concerned failed to comply with article 3, paragraph 2, and article 4, paragraphs 1, 4 and 6, of the Convention, because the authorities did not assist members of the public in seeking access to information and did not respond to requests for information concerning the project. The communication also notes that because of the lack of project-related information available to the public, there is no clarity on whether the decisions fall under article 6 or 7 of the Convention, but that, in any event, those decisions were taken without public consultation in contravention of the Convention's public participation provisions. The communication also alleges that the available remedies are not adequate, effective, fair, equitable, timely and publicly available, as required by article 9, paragraph 4, of the Convention.

4. In addition, the communication alleges that the energy strategy was approved without public consultation, in contravention of article 7 of the Convention. The communication also alleges that, because the authorities did not make any effort to consult the interested public and because they refused to provide information in English, the Party concerned failed to comply with article 3, paragraphs 2 and 9, of the Convention. Finally, by not responding to information requests, the Party concerned failed to comply with article 4, paragraph 1, of the Convention.

5. At its twenty-ninth meeting (Geneva, 21–24 September 2010), the Committee determined on a preliminary basis that the communication was admissible.

6. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 14 October 2010. On the same date, the communicant was sent a letter with questions by the Committee seeking clarification on several points of the communication.

7. In its response of 14 March 2011, the Party concerned requested the Committee to consider that domestic remedies had been pursued concerning the subject matter of the communication, which constituted effective and sufficient means of redress, and that therefore the Committee should decide not to consider the communication any further until

[1] The communication and related documents are available from http://www.unece.org/env/pp/compliance/Compliancecommittee/51TableRO.html.

the Court of Appeal delivered its judgment. The Committee, at its thirty-second meeting (Geneva, 11–14 April 2011) decided to seek the views of the communicant on the issues raised by the Party concerned. The communicant replied on 6 June 2011 informing the Committee about the judgements of the Court of Appeal, which in both cases had accepted the appeals of the authorities challenging the prior decisions of the courts of first instance that had ruled in favour of the communicant. At its thirty-third meeting (Chisinau, 28–29 June 2011), the Committee, having considered the arguments of the communicant, confirmed that it would discuss the substance of the communication at its thirty-fourth meeting (Geneva, 20–23 September 2011).

8. The Committee discussed the communication at its thirty-fourth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.

9. At the request of the Committee, the communicant and the Party concerned submitted additional information to the Committee on 31 October and 4 November 2011, respectively.

10. The Committee prepared draft findings at its thirty-ninth meeting (Geneva, 11–14 December 2012), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 29 January 2013. Both were invited to provide comments by 26 February 2013.

11. The Party concerned and the communicant provided comments on 27 February and 6 March 2013, respectively.

12. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee noted that the comments received indicated that some aspects of the facts had possibly been incorrectly reflected in the findings, and requested the secretariat to enquire with the parties in order to verify the information. It agreed that it would consider the relevant parts of its draft based on the replies received at its next session, with a view to adopting its findings in closed session. It also agreed that should the draft be substantively changed, it would be resent to the Party concerned and the communicants for comment in accordance with the procedure set out in paragraph 34 of the annex to decision I/7.

13. The questions were sent to the parties on 22 April 2013. Both parties were invited to reply by 20 May 2013. The Party concerned provided its reply on 17 May 2013 and further clarification on 7 June 2013. The communicant replied on 20 May 2013.

14. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee considered the relevant parts of its draft based on the replies received from the communicant and the Party concerned. As the Committee made substantive changes in the light of the comments received, it requested the secretariat to send the new draft findings to the Party concerned and the communicant for comment. The Committee agreed that it would take into account any comments when finalizing the findings at its forty-second meeting.

15. The new draft findings were sent to the Party concerned and to the communicant on 16 July 2013. Both were invited to provide comments by 13 August 2013.

16. The communicant provided comments on 13 August 2013. No comments were received from the Party concerned. In its comments the communicant drew the attention of the Committee to some remaining factual inconsistencies in the draft findings, in particular to the fact, not explained clearly in its comments to the previous draft findings, that the information which was eventually disclosed to the public did not include important parts of the information that had been requested by the communicant in its third request for information.

17. At its forty-second and forty-third meetings (Geneva, 24–27 September and 27–28 June 2013, respectively) the Committee considered again the relevant parts of its draft in the light of the comments provided by the communicant in its letter of 13 August 2013. In particular it re-examined the available evidence and considered that it had been under the inaccurate impression that the information which was eventually disclosed to the public was indeed an important part of the information that had been requested by the communicant, and that the only disputed matter was whether it was "the main" part of the information requested. However, in the light of comments submitted by the communicant in its letter of 13 August 2013, the Committee now understands that indeed the information which was declassified and eventually disclosed to the public cannot be considered as the information that had been requested by the communicant in its third request for information. Since declassifying and disclosing part of the information was the only fact that proved that the Party concerned had applied the Convention's requirement to interpret grounds for refusal in a restrictive way, and taking into account the public interest served by disclosure, the Committee decided to take the extraordinary measure of revising for a second time its findings regarding compliance in this respect. In the light of the above considerations the Committee decided to make the necessary changes to the draft findings and to request the secretariat to send the new draft findings to the Party concerned and the communicant for comment in accordance with the procedure set out in paragraph 34 of the annex to decision I/7. The Committee agreed it would take into account any comments when finalizing the findings at its forty-fourth meeting.

18. At its forty-fourth meeting (Geneva, 25–28 March 2014), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document for the Committee's forty-sixth meeting. It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of facts, legal framework and issues[2]

A. National legal framework

Access to information

19. The Constitution of Romania provides that the right to access any information of public interest cannot be restricted and that public authorities have the obligation to provide accurate information (art. 31). Also, the Constitution envisages that, if a person's rights are adversely affected by an administrative act or the lack of action in response to an application, that person is entitled to request annulment of the act and redress (art. 52).

20. Law 544/2001 on free access to information of public interest regulates the rights of the public to request and obtain information of public interest from public authorities and institutions. Public interest information is generally defined as any information regarding the activities and/or results of the activities of a public authority or institution, which is obliged to ensure that the information is provided in writing or orally. The exemptions stipulated for refusal of the authorities to provide information of public interest are broadly aligned to the exemptions under article 4 of the Convention.

21. Government Decision 878/2005 on public access to environmental information was adopted pursuant to Law 86/2000 ratifying the Convention and transposing European

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

Union (EU) Directive 2003/4 on access to environmental information.[3] The decision regulates access to environmental information in particular, and it closely reflects the provisions of article 4 of the Convention.

22. Law 182/2002 concerning protection of classified information aims to protect classified information and any confidential sources providing this kind of information (art. 2). The Law makes clear, however, that, regarding the right to receive and provide information, its provisions are not to be interpreted as limiting access to public interest information or as ignoring the Constitution, the Universal Declaration of Human Rights, or the pacts and other treaties to which Romania is a party (art. 3). Its main objectives include "protecting classified information against intelligence, discredit and unauthorized access actions, altering or modifying their content, as well as against sabotage or unauthorized damaging" (art. 4).[4] Law 182/2002 defines classified information as any information, data or document of interest for national security that, due to the level of its importance and the consequences that might result from its unauthorized disclosure or dissemination, must be protected (art. 5). The Law distinguishes two classes of secrecy: State secret and professional secret. A "State secret" is any information related to national security the disclosure of which could be detrimental to national security and State defence. A "professional secret" is any information the disclosure of which could be detrimental to legal entities of private or public law. Law 182/2002 is supplemented by two Government decisions: Decision 585/2002 concerning national standards for classified information; and Decision 781/2002 concerning information classified as secret of service (professional secret).

Public participation

23. Law 52/2003 concerning transparency of public decision-making provides, inter alia, for public participation in the preparation of normative acts. Accordingly, draft acts should be published on the website of an authority and the public should be able to submit comments, which should then be taken into account by the agency responsible for the procedure.

24. Government Decision 1076/2004 on environmental impact assessment for certain plans and programmes, transposing the EU strategic environmental assessment (SEA) Directive,[5] requires that an SEA be carried out for plans and programmes in certain sectors, including energy. A mandatory part of the assessment under this act is public participation, and the respective provisions follow the requirements of article 7 of the Convention.

25. Government Decision 445/2009 on environmental impact assessment (EIA) of public and private projects, transposing the EU EIA Directive,[6] requires that an EIA procedure be carried out for certain categories of projects, including nuclear power projects. A mandatory part of the assessment under this act is public participation, and the respective provisions follow the requirements of article 6 of the Convention.

[3] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[4] Translation provided by the Party concerned (attachment 2 to letter of 4 November 2011).

[5] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[6] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended.

Legal framework regarding nuclear power project

26. The legislation of the Party concerned includes a number of legal acts regulating issues related to nuclear energy (Law 111/1996, Law 13/2007 and Government decision 7/2003). The authorization process for a nuclear power project involves several stages of approval until the final construction and operation permits are issued.

B. Facts

27. The communication concerns the alleged non-compliance by the Party concerned with the provisions of the Convention in relation to:

(a) The decision-making process for the proposed construction of a new NPP;

(b) The adoption of the energy strategy.

Decision-making process for the proposed construction of a new NPP

28. Articles in the press and statements of the Ministry of Economy, Commerce and Business Environment (Ministry of Economy) informed the public about the exploratory/ research studies commissioned by the Ministry regarding possible locations for a new NPP.

29. Further to such a statement made by the Minister of Economy in 2009, on 6 February 2009 Greenpeace CEE submitted a request to the Ministry of Economy to access the following information relating to the proposed NPP: the list of the locations that were examined for the construction; the 10 possible and the 2 preferred locations; a copy of the official decision regarding the 2 preferred locations; and all other documents related to the selection procedure.

30. The Ministry did not respond to this request and Greenpeace CEE submitted a new request on 24 March 2009. No response was received (see annex 1 to the communication).

31. In March 2009, Greenpeace CEE brought the matter to the Court. In October 2009, the Bucharest Court ordered the Ministry to provide the requested information (annex 2 to the communication). On 27 November 2009, the Ministry appealed the court decision, on the grounds that the information requested was not "public information" (annex 3 to the communication). The case was postponed twice. On 22 April 2010, the Ministry declassified the list of the 102 locations studied at the beginning of the project, but not the rest of the information (annex 4 to the communication). In the meantime, in March 2011, the Court of Appeal decided in favour of the Ministry.

32. Further to another press statement made by a Romanian news agency, Mediafax, in October 2009, that there were four possible locations for the proposed NPP at Somes River, in November 2009 Greenpeace CEE Romania submitted a third request for access to information about: the four possible locations on Somes River that were being studied; the quantity of the water that could be used as a cooling agent; and the capacity that the new NPP could have.

33. The Ministry responded that the information requested was not public and that no decision had yet been made regarding the NPP (annex 6 to the communication). The Ministry in its response evoked the exceptions of Law 544/2001 and stated that "exploratory technical and [economic] data (as well as any social and political information belonging to the Romanian State) regarding a new nuclear power plant in Romania are secret; … such data need to be supplemented until a decision can be made" (translation provided by the communicant in annex 6 to the communication). The main points of the response were that: (a) the location study had not been completed yet; (b) the study was classified; (c) the exact location would be established when all elements had been analysed;

and (d) all relevant information would be available to the public, and the public would be notified and consulted, when the study was finalized and the location was known. The Ministry could not address the specific questions on the water used as a cooling agent and the possible NPP capacity, because the study was still in progress. The Ministry also included in an attachment all the binding legislation that provided for public consultation before the construction of a nuclear facility in the country, including international treaties to which Romania is a party (such as the Treaty establishing the European Atomic Energy Community and the Law ratifying the Convention on Environmental Impact Assessment in a Transboundary Context) and national laws on nuclear and electricity matters.

34. In 2009, the communicant brought the matter to court. In March 2010, the Bucharest Court decided in favour of the communicant's request and ordered the Ministry to provide the requested information (annex 7 to the communication). However, the Court of Appeal accepted the arguments submitted by the Ministry and ruled that the requested information was not final.

The Energy Strategy

35. The "Romanian Energy Strategy for 2007–2020" was approved in 2007 (Decision 1069/2007).

36. In February 2010, the SEA procedure, including public consultations, was initiated. In August 2010, a document was posted on the website of the Ministry of Environment and Forests (Ministry of Environment) describing the SEA procedure (annex 8 to the communication). That document mentioned that the Ministry of Economy had informed the Ministry of Environment that the Strategy had been approved by a Government Decision. It also mentioned that, although the provisions of the SEA Directive required that an SEA be carried out before approving a strategy, the Energy Strategy had been approved in 2007 without having applied the environmental assessment procedure. Depending on the outcome of the SEA procedure (which started after the approval of the Strategy), the Strategy would then be revised or updated.

37. In 2009, Greenpeace CEE Austria requested the Ministry of Economy to provide an English translation of the Energy Strategy. No response was received and the matter was brought to court. The courts decided in favour of the Ministry, both at first instance and on appeal.

38. Later, the communicant asked the Ministry whether any public consultation had taken place before the approval of the Energy Strategy in 2007. No response was received.

C. Substantive issues

Decision-making process for the proposed construction of a new NPP

Article 3, paragraph 2

39. The communicant alleges that the authorities did not make any effort to assist and provide guidance to the public in seeking access to information and facilitating public participation regarding the proposed NPP; therefore the Party concerned failed to comply with article 3, paragraph 2, of the Convention.

40. The Party concerned disagrees with the communicant. In its view, this provision of the Convention aims at environmental education and awareness-raising efforts by the Parties in general. It argues that the fact that the information requested by the communicant was not provided does not imply non-compliance with article 3, paragraph 2.

Article 4, paragraphs 1, 4, 6 and 7

41. The communicant alleges that by not responding to the first and second requests for information and by responding to the third request saying that the information was classified and as such it could not be disclosed, the Party concerned failed to comply with article 4, paragraph 1, of the Convention.

42. The communicant then alleges that by refusing to disclose information that does not fall under any of the exemptions under the Convention, and by not adequately justifying why the information could not be disclosed, the Party concerned failed to comply with article 4, paragraphs 4 and 7, of the Convention. It argues in particular that the study concerning the proposed NPP cannot be considered as part of internal communications, as argued by the Party concerned, but is in itself an administrative normative act.

43. The communicant also alleges that while article 4, paragraph 6, of the Convention is not clearly reflected in Romanian legislation, it is directly applicable in the national legal order. In its view, the public authorities had an obligation to sort out the classified information from all the information that had been requested and make available the remainder. Since they did not act in this manner, the Party concerned failed to comply with article 4, paragraph 6, of the Convention.

44. The Party concerned denies the allegations and refers in particular to article 4, paragraph 3 (c), of the Convention: the information requested related to a study commissioned by the Ministry, which was material in the course of completion or part of internal communications of public authorities, and this is classified material under national law, until a final decision is made on the matter. The Party concerned also mentions that part of the study was declassified because the Ministry took into account the public interest served. At that preparatory stage of the project, and considering public security and the confidential character of information relating to the economic interests associated with nuclear energy matters, it was not possible to make more information publicly available. The Party concerned asserts that the authorities refused to disclose the requested information in accordance with Law 544/2001 and Government Decision 878/2005 (see paras. 20 and 21 above).

Article 6 and article 7 decisions

45. The communicant alleges that because of the lack of information available to the public, it has difficulties indicating whether the decisions at issue fall under article 6 or 7 of the Convention. Therefore, the communicant requests the Committee to examine the decision concerning the details of the construction (location, technology, etc.) as a project under article 6, and the decision to construct the NPP as a plan under article 7.

46. The Party concerned contends that no decisions falling under article 6 or 7 of the Convention have been adopted. The Ministry of Economy frequently commissions studies from experts in order to explore the viability of economic opportunities for the country. The studies in questions were commissioned to explore energy security options in Romania and cannot be considered as decisions under the Convention.

Article 6, paragraphs 1, 2, 3, 4, 6, 7, 8 and 9

47. The communicant alleges that the decision concerning a new NPP falls under article 6, paragraph 1 (a), of the Convention and that, by not making any public announcement of the project, the Party concerned failed to comply with article 6, paragraph 2, of the Convention. According to the communicant, press releases cannot be considered as equivalent to a public notice under the Convention.

48. The communicant further alleges that, since no public consultations took place before the adoption of the decisions in question, the Party concerned failed to comply with article 6, paragraphs 3 and 4, of the Convention, because there were no reasonable time frames allowing for sufficient time to inform the public so that the public could prepare and participate effectively, and no early public participation, when all options were open. The communicant adds that, for projects of such size and importance as an NPP, the study of 120 possible locations and the subsequent narrowing down of the locations to 10 and then to 4, constitutes an early phase of the decision-making for a specific activity under article 6 and the public should participate.

49. The communicant also alleges that, since no information was provided to the public for the purpose of public participation, the public did not submit any comments and hence no account was taken of the result of public consultations. Therefore, the Party concerned failed to comply with article 6, paragraphs 6, 7 and 8, of the Convention.

50. The communicant finally alleges that, since information about the project and the specific decisions, including the reasoning, to proceed with a new NPP were never communicated to the public, the Party concerned failed to comply with article 6, paragraph 9, of the Convention.

51. The Party concerned refutes these allegations and states that it did not fail to comply with any of the provisions of article 6 of the Convention. It claims that the communicant misinterprets the purpose of article 6, because the public participation provisions of the Convention apply to "decisions on whether to permit proposed activities listed in annex I" and any preliminary study that could possibly lead to a decision to permit the construction of an NPP cannot be considered as a permitting decision under article 6.

Article 7, in conjunction with article 6, paragraphs 3, 4, and 8

52. According to the communicant, the decision to construct the NPP, if considered as a plan or policy under article 7, was taken without any consultations within a transparent and fair framework. Thus, according to the communicant, the Party concerned failed to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

53. The Party concerned claims that the preliminary studies on a possible NPP project commissioned by the Government are not a plan or policy. Therefore, they do not fall under article 7 and there was no obligation for the Party concerned to provide for public participation. Consequently it was not in non-compliance with the relevant provisions of article 7.

Article 9, paragraph 4

54. According to the communicant, the first court decision issued in November 2009 (seven months after the application was made in April 2009) was suspended when the Ministry filed its appeal and that decision was not executed (i.e., no access was provided to the information as requested) (see para. 31 above). In the meantime, the Court of Appeal decided in favour of the Ministry. In addition, the second court decision, issued in August 2010 (eight months after the application was made in December 2009), had also been issued in favour of the Ministry (see para. 34 above).

55. The communicant alleges that judges assigned to hear cases related to classified information must be certified, which extends the timing necessary to render a judgement.

56. The communicant further alleges that court decisions are not publicly available with the exception of those parts that relate to the trial, and are considered confidential because of the overly broad interpretation of personal data protection laws.

57. The communicant finally alleges that, due to the deficient transposition of the requirements of the Convention into the national legal order, in practice Romanian courts would never grant injunctive relief in environmental cases.

58. For all these reasons, the communicant alleges that the Party concerned fails to provide for adequate and effective remedies, which are fair, equitable, timely and publicly accessible, as required in article 9, paragraph 4, of the Convention.

59. The Party concerned refutes the communicant's allegations and states that it does not fail to comply with article 9, paragraph 4, of the Convention. First, it claims that remedies are adequate, as evidenced by the fact that the communicant was able to access court remedies when it considered that the authorities had infringed the Convention, and the Court of first instance had actually decided in favour of the communicant. Second, the Party concerned claims that remedies are effective, because any final decision is binding and is immediately executed. The Party concerned adds that it is normal that the appeal lodged by the losing party has suspensory effect. Third, the Party concerned finds that the communicant did not substantiate its allegations that remedies are unfair or inequitable, and it therefore does not deem it appropriate to comment at all. Fourth, the Party concerned claims that remedies are timely, as demonstrated by the fact that the courts issued their decisions in a maximum of seven months after the applications had been filed and the parties were immediately notified. Finally, the Party concerned mentions that court cases concerning access to public information are free of charge and that all court decisions are transparent and accessible to the public through Internet databases and specialized journals.

The Energy Strategy

Article 3, paragraphs 2 and 9

60. The communicant alleges that no effort was made by public authorities to encourage the public, within the country and in neighbouring countries, to participate in public consultations for the Energy Strategy, and therefore the Party concerned failed to comply with article 3, paragraph 2, of the Convention

61. The communicant further alleges that public authorities, by refusing to provide an English translation of the information requested, discriminated against foreign members of the public (i.e., Greenpeace CEE Austria), and therefore the Party concerned failed to comply with article 3, paragraph 9, of the Convention.

62. The Party concerned reiterates its arguments on the interpretation of article 3, paragraph 2, of the Convention (see para. 40 above), that the provision aims at environmental education and awareness-raising activities in general to promote the relationship between authorities and the public concerned. Therefore, according to the Party concerned, consideration of alleged non-compliance with article 3, paragraph 2, is not relevant in the present context.

63. As for article 3, paragraph 9, the Party concerned states that foreign members of the public, such as Greenpeace CEE Austria enjoy the same rights as any Romanian members of the public, including registered NGOs, in respect of the language in which the requested documentation is available, and in this case the information was available only in Romanian. Therefore, the Party concerned states that it is not in non-compliance with article 3, paragraph 9, of the Convention.

Article 4, paragraph 1

64. The communicant alleges that for a document of great importance in a transboundary context, such as the Energy Strategy, there is an obligation for the Party concerned to provide translation of the text in a language other than Romanian, and

preferably in English, so as to enable the public concerned of neighbouring countries to understand the content. In addition, by failing to provide to a foreign member of the public, i.e., Greenpeace CEE Austria, the Energy Strategy in the form requested, i.e., in English, the Party concerned failed to comply with article 4, paragraph 1, of the Convention.

65. The Party concerned disagrees with the communicant. It recalls that article 4, paragraph 1, requires a public authority to provide the requested information in the form requested, namely in paper, electronic media or other physical means for storing information, but not to translate the information requested into a language different from the language in which the information is available; this would not be a reasonable interpretation of the provision. The Party concerned adds that according to article 4, paragraph 1 (b), public authorities have to provide the information in the form requested "unless it is reasonable to make it available in another form, in which case reasons shall be given for making it available in that form". The Energy Strategy was not available in any language other than Romanian and it was not reasonable that the authorities were requested to translate it. The Party concerned finally comments that, from the information submitted by the communicant so far, it is obvious that the communicant had the means to finance the translation of the Strategy.

Article 7, in conjunction with article 6, paragraphs 3, 4, and 8

66. The communicant alleges that, since the Energy Strategy is an environmental policy, and since sufficient public participation did not take place during its preparation, the Party concerned failed to comply with article 7 in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

67. In response to the assertion by the Party concerned that NGOs had participated in a working group preparing the Strategy, the communicant submitted a letter from an NGO that according to the Party concerned had participated in the working group, denying participation in any working group but admitting that it had provided comments to the draft Strategy (see annex 3 to the communicant's response of 6 June 2011).

68. The Party concerned explained that the Energy Strategy was drafted by a large working group with the participation of representatives from various stakeholders, including NGOs, and that the draft was subject to public consultation. Specifically, the draft was published on the websites of the Ministry of Economy and of the Secretariat General of the Government. There had been a 30-day comment period and comments were taken into account in finalizing the Strategy. At the Committee's thirty-fourth meeting in September 2011, the Party concerned had informed the Committee that an SEA procedure was being conducted and that, upon the conclusion of that procedure, the Strategy would be updated or revised as appropriate. Therefore, the Party concerned stated that it was not in non-compliance with article 7 of the Convention.

Domestic remedies

69. The communicant brought the matter of the failure of the Ministry of Economy to grant access to information three times before the courts (see paras. 31, 34 and 37 above). In the first two cases, the courts decided in favour of the communicant/applicant, but the Court of Appeal decided in favour of the Ministry. In the third case, both the courts of first instance and of appeal decided in favour of the Ministry.

70. The communicant filed a complaint against the authorities for failure to organize public participation (in the framework of the SEA procedure) before the approval of the Energy Strategy. The Court of Appeal rejected the case. The communicant has also submitted a complaint on this issue with the European Commission (CHAP (2011)01398).

III. Consideration and evaluation by the Committee

71. Romania ratified the Convention on 11 July 2000. The Convention entered into force for Romania on 30 October 2001.

72. With respect to access to information, the Committee considers that the information requested by the communicant is "environmental information" in the meaning of article 2, paragraph 3, of the Convention.

73. The Committee was requested by the communicant to examine the decision concerning the details on the construction of the NPP (location, technology, etc.) as an activity under article 6, and the decision to construct a new NPP as a plan under article 7. The Committee notes, however, that the only document acknowledged by both the communicant and the Party concerned to have been issued in relation to the project is a study for the selection of possible locations for the NPP, and the Committee has not been provided with any further information to prove that any decision in this respect has been taken. The Committee does not consider a study aiming at examining possible locations for a project, according to certain criteria (geographical, scientific, etc.), and making proposals for the preferred location(s) to be a decision under article 6, or as a plan, programme or policy under article 7, of the Convention. Nor is there any other evidence provided to the Committee that there was a decision taken to permit the NPP. Therefore, in relation to the study for the possible locations, the Committee will not examine any allegations of non-compliance with the public participation provisions of articles 6 and 7 of the Convention.

74. Bearing in mind the fact that the issue of timeliness of judicial procedures related to access to information is the subject of another communication involving the same communicant and the same Party concerned, the Committee also decides not to address this issue in the present case.

Decision-making process for the proposed construction of a new NPP

Endeavours to ensure that public authorities assist and guide the public (art. 3, para. 2)

75. The communicant alleges non-compliance with article 3, paragraph 2, of the Convention in relation to the decision-making for the proposed NPP, because the public authorities did not make any effort to assist, provide guidance or encourage members of the public in Romania and abroad to be informed and participate in the decision-making.

76. Article 3, paragraph 2, of the Convention contains a general obligation for the Party to endeavour to ensure that its officials and public authorities assist and provide guidance to the public in exercising its rights under the Convention. This provision follows the guidance of the eighth preambular paragraph, which acknowledges that "citizens may need assistance in order to exercise their rights".

77. The information provided to the Committee, in particular in annex 6 to the communication, shows that the authorities provided some guidance to the public regarding the nature of the relevant information and the legal framework for the respective decision-making concerning the NPP. Moreover, there was no evidence provided to the Committee that the guidance, although not meeting the expectations of the communicant, was manifestly and intentionally misleading. The allegations of the communicant are not substantiated and therefore the Committee does not find that the Party concerned failed to comply with article 3, paragraph 2, of the Convention.

Failure to respond to requests for environmental information (art. 4, paras. 1, 2 and 7)

78. The communicant submitted three requests for information concerning the proposed NPP.

79. The general obligation of the public authorities to respond to requests of members of the public to access environmental information is enshrined in article 4, paragraph 1, of the Convention. In addition, authorities have to respond to a request within one month after the request was submitted (art. 4, para. 2) and, in case of a refusal, this should be in writing (art. 4, para. 7), giving the reasons for the refusal, and as soon as possible, but at the latest within one month, unless the complexity of the information justifies an extension of up to two months after the request.

80. In the present case, the Party concerned has not provided any evidence to substantiate its claims that the authorities duly addressed all requests for information despite the Committee's request. The Committee thus considers that the allegation of the communicant that its first and second requests for information were ignored represent the actual facts. Therefore, since the authorities did not respond at all to two of the three information requests submitted by the communicant in relation to the decision-making process regarding the proposed construction of a new NPP, the Committee finds that the Party concerned failed to comply with article 4, paragraph 1, in conjunction with paragraphs 2 and 7, of the Convention.

Refusal of environmental information in relation to the NPP (art. 4, paras. 3 and 4)

81. The authorities responded to the third request for environmental information submitted by the communicant. In that case, the authorities refused to grant access. The Committee examines whether this refusal can be justified on the basis of article 4, paragraphs 3 (c) and 4 (a), (b) and (d).

82. With respect to article 4, paragraph 3 (c), the Committee notes that authorities may refuse to grant access to material which is in the course of completion only if this exemption is provided under national law or customary practice. Indeed, the legislation of the Party concerned specifies that public authorities may refuse a request for environmental information if the request concerns material in the course of completion of unfinished documents or data (Government Decision 878/2005, art. 11, para. 1).

83. The Committee recalls that even if not mentioned under article 4, paragraph 3 (c), as a principle of law exemptions are to be interpreted restrictively. This is particularly important in view of the public interest served by the disclosure and the aims and objectives of the Convention.

84. The study which included the information requested by the communicant was prepared by the Centre of Designing and Engineering for Nuclear Projects under the Romanian Authority for Nuclear Activities (RAAN-SITON), a specialized agency of the central public administration, acting as a legal person, coordinated by the Ministry of Economy and responsible for providing technical assistance to the Government in nuclear matters. Although the agency is somehow related to the Ministry of Economy, it is not an internal unit of that Ministry and is formally independent.

85. The Convention does not define the "material in the course of completion". The Committee considers that the phrase "material in the course of completion" relates to the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared.

86. The Party concerned also argues that this information constituted internal communications of public authorities.

87. The Committee finds that when a study that had been commissioned by a ministry from a somehow-related-to-it-but-separate entity has been completed, submitted to and approved by this ministry, such a study can neither be considered as "material in the course of completion" nor as "internal communications", but rather as a final document which could and should be publicly available. Therefore, the authorities could not refuse information on this ground.

88. According to article 4, paragraph 4 (a), of the Convention, a public authority may refuse a request for environmental information when the disclosure may adversely affect the confidentiality of proceedings of a public authority, and this is provided for under national law. Indeed, the legislation of the Party concerned (Government Decision 878/2005, art. 12) provides for such an exception.

89. Yet, the Committee considers that the term "proceedings" in article 4, paragraph 4 (a), relates to concrete events such as meetings or conferences and does not encompass all the actions of public authorities. While national legislation may, according to this provision of the Convention, provide for the possibility to consider the minutes of a number of meetings held in order to select feasible locations for an NPP, as confidential, it cannot under this provision treat as confidential all the actions undertaken by public authorities in relation to selecting feasible locations for an NPP, including all the related studies and documents. In particular, national legislation may provide for the confidentiality of operational and internal procedures of an authority. The criteria in legislation for such exceptions should be as clear as possible, so as to reduce the discretionary power of authorities to select which proceedings should be confidential, because this might lead to arbitrary application of the exemption. This is in line with the principle that all exemptions to the requirement to provide access to requested environmental information are subject to a restrictive interpretation and must take into account the public interest served by the disclosure. Therefore, the authorities in this case could not refuse information on this ground.

90. Article 4, paragraph 4 (d), of the Convention allows authorities to refuse access to commercial and industrial information, where such information is protected by law in order to protect legitimate economic interests. The Convention does not define which information is "commercial and industrial", but the criteria and the process for characterization of information as confidential on this basis should be clearly defined by law, so as to prevent authorities from withholding information in an arbitrary manner.

91. The Convention does not define "legitimate economic interests" either. While the exemption from the obligation to disclose information in article 4, paragraph 4 (d), is predominantly focused on protecting legitimate economic interests of private entities, it may also be used to protect legitimate economic interests of public bodies, for example those referred to in article 2, paragraph 2 (b) and (c), or, in certain exceptional circumstances, even of entire States, provided, however, that the requested information is of a commercial or industrial nature, according to the criteria and the process described in the law.

92. Even so, in the present case the Committee does not find that a study, prepared by an entity which is closely related to the public administration and aimed at selecting the possible locations for an NPP could be considered as "commercial or industrial information", as referred to in article 4, paragraph 4 (d), of the Convention. Therefore, in practice the authorities in this case could not refuse information on this ground, even if the exemptions stipulated in the legislation for refusal of the authorities to provide information of public interest are broadly aligned to the exemptions under article 4 of the Convention.

93. Finally, according to article 4, paragraph 4 (b), public authorities may withhold information when the release would adversely affect international relations, national

defence or public security. Thus national law, generally, or the administration, in specific cases, may define information as involving State secrets if the release may harm State security and defence. The law of the Party concerned specifies that information of "scientific, technologic or economic activities and investments related to the national security or defence or which are of utmost importance for the economic, technical and scientific interests of Romania" and "scientific research in the field of nuclear technologies, excepting fundamental research, as well as the programmes for the protection and security of nuclear materials and facilities" (Law 182/2002, art. 17, paras. (k) and (l), respectively)[7] may qualify as "State secrets", and provides for the criteria and the procedures to be followed for the classification of the information.

94. The Committee finds that the study aiming at the selection of possible locations for the NPP can be a "State secret" under national law, and public authorities may thus refuse access to information on the basis of the exemption of article 4, paragraph 4 (b), of the Convention. However, the exemption is to be interpreted narrowly, taking into account the public interest served by the disclosure. In the present case, the Party concerned has not convinced the Committee that, in refusing access to the requested information on the ground that disclosure could adversely affect international relations, national defence or public security, the Party concerned interpreted the grounds for refusal in a restrictive way, so as to take account of the public interest served by disclosure, as set out in the final subparagraph of article 4, paragraph 4. The Committee notes that the reply of the Ministry of Environment to the third request for information submitted by the communicant (see para. 33 above) is limited to indicating that the decision regarding location of the NPP in question has not been taken yet and therefore according to applicable Romanian legislation the requested information should be considered as secret. The Committee also notes that neither in this document nor in any other document submitted by the Party concerned is there any mention of taking into account the public interest served by the disclosure, or about balancing the interests for and against the disclosure of the information requested by the communicant in its third request for information. In its reply of 14 March 2011 to the questions of the Committee (see para. 7 above) the Party concerned indicates only that such information regarding pre-decisional studies is "of no relevance for the public". Furthermore, the Committee notes that the only official document presented to the Committee which includes an attempt to consider the public interest served by disclosure is the judgement of the Bucharest Court (see para. 34 above), which notably decided in favour of the communicant and ordered the Ministry to provide the requested information. The Committee also notes that the judgement of the Court of Appeal which overturned the above judgement of the Bucharest Court does not include any discussion in this respect except for stating that pre-decisional studies should not be disclosed until authorities decide that the issue is ready to be submitted for public debate required by applicable procedures. In this respect, the Committee considers that access to information under article 4 of the Convention should not be identified with access to information in the context of public participation procedures. The obligation under article 4 to make available environmental information to the public upon request is not limited to matters being subject to public participation procedures and — unless legitimate reasons for refusal are being applied according to appropriate procedures — covers all environmental information which is held by public authorities, not least the information which public authorities themselves, in press releases or elsewhere, reveal that they hold (as was true in the present case, see para. 32).

95. The Committee concludes that in the present case the Party concerned has not been able to show that any of the grounds for refusal referred to in article 4 provide a sufficient

[7] Translation provided by the Party concerned. (See attachment 2 to the letter of the Party concern of 4 November 2011.)

basis for not disclosing the information requested regarding the possible locations for the NPP. Although part of the information originally requested was eventually declassified and made available to the public, the rest of the information requested, in particular the information requested by the communicant in its third request for information, was not disclosed without giving sufficient reasons and without demonstrating that consideration had been given to the public interest in disclosure. Thus, with respect to the communicant's third information request, by not ensuring that the requested information regarding the possible locations for the NPP was made available to the public, and by not adequately justifying its refusal to disclose the information requested under one of the grounds set out in article 4, paragraph 4, of the Convention, taking into account the public interest served by disclosure, the Party concerned failed to comply with article 4, paragraphs 1 and 4, of the Convention.

96. The Committee also considers that the relationship between the legal regimes of the Party concerned with respect to general access to information, access to environmental information and classified information, in particular the apparent broad discretion of public authorities to classify information as a "professional secret", give rise to concerns as to whether there is a clear, transparent and consistent framework to implement the respective provisions of the Convention. However, based on the information before it in the context of the current communication, the Committee does not go so far as to find the Party concerned to be in non-compliance with article 3, paragraph 1, of the Convention.

Separation and disclosure of the part of information that is not exempted (art. 4, para.6)

97. The communicant claims that the Party concerned failed to comply with article 4, paragraph 6, of the Convention, by not separating and disclosing part of the information that could be separated without prejudice to its possible confidentiality, so as to make available the remainder of the information requested. The Committee observes that this provision is clearly reflected in Romanian legislation (Government Decision No. 878/2008 on public access to environmental information, art. 15). The Committee also notes that part of the study was declassified and made available to the public, although this was done with some delay.

98. The Committee is concerned about the clarity, transparency and consistency of the relevant legal framework, in particular the fact that it includes broadly defined categories of information that can be classified as confidential, which may lead to the classification of the whole information; and the fact that the authorities classified the information evoking different grounds. Furthermore, there are indications that article 4, paragraph 6, may not be regularly observed in practice by the public authorities of the Party concerned (e.g., information and documents submitted by the communicant, such as the Constanta Court Civil sentence No. 1359, file no 6584/118/2008). Nevertheless the Committee has not been provided with sufficient information to ascertain whether the above-mentioned features of the Romanian legal framework and practice amount to systemic non-compliance with article 4, paragraph 6, of the Convention.

Procedure for refusal of an information request (art. 4, para. 7)

99. The Committee observes that, apart from the cases where the requests for information were ignored, reasons for the refusals have been stated. While it is a different matter, dealt with above, as to whether the reasons given were accurate and in compliance with the Convention, and while the Committee has already expressed concerns as to the clarity of the legal framework concerning access to information, the Committee does not find that the evidence submitted demonstrates that the Party concerned failed to comply with article 4, paragraph 7, of the Convention.

Effective, fair and publicly accessible review procedures (art. 9, para. 4)

100. The communicant makes several allegations with respect to non-compliance with article 9, paragraph 4, of the Convention. First, regarding the allegation concerning the availability of injunctive relief in environmental cases, on the basis of the information before it in the context of the current communication, the Committee is not in a position to make any findings concerning compliance in this respect.

101. Second, the communicant did not substantiate how the requirements in the law of the Party concerned that judges assigned to hear cases related to classified information must be certified to do so as such result in delayed, ineffective or unfair procedures. Therefore the Committee does not find that the Party concerned failed to comply with article 9, paragraph 4, with respect to access to justice in these respects.

102. Third, with respect to the allegations that the suspensive effect of an appeal affects the effectiveness of judicial procedures, the Committee notes that this constitutes a rather a common feature of law and practice in most jurisdictions, and the Committee considers that this feature serves well the rule of law. Therefore the Committee finds that the Party concerned did not fail to comply with article 9, paragraph 4, of the Convention as regards its obligation to provide for effective remedies.

103. Fourth, with respect to the allegations regarding the accessibility of court decisions, the Committee notes that the Party concerned referred to a number of arrangements already undertaken or planned to be undertaken to provide full accessibility to court decisions. The requirements in article 9, paragraph 4, are limited to the procedures referred to in article 9, paragraphs 1, 2 and 3, of the Convention. However, any reasons not to disclose a decision relating to the matters governed by the Convention, such as data protection, should be considered under the article 4 of the Convention and not under article 9, paragraph 4. Therefore the Committee finds that the Party concerned did not fail to comply with the requirement of article 9, paragraph 4, that decisions be publicly accessible.

The Energy Strategy

Endeavours to ensure that public authorities assist and guide the public (art. 3, para. 2)

104. According to the communicant the public authorities failed to encourage the public, within the country and in neighbouring countries, to participate in the procedures regarding the Energy Strategy. Yet, the communicant did not sufficiently substantiate how the lack of such efforts in relation to this particular procedure should be seen as evidence of a systematic failure of the Party concerned to assist the public and facilitate its participation in decision-making. Therefore, the Committee does not find that the Party concerned failed to comply with article 3, paragraph 2, of the Convention.

Non-discrimination (art. 3, para. 9)

105. The communicant claims that the authorities discriminated against foreign members of the public (i.e., Greenpeace CEE Austria), because they refused to grant information in English. While article 3, paragraph 9, is intended to prevent not only formal discrimination but also factual discrimination, this provision cannot be interpreted as generally requiring the authorities to provide a translation of the information into any requested language. If, on the other hand, national law provides for translations to different official languages or sets criteria also for other translations, article 3, paragraph 9, of the Convention implies that these criteria must be applied in a non-discriminatory way. Moreover, if the authority at the time of the request was in possession of such a translation, it would have been obliged under article 4 of the Convention to disclose the translated version to the public. In the present case, however, the Party concerned confirmed that at that time the public authorities

did not hold such a translation, and the communicant did not provide evidence to the contrary.

106. In this situation the fact that the Party concerned did not provide English translations of the requested information cannot be considered as discrimination, and therefore the Committee finds that the Party concerned did not fail to comply with article 3, paragraph 9, of the Convention.

Access to information in the "form requested" and translation (art. 4, para. 1 (b))

107. The communicant also claims that the authorities were under the obligation to provide the Energy Strategy in "the form requested", i.e., in English, to a member of the public from abroad, i.e., Greenpeace CEE Austria. The Committee clarifies that article 4, paragraph 1, of the Convention relates to the material form of the requested information, such as such as paper, electronic media, videotape, recording, etc., and does not include an obligation to translate the document into another language. Thus, failing to provide the English translation of the requested document (the Energy Strategy), since such translation was not already available with the authorities, does not constitute non-compliance with article 4, paragraph 1 (b), of the Convention.

Public participation for plans and programmes (art. 7, in conjunction with art. 6, paras. 3, 4, and 8)

108. Regarding the allegation that no proper public participation was provided during the preparation of the Energy Strategy, the Committee notes that while it is undisputed that the Strategy is a document subject to article 7 of the Convention and some public participation took place during its preparation, there are different views in relation to the participation of NGOs in the working group drafting the Strategy.

109. In this context, it should be stressed that whether a particular NGO participated or not in the working group drafting the Strategy is irrelevant from the point of view of meeting the requirements of article 7 of the Convention, because the inclusion of representatives of NGOs and "stakeholders" in a closed advisory group cannot be considered as public participation under the Convention. Furthermore, whatever the definition of the "public concerned" in the law of a Party to the Convention, it must meet the following criteria under the Convention: it must include both NGOs and individual members of the public; and it must be based on objective criteria and not on discretionary power to pick individual representatives of certain groups. In this context, participation in closed advisory groups cannot be considered as public participation meeting the requirements of the Convention.

110. Furthermore, the Committee notes that, while indeed the draft 2007 Strategy was published on the websites of the Ministry of Economy and the Secretariat General of the Government, formally the general public had only 11 days to get acquainted with the draft and submit comments. Despite the fact that some members of the public had been able to submit comments also outside the scope of these 11 days, the Committee considers that the Party concerned failed to ensure a reasonable time frame for public participation in the case of such a document. Thus, by not providing sufficient time for the public to get acquainted with the draft and to submit comments thereon, the Party concerned failed to comply with article 7, in conjunction with article 6, paragraph 3, of the Convention.

IV. Conclusions and recommendations

111. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

112. The Committee finds that:

(a) Since the authorities did not respond at all to two of the three information requests submitted by the communicant in relation to the decision-making process regarding the proposed construction of a new NPP, the Party concerned failed to comply with article 4, paragraph 1, in conjunction with paragraphs 2 and 7, of the Convention (see para. 80 above);

(b) With respect to the communicant's third information request, by not ensuring that the requested information regarding the possible locations for the NPP was made available to the public, and by not adequately justifying its refusal to disclose the requested information under one of the grounds set out in article 4, paragraph 4, of the Convention, taking into account the public interest served by disclosure, the Party concerned failed to comply with article 4, paragraphs 1 and 4, of the Convention (see para. 95 above);

(c) By not providing sufficient time for the public to get acquainted with the draft 2007 Energy Strategy and to submit comments thereon, the Party concerned failed to comply with article 7, in conjunction with article 6, paragraph 3, of the Convention (see para. 110 above).

B. Recommendations

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

(a) Take the necessary legislative, regulatory and administrative measures to ensure that public officials are under a legal and enforceable duty:

(i) To respond to requests of members of the public to access environmental information as soon as possible, and at the latest within one month after the request was submitted, and in the case of a refusal, to state the reasons for the refusal;

(ii) To interpret the grounds for refusing access to environmental information in a restrictive way, taking into account the public interest served by disclosure, and in stating the reasons for a refusal, to specify how the public interest served by disclosure was taken into account;

(iii) To provide reasonable time frames, commensurate with the nature and complexity of the document, for the public to get acquainted with draft strategic documents subject to the Convention and to submit its comments;

(b) Provide adequate information and training to public authorities about the above duties.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Fortieth meeting
Geneva, 25–28 March 2013
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2010/53 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Prepared by the Compliance Committee and adopted on 28 September 2012

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I. Introduction

1. On 26 November 2010, the Moray Feu Traffic Subcommittee of Lord Moray's Feuars Committee (the communicant), representing the interests of Moray Feu residents, submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the United Kingdom of Great Britain and Northern Ireland had failed to comply with its obligations under the Convention.

2. The communicant alleges that its rights under all three pillars of the Convention have been breached, and in particular articles 1, 3, 4, 5, 6, 7 and 9. First, the communicant alleges that the City of Edinburgh Council has failed to collect relevant environmental information and to provide environmental information that it already possesses upon request. Second, the communicant alleges that it has been denied meaningful participation with respect to the permanent rerouting of traffic through the residential area of the Moray Feu, Edinburgh, in order to make room for a light rapid transit system, the Edinburgh Tram Network. Third, the communicant alleges that, through the use of a private Act of Parliament to approve the tram system, residents of the Moray Feu have been denied access to justice regarding a significant infringement on their environment.

3. At its thirty-first meeting (22–25 February 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 29 March 2011. On the same date, taking into account that a complaint on this matter had also been submitted by the communicant to the Scottish Public Services Ombudsman (Ombudsman),[1] the Committee decided to suspend any further consideration of the communication until further information was provided on the progress of the complaint before the Ombudsman.

5. On 29 June 2011, the communicant forwarded to the Committee the Ombudsman's decision, together with the communicant's letter to the Ombudsman providing its comments on that decision.

6. On 12 July 2011, the communicant forwarded to the Committee various e-mail correspondence between itself and the City of Edinburgh.

7. By letter of 23 August 2011, the Party concerned responded to the communicant's allegations.

8. At its thirty-fourth meeting (20–23 September 2011), the Committee agreed to discuss the content of the communication at its thirty-fifth meeting (13–16 December 2011).

9. In response to a request by the Committee, by letter of 29 November 2011, the communicant itemized the various provisions of the Convention it alleged that the Party concerned had breached.

10. The Committee discussed the communication at its thirty-fifth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.

[1] Referred to as the SPSO in the correspondence with the Committee.

11. Further to the Committee's request for clarification of certain issues, the communicant submitted additional information on 9, 11, 15 and 16 February 2012, and the Party concerned submitted additional information on 17 February 2012.

12. The Committee prepared draft findings at its thirty-seventh meeting (26–29 June 2012) and, in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 13 August 2012. Both were invited to provide comments by 10 September 2012.

13. The Party concerned and the communicant provided comments on 10 September 2012.

14. At its thirty-eighth meeting (25–28 September 2012), the Committee adopted its findings and agreed that they should be published as a formal pre-session document for the Committee's fortieth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[2]

A. Legal framework

15. In February 2008, the Scottish Government amended the Local Authorities Traffic Orders (Procedure) (Scotland) Regulations, 1999 (SSI 2008/03). These Regulations set out the procedure to be followed by local authorities before they make a Traffic Regulation Order, like those adopted in order to allow the Edinburgh Tram Network to operate within sections of the public road network. This amendment was intended to speed up the application of such regulations to projects that have already been subjected to full parliamentary scrutiny and approved under an Act of Parliament by providing for discretionary, rather than mandatory, hearings of objections.

16. The Transport, Infrastructure and Environment Committee (TIE Committee) (formerly the Transportation Committee) is an Executive Committee of the City of Edinburgh City Council. The TIE Committee has been the main body involved on the part of the City Council in the promulgation of the traffic regulations and the implementation of the tram project, as summarized below.

B. Facts

17. The Moray Feu is a residential area in the centre of Edinburgh in New Town, which was inscribed in 1995 as a World Heritage Site by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The communication concerns the objections of Moray Feu residents to the permanent rerouting through the Moray Feu of all general traffic from the main shopping thoroughfare of the city centre (Princes Street and Shandwick Place), which lies somewhat to the south. The traffic alterations started in the mid-1990s. However, the Edinburgh Tram Network, a project launched in 2004 and designed to run through the city centre, had an additional impact on the traffic regulation

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

design. The sequence of the main facts with respect to the development of the related traffic regulations and the tram project are summarized in the following paragraphs.[3]

18. In 1995–1996, Phase I an experimental Traffic Regulation Order was introduced — the Central Edinburgh Traffic Management (CETM) Scheme — removing westbound traffic from Princes Street, Edinburgh's main shopping thoroughfare. The Scheme was monitored, findings were prepared and subsequently different phases of statutory consultation with various stakeholders, including public authorities, the business community and organizations and individuals in affected areas, took place from 1997 to 2003, which resulted in the introduction of amendments and measures. After the 1999 Regulations were adopted (see para. 15), independent reporters also participated in the consultation.

19. Phase II of the Scheme (permanent Traffic Order Regulation), was finalized and implemented in 2005/06. The Scheme incorporated recommendations and observations that followed the consultations and impacted on the Morey Feu, inter alia: (a) since the bulk of east- and westbound traffic used Shandwick Place, the increase through the Moray Feu would be minimal; (b) "alternatively, and preferably, there should be some more radical approach that keeps through traffic out of the [Moray Feu] altogether"; (c) the westbound ban on Princes Street should not apply overnight or in evenings (see annex 10 to the communication).

20. In 2004, the Council of the City of Edinburgh lodged two Bills with the Scottish Parliament for the construction of the tram system: Line 1 and Line 2. The system would also run along Princes Street and Shandwick Place and, according to the accompanying plans, general traffic would not be permitted on those streets. The parliamentary scrutiny by the Parliamentary Committee, including a Preliminary Stage, a Consideration Stage and a Final Stage, took place from 2004 to 2006.

21. In this context, in 2005 Moray Feu residents began to make representations to the Council regarding their concerns about the environmental implications of the tram scheme for the Morey Feu. In particular, the Lord Moray Feuars Committee, through the New Town, Broughton and Pilrig Community Council, submitted an objection regarding the failure to make provision to prevent wholesale traffic displacement through the Moray Feu directly in contravention of the recommendations of the 2003 public hearing. The objection was not acknowledged in the Parliamentary Committee report.[4] At the consideration stage, the Committee heard the Council's objections — including those of Moray Feu residents — but did not uphold any of them.

22. In April 2006, the two private Acts of the Scottish Parliament approving the construction and operation of the Edinburgh Tram Network received Royal Assent.[5] Subsequently, detailed traffic modelling commenced.

23. In March 2008, Shandwick Place was closed to general traffic under a Temporary Traffic Regulation Order in view of the tram infrastructure works (laying of tram rails, etc.). One of the alternative routes on the public road network was directed through the

[3] For a detailed outline of events, see the draft chronology prepared by the secretariat on 20 January 2012, the changes on the draft chronology suggested by the communicant on 15 February 2012, as well as the chronology provided by the Party concerned on 17 February 2012. These documents and other documents related to the communication that have been submitted for consideration are available from http://www.unece.org/env/pp/compliance/Compliancecommittee/53TableUK.html.

[4] Details on the three stages for both Bills are available from http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25121.aspx and http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25156.aspx.

[5] Edinburgh Tram (Line One) Act 2006 and Edinburgh Tram (Line Two) Act 2006.

Moray Feu. Temporary asphalt surfacing was laid on sections of stone cobble carriageway. Today, Shandwick Place still remains closed to general traffic.

24. In fall 2008, "Traffic Regulation Design Update Exhibitions" at several locations in Edinburgh were held for the public to view the first draft of traffic measures coming out of the detailed design work. The proposals show the restriction on general traffic through Shandwick Place as a required feature of the permanent scheme. In the view of the communicant these exhibitions were informative rather than interactive.

25. In 2008, Moray Feu residents commenced individual representations to the Council for measures to limit the volume and nature of the traffic passing through the Moray Feu. At that point, Moray Feu residents felt that the Council would not take action and they formed the Moray Feu Traffic Subcommittee (the communicant) under the Lord Moray Feuar's Committee.

26. Chief among these representations was that the impact of the traffic displacement on the Moray Feu was untenable. Upon the Council's refusal to carry out surveys to measure the increase in traffic volume, the Lord Moray Feuar's Committee undertook their own surveys, which showed an approximately 45 per cent volume increase (traffic was extended through the night and included buses and heavy goods vehicles). Other representations included that traffic should be shared between the Moray Feu and Princes Street (going through the latter especially during the evenings and overnight), while the reopening of a parallel route through the non-residential Charlotte Square should be considered; that the volume and type of vehicles travelling through the Moray Feu should be considered; that the Moray Feu had not been included in the Air Quality Management and Council Noise Management Areas; that no pedestrian safety and no impact assessment had been undertaken; and that the traffic intrusion would harm a UNESCO World Heritage Site, etc.[6]

27. Following the representations, additional air quality monitoring started in Great Stuart Street in 2009. In addition, it was recommended that traffic be permitted one-way eastbound on Hope Street to encourage traffic to use Charlotte Square in preference to the Moray Feu. Tram orders and design were accordingly amended.

28. As the tram network was progressing, new Traffic Regulation Orders were needed to amend the existing ones so as to enable the operation of the tram network. The Statutory Consultation for promotion of New Orders was launched in 2009 and the drafts were sent to key stakeholders and posted on the Internet for information.

29. In January 2010, the communicant made a formal complaint to the City of Edinburgh Council, which involved an exchange of letters. This was followed by a complaint to the Ombudsman in June 2010, who issued a decision on 22 June 2011 in which none of the communicant's complaints were upheld (see para. 68 below).

30. In February 2010, further to the outcome of the Statutory Consultation process, members of the Council, as the local traffic authority, approved the start of the legal process to make two Traffic Regulation Orders in relation to the Edinburgh Tram Network.[7] The

[6] See the original communication listing the communicant's claims, pp. 7–8.

[7] The Orders were: (a) The City of Edinburgh Council (Edinburgh Tram) (Prohibition of Entry, Motor Vehicles and Turning, One-Way Roads, Bus/Tram Priority Lanes and Weight Limit) Traffic Regulation Order 201(-) TRO/09/60A; and (b) The City of Edinburgh Council (Edinburgh Tram) (Traffic Regulation; Restrictions on Waiting, Loading And Unloading, and Parking Places) Designation and Traffic Regulation Order 201(-) TRO/09/60B.

Traffic Regulation Orders (TRO1)[8] were advertised on 22 February 2010 with a period to comment/object until 20 March 2010.

31. In September 2010, the report on the comments and objections on the TRO1 noted that the majority of the comments and objections received related to concerns about the impact of the traffic restriction on Shandwick Place and concerns about a proposed banned manoeuvre at Blenheim Place.

32. On 23 November 2010, the Council's TIE Committee considered the report and recommendations, i.e.: (a) the TRO1 proposal for implementing the tram system (according to the communicant, without provision for limiting traffic displacement through the Moray Feu); (b) a recommendation to set up "workshops" to address objections; and (c) a recommendation to retain the ban on road traffic on Shandwick Place.

33. In January 2011, the inaugural meeting with all objectors to TRO1, including Moray Feu residents, took place, at which the structures of the forthcoming three workshops were agreed and chairs were elected. One of the communicant's representatives was elected to chair two workshops.

34. In March 2011, air quality issues were reviewed by the Tram Subcommittee of the TIE Committee, with representations from the Moray Feu and expert witnesses called by officials. The Subcommittee concluded that monitoring was being undertaken correctly and that there was no significant evidence of increased respiratory problems in the Moray Feu, and noted that the experts disputed the figures for nitrogen dioxide (NO_2) and particulates in the atmosphere cited in the Moray Feu-conducted study.

35. A study concluded in April 2011 showed that the impact of rerouted traffic on the Moray Feu would likely be less than that reported in 2008. The study results were communicated to Moray Feu residents.

36. In the meantime, steps were also undertaken for the introduction of a 20 mile-per-hour zone in the area north of Haymarket.

37. In September 2011, the Edinburgh Council took the decision to introduce the tram project in phases and approval was given for the Statutory Process to vary the TRO1 Orders, as necessary.

38. In February 2012, the TIE Committee considered the report on the workshop and its recommendations on how to take forward the issues identified.

C. Substantive issues

Access to information — articles 4 and 5

39. The communicant alleges that the Council has failed to both gather appropriate environmental data and to provide on request data that they already possess, in breach of articles 4 and 5 of the Convention. No specific environmental impact study on the likely effects of the increased traffic flow on residential Moray Feu has been published. The communicant has repeatedly requested data regarding the trams scheme from the Council including: traffic volume counts, prior to and following the "temporary" traffic diversion in March 2008; and air quality measurements (noting that air quality had been one of the Council's justifications for the 1996 and 2005 clearance of general traffic from Princes Street). Following the Council's indication that it had not and did not intend to make such

[8] TRO1 is the acronym used by the Party concerned for referring to the two Traffic Regulation Orders related to the introduction of the tram line.

measurements, the communicant commissioned a pre-diversion traffic count and undertook its own post-diversion count. Finally, in October 2010, the Council also installed an automatic traffic counter.

40. With respect to exhaust gas pollution, the communicant alleges that despite its requests the Council refused to monitor these on the grounds that the Moray Feu was outside its Noise and Air Quality Management Areas. The communicant considers this justification highly flawed, because the central Edinburgh Air Quality Management Area was designed to cover the Princes Street/Shandwick Place route.

41. The communicant therefore set up its own NO_2 and noise monitoring and recording station in a basement area of Randolph Crescent. Sometime later, allegedly without informing the communicant, the Council set up a passive diffusion tube in one of the streets of the Moray Feu approximately two metres above street level. Data from this device requested by the communicant showed that this street had changed from one of the least polluted streets in Edinburgh to one which, in December 2009, was the second most polluted street monitored as part of the Council's Air Quality Management Area and the only one of those five streets to be residential in nature. Residents raised concerns over the placement of the passive tube above street level when many residents reside in basement flats approximately five metres below the level of the diffusion tube. Residents' monitoring showed the basement level to be experiencing higher concentrations of pollutants.

42. The communicant also queries the corrections applied by the Council to its raw NO_2 measurements, which, according to the communicant, significantly reduced the Council's reported figure. The communicant claims that a Department for Environment, Food and Rural Affairs (DEFRA) expert showed the Council's application of a diffusion curve correction to be flawed and that the Council refuses to acknowledge this fact. Moreover, the communicant claims the Council refuses to disclose the inputs to its use of a correction tool supplied by DEFRA. On the basis of this undisclosed correction tool the Council claims that the data collected by the communicant is invalid (annex 12 to the communication, annex 5 to the Party's response).

43. The communicant submits that, despite its invitation for the Council to do so, Council officials have failed to collaborate with the communicant in its belated installation of NO_2 diffusion tubes, and refused to site any of these alongside the communicant's existing sensors for comparison.

44. With respect to traffic noise, the communicant claims that it has recorded extremely high day and night-time traffic noise levels, but these have been dismissed by the Council (annex 14 to the communication). To the knowledge of residents, the Council has not carried out noise measurements within the Moray Feu.

45. The Party concerned notes that the tram scheme was subject to a full Scottish Transport Appraisal Guidance appraisal, which was considered by Parliament in reaching its decision to promote the scheme.

46. More generally, the Council has a statutory duty to monitor air quality and to assess and develop actions to improve air quality.[9] The Council collects and calibrates air quality data in compliance with national guidelines for the United Kingdom, namely with DEFRA Local Air Quality Management Technical Guidance (09). This data and calibration is validated by an independent laboratory. The data are published annually — as required of

[9] This is described in more detail in a report to the Tram Subcommittee on 28 February 2011 (see annex 7 to the Party's response, posted on the website for the communication or received by the secretariat on 23 August 2011).

all Scottish Local Authorities — once it has been scrutinized and formally ratified by the Scottish Government and the Scottish Environment Protection Agency.

47. The Party concerned agrees with the communicant that the Moray Feu is outside current City Centre Air Quality Management Area. The Party concerned submits this is because the recorded levels of nitrogen do not warrant the inclusion of the Moray Feu area in the Management Area. Notwithstanding this, additional air quality monitoring has been undertaken in the Moray Feu (Great Stuart Street) since July 2009.[10]

48. In respect of the communicant's allegations that the Council has failed to provide raw data upon request, the Party concerned claims that this information was indeed provided, together with the advice that, as it was "raw" data and therefore had not been calibrated, no conclusions could be drawn from the data at that stage.

49. The Party concerned invites the Committee to note that the Ombudsman did not uphold the communicant's complaint that the Council had not carried out a proper and comprehensive environmental impact study (Ombudsman findings of 22 June 2011, paras. 34–36).

50. The Party concerned submits that, at the meeting of the TIE Committee on 27 January 2011, the communicant claimed that data presented to the TIE Committee was "flawed" and that officials had "significantly underestimated" levels of pollutants. To address these claims, the TIE Committee instructed officials to prepare another report on the following: technical data supplied by the objectors; monitoring of NO_2/pollutants on building facades and at basement level; and medical information on any increase in respiratory complaints.

51. The Party concerned also submits that, as requested by the TIE Committee, Council officials undertook the necessary investigation into the three matters above, including consulting experts in the field, and prepared the requested report. The report was considered at a specially convened meeting of the Tram Subcommittee on 28 February 2011. The Subcommittee also heard evidence from the expert witnesses, as well as representations from the communicant, in order to better understand the issues.[11]

52. The Party concerned submits that, although expert witnesses at the meeting showed that the communicant's data was misleading, the Subcommittee instructed officials to extend exceptionally the air quality monitoring in the Moray Feu area to include monitoring at basement level in order to address the communicant's concerns. As a result, in June 2011 monitoring in basements and on building facades began at a number of additional locations. From the additional monitoring, the Council will determine annualized estimated mean values in the first quarter of 2012, by which time the applicable bias adjustment factor and background concentration value for the full 2011 calendar year will have been derived. This will enable further environmental information on this subject requested by the Subcommittee to be made available to the public.

Public participation — articles 6 and 7

53. The communicant alleges failures in the public participation process. It alleges that the Scottish Transport Appraisal Guidance Report,[12] undertaken at the parliamentary approvals stage, does not consider the impacts of the tram scheme on the Moray Feu. In fact, it was written two years before the parliamentary hearings at which the Council denied

[10] Ibid., para. 2.6.

[11] See committee report, witness statements and minutes of this meeting (annexes 7–10 to the Party's response).

[12] Report to the Tram Subcommittee of 28 February 2011, para. 2.6 (annex 7 to the Party's response).

that the Moray Feu would be affected. The communicant submits that it is incorrect to imply that the report fulfils the requirement for an environmental impact study on the Moray Feu traffic diversion, since the only mention of traffic diversions occurs in appendix B to the report.[13]

54. In response to assertions that the Council provided opportunities for public participation that more than met its statutory obligations, the communicant submits that it is only necessary to study the public objections and the Council's response to these to understand how unsatisfactory this participation has been for residents (as detailed in annex 5 to the Party's response).

55. Moreover, the communicant alleges that without the discipline imposed through the ultimate scrutiny of a public hearing, the Council has been able to reject inconvenient criticism with untested argument. In the view of the communicant, concessions — such as the granting of the one-way reopening of Charlotte Square — have been made only under extreme pressure from residents, ultimately with the assistance of Ward councillors.

56. The Party concerned submits that as the proposal for the tram and the traffic rerouting was approved by Acts of Parliament in April 2006, the scheme was subject to full parliamentary scrutiny and there were opportunities for public participation in this process. It notes that paragraphs 3.4 to 3.7 of the Statement of Case for the Traffic Regulation Orders describe these opportunities (annex 2 to Party's response). A full Scottish Transport Appraisal Guidance report was undertaken at the parliamentary approvals stage and the parliamentary process promoted further design refinements in response to various objections received at that time (specifically, two bill amendments were published and were in turn subject to an objection period). Information for Objectors to Private Bills is available on the Scottish Parliament website.[14]

57. The Party concerned adds that, although the Council did not, in the exercise of its discretion under the 1999 Regulations, ultimately decide to hold a hearing of objections in relation to the Traffic Regulation Orders, it undertook extensive informal consultation during the preparation of those Orders. The Party concerned submits that the absence of a public hearing does not signify a lack of opportunities to participate in the decision-making process, since the bulk of consultation, both informal and formal, precedes any hearing, if one is held. The steps taken to consult members of the public are detailed in the Statement of Case for the Traffic Regulation Orders, which provides an overview of the development of the tram project and how it met the relevant statutory requirements with respect to public participation (see section 6 in particular). The thorough public consultation carried out for the tram Traffic Regulation Orders is also outlined in the response to the Ombudsman (annex 1 to the Party's response). In addition, public exhibitions of the draft Traffic Regulation Order drawings were held in September 2008 "to give the public the opportunity to view and comment upon the emerging [Traffic Regulation Order] proposals …", while "comments arising from this process will be considered and, as far as possible, will be incorporated in the finalization of the design" (annex 3 to the Party's response).

[13] "The only mention of traffic diversions occurs in Appendix B page 70. Under 'Operational Phase', the statement appears '... existing traffic will be diverted from the tram route in a number of places. There will be a change of low magnitude in the townscape of a number of areas due to increased traffic, but because the extent of traffic diversions has not been fully modelled this cannot be assessed in detail.'" (response by the Communicant posted on the website for the communication or received by the secretariat on 30 September 2011, p. 3, para. 2; the report itself is no longer accessible from the City of Edinburgh Council website).

[14] http://www.scottish.parliament.uk/business/bills/billguidance/ifotpb.htm.

58. The Party concerned submits that an example of how residents' concerns were taken into account can be seen in the modification of the Traffic Regulation Orders following concerns about increases in traffic on Shandwick Place (see para. 32 above). The Party concerned contends that the draft Orders were also modified in a number of other respects as a result of comments received during the above-mentioned exhibitions.

59. The Party concerned reports that, since the communicant submitted its communication to the Committee, there have been a number of relevant developments, in particular the TRO1 Review (annex 6 to the Party's response), which set out actions to address objections to the tram Traffic Regulation Orders. One of the recommendations was to set up workshops to engage with the local communities to investigate and consider potential mitigation measures in relation to the required Shandwick Place restriction. These workshops (three in total, two chaired by a representative of the communicant) commenced in January 2011.

60. The Party concerned invites the Committee to note that the Ombudsman did not uphold the complaint that residents of the area were excluded from meaningful participation in the decision-making process (Ombudsman findings of 22 June 2011, paras. 27–29). The Ombudsman concluded specifically that residents made representations on the bills in question and were heard as to their concerns and that they have and will continue to have the opportunity to make representations on the development of the Traffic Regulation Orders.

Access to justice — article 9

61. The communicant submits that the use of a private Act of Parliament to approve the trams scheme removed the requirement to hold a public hearing, irrespective of the number of objections to the scheme received from the public. It submits that the use of the Act of Parliament for this purpose — and the Council's statement to the Parliamentary Hearing preceding the Act that the tram proposals would not impact on traffic travelling through the Moray Feu — resulted in the residents of the Moray Feu being denied access to justice under article 9 of the Convention.

62. The communicant notes that the 2008 amendment to the 1999 Regulations providing for discretionary, rather than mandatory, hearing of objections, in order to speed up projects, such as the Traffic Regulation Orders that were subject to full parliamentary scrutiny, reduced access to justice and was introduced only three years after the Party concerned ratified the Aarhus Convention.[15] In this respect, the communicant alleges that, contrary to the Party's claim, traffic rerouting through the Moray Feu had not been subject to parliamentary scrutiny. In fact, at the 2005 parliamentary hearing the agent for the Council, in answer to the submissions of the community chairs, claimed specifically that the residential Moray Feu area would be unaffected by the trams scheme (annex 2 and3 to the communication). In this regard, the communicant notes the Council assertion that the need to permanently divert general traffic through the Moray Feu had not been discovered until 2008 (when it became public knowledge through the September 2008 exhibitions), following which, in the Traffic Regulation Order proposal of 22 September 2009, traffic diversion was designated as a "wider area" issue to be dealt with after the trams became operational.

63. With respect to the local workshops held instead of an independent public hearing, the communicant notes that any recommendations produced have been adjudicated upon by

[15] Annex 10 to the communication shows extracts from a previous Hearing Report dealing with traffic diversion into the Moray Feu.

the same Council officials that the communicants had been petitioning since 2008. Moreover, it was stated those officials were attending the workshop in the role of support but not for the purpose of providing a solution.

64. The Party concerned refutes the communicant's allegation that they had no access to justice to challenge the decisions on the tram Traffic Regulation Orders. It submits that the communicant had the opportunity to participate in the decision-making process through the public consultation process described. Moreover, in respect of access to justice, the Notices for the Traffic Regulation Orders published in the *Scotsman* on 7 December 2010 stated that any person wishing to question the validity of the Traffic Regulation Order might, within six weeks from the making of the order, apply to the Court of Session for that purpose.

65. Finally, the communicants had the option to petition for judicial review of the decision of the Council to make the Traffic Regulation Orders if they thought there was a basis to do so.

66. In respect of the option of judicial review, the communicant alleges that that had been costed for them at a minimum of £60,000, with the possibility of an unlimited expenses award. The communicant submits that this is out of reach for Moray Feu residents in terms of access to justice.

D. Domestic remedies

67. In January 2010, the communicant submitted a formal complaint to the Edinburgh Council (annex 8 to communication) on a number of grounds, including a contention that they had been excluded from meaningful participation in the CETM and the tram projects, both of which had a significant impact on the Moray Feu. The complaint resulted in the exchange of a series of lengthy letters between the communicant and the Council between February and April 2010. In its final response, the Council did not uphold the complaint and indicated that the communicant had the right to appeal the decision with the Ombudsman.

68. In June 2010, the communicant submitted a complaint to the Ombudsman where it claimed that: (a) the Council had increased traffic in the Moray Feu by the way they had managed traffic flow, following their decision to develop the tram system (complaint not upheld); (b) residents of the Moray Feu were excluded from meaningful participation in the process (complaint not upheld); (c) the Council had not carried out a proper and comprehensive environmental impact study regarding noise, air pollution, safety and continual vehicle passage through the predominantly residential area as a proposed permanent situation (complaint not upheld); and (d) the Council had repeatedly made misleading statements, both to residents of the Moray Fey and to other involved parties; most notably to the parliamentary hearings regarding the effect on the Moray Feu (complaint not upheld). The Ombudsman raised a number of issues with the Council in August 2010. The Ombudsman's summary of investigation, dated 22 June 2011, concluded that it had no recommendations to make.

69. No other domestic or international procedures have been initiated to address the matters referred to in the communication.

III. Consideration and evaluation by the Committee

70. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

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. With respect to access to information, the communicant had the possibility to address the issue with the Scottish Information Commissioner, and with respect to public participation, review procedures were available for members of the public, including the communicant, to question the validity of the Traffic Regulation Order within six weeks from the making of the Order and also to petition for judicial review of the decision of the Council to make the Traffic Regulation Order.

72. In addition, the Committee notes that it is not its mandate to evaluate whether the technical data measured/provided or whether the equipment used by the Council and the communicant were reliable or not.

Access to information

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.

78. The Committee notes that the Party has informed it by letter dated 10 September 2012 about the release of the requested raw data by the Edinburgh City Council. In the context of release of data, the Committee also takes note that the communicant did not use the free-of-cost administrative procedure of complaint to the Scottish Information Commissioner.

Public participation

79. In order to assess whether the participatory rights of the public concerned have been infringed during the decision-making procedure, it is necessary to determine what is the decision at issue. The communication relates to the implementation of the Edinburgh Tram Network in the City of Edinburgh. The Committee understands that the communicant does not challenge the public participation process in the context of the adoption of the decision for the project — (Edinburgh Tram (Line One) and Edinburgh Tram (Line Two) private Acts of the Scottish Parliament received Royal Assent in April 2006 — but that it challenges the public participation process for the adoption of the related Traffic Regulation Orders.

80. The Traffic Regulation Orders impacting on the Moray Feu include: the CETM, which was elaborated in the mid-1990s, concluded in 2003 and introduced between May and October 2005; and the TRO1, which was deemed necessary in 2009 in order to properly implement the tram project.

81. The Committee will not examine the process that led to the adoption of the CETM, because this process was effectively concluded in 2003, before the entry into force of the Convention for the Party concerned.

82. The Convention provides for somewhat differentiated requirements for public participation in the framework of decisions on specific activities (art. 6), plans, programmes (art.7) and policies (art. 7), or executive regulations and generally applicable legally binding normative instruments (art. 8). Whether the Traffic Regulation Order falls within the scope of article 6, article 7 or article 8 of the Convention must be determined on a contextual basis, taking into account the legal effects of the Order (cf. the findings on communication ACCC/C/2006/16 concerning Lithuania (ECE/MP.PP/2008/5/Add.6), para. 57).

83. The TRO1 provides direction on how traffic would be organized in a certain area. It is not an act permitting a specific activity, but has general application to all persons that are in a similar situation and unlike a plan or programme, it creates binding legal obligations. As such, it is an act within the scope of article 8 of the Convention.

84. The Convention prescribes the modalities of public participation in the preparation of legally binding normative instruments of general application in a general manner, pointing to some of the basic principles and minimum requirements on public participation enshrined by the Convention (i.e., effective public participation at an early stage, when all options are open; publication of a draft early enough; sufficient timeframes for the public to consult a draft and comment). Parties are then left with some discretion as to the specificities of how public participation should be organized. In the present case, the public has been given the opportunity to comment at various occasions (see also the report of the Ombudsman, in particular paragraphs 22–29). The Committee finds that the Party concerned has offered opportunities for public participation to a degree that meets the requirements of article 8.

85. In particular, the Committee notes that: (a) the effect of TRO1 was essentially the same as the effect of the CETM, namely the rerouting of traffic from the shopping thoroughfare of the city through the Moray Feu, and although the Committee does not examine whether the process for the adoption of the CETM was in compliance with the Convention, Moray Feu residents essentially have had the opportunity to provide comments/objections/representations to the effects of CETM since 1997; (b) importantly, TRO1 has yet not been finalized and, at the recommendation of the TIE Committee, workshops are still being organized to take forward measures to address the wider-area impact of the traffic restriction on Shandwick Place.

86. The Committee also examines whether the result of public participation was taken into account as far as possible. This is mandatory under article 8 and in practice it means that the final version of the normative instrument — here the Traffic Regulation Orders — should be accompanied by an explanation of the public participation process and how the results of the public participation were taken into account.

87. To this end, the Committee reviewed the TIE Committee Reports: "Edinburgh Tram — Traffic Regulation Orders" and "Edinburgh Tram — Traffic Regulation Order: TRO1 Review", both dated 21 September 2010 (annexes 5 and 6 to the Party's response of 23 August 2011). The Committee finds that the comments relating to the impact on the Moray Feu were considered. Although the comments and supporting documentation on air and noise quality were rejected, a detailed reasoning was provided and specific actions were recommended. Among actions to be undertaken were to continue to monitor air quality, and to organize workshops with the residents to discuss mitigation measures. Mitigation measures were seen as necessary as, although the official measurements showed that air and noise quality were within the United Kingdom and European Union standards, it was recognized that there was an air and noise quality impact. In addition, it was recommended to note alternative rerouting (e.g., reopening of Hope Street eastbound) to help redistribution of traffic in the area.[16]

88. For these reasons, the Committee does not find that the Party concerned has failed to take into account as much as possible the objections/comments of the communicant. At the same time, the Committee notes that the public participation process has not been completed yet. The Party concerned may well have striven to promote public participation, but the Committee notes that participation would have been more effective if the raw data, which was part of the basis for decision-making, had been duly provided to the public. While the Committee has already concluded that refusing access to the raw data constitutes non-compliance with article 4, the Committee does not find this to amount to non-compliance also with article 8. Noting that the decision-making procedure has not been completed, the Committee stresses that the raw data should be made available to the public in the continuing decision-making.

IV. Conclusions and recommendations

89. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

90. The Committee finds that by not providing the requested raw data to the public the Party concerned failed to comply with article 4, paragraph 1, of the Convention for a certain period (para. 77). At the same time, it notes that the raw data are provided to the public now. Therefore, the Party concerned is no longer in non-compliance with article 4, paragraph 1, of the Convention.

[16] See in particular paragraphs 3.24 to 3.40, item 2.1 in appendix 1 and sections 14 to 18 in appendix 2 of the "Edinburgh Tram — Traffic Regulations Orders" report (see annex 5 to the Party's response).

B. Recommendations

91. The Committee, pursuant to paragraph 35 of the annex to decision I/7, and taking into account the cause and degree of non-compliance, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommend that the Party concerned ensure that the practice of releasing raw data in ongoing decision-making processes is maintained.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Thirty-ninth meeting
Geneva, 11–14 December 2012
Item 7 (a) of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union

Prepared by the Compliance Committee and adopted on 29 June 2012

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I. Introduction

1. On 15 October 2010, a member of the public, Mr. Pat Swords (the communicant), submitted a communication to the Compliance Committee alleging a failure by the European Union (EU) (the Party concerned) to comply with its obligations under articles 5 and 7 of the of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), in relation to Ireland's renewable, especially wind, energy policy.[1]

2. The communication alleges that public authorities in Ireland and the Party concerned failed to disseminate information concerning the Renewable Energy Feed-In Tariff I (REFIT I) programme in Ireland — a programme supported by the Party concerned both by means of direct funding and by approving State aid — in a timely, accurate and sufficient manner. This information related both to the programme in general and to the carrying out of strategic environmental assessment (SEA). Therefore, according to the communication, the Party concerned failed to comply with article 5 of the Convention. The communication also alleges that Ireland, in adopting its REFIT I programme, did not comply with EU SEA legislation (i.e., the SEA Directive),[2] and that the Party concerned approved State aid for REFIT I without ensuring that Ireland, as an EU member State, had complied with EU law. Therefore, the Party concerned failed to comply with article 7 of the Convention. In addition, the communication alleges that the Party concerned, by providing financial assistance to Ireland for the interconnector project, one of the elements for the implementation of REFIT I, failed to comply with the Convention because the project was not subject to environmental impact assessment (EIA), as required under EU law, and did not comply with the public participation provisions of the Convention.

3. The communication also alleges that the Party concerned did not comply with the Convention by failing to properly monitor implementation of EU law related to the Convention (specifically on access to information, dissemination of information and public participation) by Ireland (not a Party to the Convention) with respect to Ireland's National Renewable Energy Action Plan (NREAP).

4. At its thirtieth meeting (14–17 December 2010), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 28 January 2011. On the same date, a number of questions were sent to the communicant soliciting clarification and additional information on a number of issues in the communication.

6. At its thirty-third meeting (27–28 June 2011), the Committee agreed to discuss the content of the communication at its thirty-fourth meeting (20–23 September 2011).

7. The communicant replied to the Committee's questions on 21 June 2011. In his response, the communicant expanded the scope of the communication to include allegations of non-compliance by the Party concerned with articles 3, 4, 6 and 9 of the Convention. The Party concerned responded to the allegations of the communication on 28 June 2011. In addition, on 20 July 2011, the Party concerned sent a letter to the Committee challenging

[1] The original communication and related documents and submissions from the communicant and the Party concerned, including texts of the national laws and specific decisions related to the case and referenced herein, are available on a dedicated web page for the communication, and are available from http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html.

[2] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

the admissibility of the communication because of the considerably expanded scope of the allegations by the communicant in its submissions of 21 June 2011 as compared with the original communication. The Party concerned also requested the Committee to postpone the discussion of the content of the communication, if the scope would be so broad, to allow for the Party concerned to duly respond.

8. The Committee considered the request of the Party concerned and, using its electronic decision-making procedure, it decided that that the discussion at the thirty-fourth meeting of the Committee would relate to the following issues:

(a) The responsibility of the Party concerned to monitor proper implementation of EU law related to the Convention by Ireland (not a Party to the Convention) with respect to the NREAP (art. 3, 4 and/or 5, 6 and/or 7 of the Convention) in terms of:

(i) Access to/provision of information regarding the alleged non-conduct of SEA for the programme;

(ii) Collection and dissemination of information;

(iii) Public participation.

(b) The responsibility of the Party concerned to comply with the Convention in respect of the approval of State aid for the REFIT I programme in Ireland and the approval of financial support (€110 million) for the interconnector project (between Ireland and the United Kingdom of Great Britain and Northern Ireland), a project in the context of REFIT I (arts. 3 and 5), in particular:

(i) Approval of State aid and financing of a project in respect of which the Convention may not have been properly implemented;

(ii) Failure to disseminate information in respect of REFIT I and the interconnector project.

9. On 5 September 2011, the communicant provided additional information.

10. The Committee discussed the communication at its thirty-fourth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the communicant and the Party concerned provided documents and written statements to the Committee.

11. At the request of the Committee, the Party concerned submitted additional information to the Committee on 10 November 2011. The communicant was given the opportunity to react to this additional information and submitted his reaction on 14 November 2011.

12. Information submitted by the communicant on 10 January, 29 January and 13 March 2012, which sought to further expand the communication, was not considered by the Committee.

13. The Committee prepared draft findings at its thirty-sixth meeting (27–30 March 2012), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 4 May 2012. Both were invited to provide comments by 1 June 2012.

14. The communicant and the Party concerned provided comments on 27 and 29 May 2012, respectively.

15. At its thirty-seventh meeting (26–29 June 2012), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the

Committee's thirty-ninth meeting (11–14 December 2012). It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[3]

A. Legal framework

The Party concerned and its Member States: competences with respect to the Aarhus Convention

16. Article 216, paragraph 2, of the Treaty on the Functioning of the European Union provides that "Agreements concluded by the Union are binding upon the institutions of the Union and on its [m]ember States".

17. Upon signing the Convention, the Party concerned acknowledged the importance of covering the EU institutions, alongside national public authorities, but declared that EU institutions would apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of EU law in the field covered by the Convention.

18. Upon approving the Convention, the Party concerned confirmed its declaration made upon signature. It also declared that the legal instruments that it had already enacted to implement the Convention did not cover fully the implementation of the obligations resulting from article 9, paragraph 3, of the Convention, to the extent that they did not relate to acts and omissions of EU institutions under article 2, paragraph 2 (d), and thus member States would be responsible for the performance of these obligations until the Party concerned, in the exercise of its powers under the Treaty establishing the European Community (which was superseded by the Treaty on the Functioning of the European Union), adopted provisions of EU law covering the implementation of these obligations. The Aarhus Regulation[4] came into effect on 28 June 2007.

State aid

19. State aid is in general prohibited under the law of the Party concerned because it is considered as distorting competition and trade inside the EU (see also Treaty on the Functioning of the European Union, art. 108, para. 3). Exceptionally, State aid may be allowed, on the basis of a detailed set of rules to assess, investigate and monitor State aid, devised by the Commission, such as those on "horizontal objectives" (environment, research and development), regional aid, etc. The approval of exceptions rests exclusively with the Commission.

20. State aid for environmental protection, governed by the guidelines of the Party concerned on State aid for environmental protection,[5] is granted on the basis of the consideration that environmental protection (especially in terms of sustainable development and the "polluter-pays" principle) needs to be integrated into the definition and

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

[4] Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[5] Community guidelines on state aid for environmental protection of 3 February 2001, replaced by the Community guidelines on State aid for environmental protection of 1 April 2008.

implementation of competition policy. The guidelines limit the number of exceptions in order to avoid distortion of competition within the Union.

Legislative framework for the use of renewable energy sources of the Party concerned and its member States

21. Directive 2009/28/EC on the use of renewable energy sources[6] establishes a common framework for the production and promotion of energy from renewable sources. The Directive sets national targets and measures for EU member States (Directive, art. 3). In addition, every member State has to develop a NREAP, which sets the share of energy from renewable sources consumed in transport and in the production of electricity and heating for 2020. In preparing NREAPs, member States must take into consideration efficiency measures aiming at reducing final energy consumption. This means that the more consumption is reduced, the less energy from renewables has to be produced (ibid., art. 4).

22. Preambular paragraph 90 of the Directive mentions that the implementation of the Directive should reflect, where relevant, the provisions of the Aarhus Convention.

23. NREAPs are to comply with the requirements set out in article 4 of Directive 2009/28/EC. These requirements have been detailed in a template adopted by the Commission.[7] Section 5.4 of the template requires member States to indicate how "regional and/or local authorities and/or cities" as well as stakeholders were involved in the preparation of the plan and to "explain the public consultation carried out for the preparation" of the plan.

EU financial assistance in the field of energy

24. The European Energy Programme for Recovery (EEPR), established by the EEPR Regulation,[8] was introduced in the context of the energy and financial crisis and aims at funding projects in three areas of the energy sector: gas and electricity infrastructures; offshore wind energy; and carbon capture and storage.

25. The EEPR Regulation (art. 23, para. 4) requires that projects and actions financed under its terms must be carried out in accordance with EU law and take into account any relevant EU policy, in particular those relating to the environment.

EU law on public access to information

26. Directive 2003/4 on public access to information[9] replaced and repealed Directive 90/313/EC on the freedom of access to information on the environment, in order to bring EU legislation in line with the Convention. The purpose of the Directive is to ensure that environmental information is systematically available and distributed to the public. Applicants for environmental information do not have to state an interest and it falls upon the member States to ensure that public authorities make environmental information they hold available to any requester within one month (or, for exceptions due to the volume of the requested information, two months) and that information relating to imminent threats to

[6] Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

[7] Commission Decision of 30 June 2009 establishing a template for National Renewable Energy Action Plans under Directive 2009/28/EC.

[8] Regulation (EC) No 663/2009 of the European Parliament and of the Council of 13 July 2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy.

[9] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

human health or the environment is immediately distributed to the public likely to be affected. The Directive also requires EU member States to ensure that any applicant that considers that its request for information has not been handled in accordance with the provisions of the Directive has access to a procedure of administrative reconsideration/ review.

27. The European Commission reviews implementation of the Directive by member States on the basis of their reports. It then reports to the Council and the European Parliament and proposes revisions as appropriate.

EU law on public participation

28. Directive 2003/35/EC provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment.[10] In this context, Directive 2003/35/EC primarily introduces amendments to EU legislation relating to EIA (see also paras. 30 ff. below) and to integrated pollution prevention and control (IPPC).[11]

29. In addition to EIA and IPPC, EU legislation provides for public participation in environmental decision-making in other instruments. Relevant examples include instruments related to SEA and water management.[12]

Environmental impact assessment

30. The EU EIA Directive[13] was first adopted in 1985 and applies to projects, as defined in its annexes I and II. Annex I lists projects that are considered to have significant effects on the environment and the conduct of an EIA is mandatory. Annex II lists projects for which the conduct of an EIA rests at the discretion of a member State; the latter has to determine the effects of a project on the basis of a screening procedure, taking into account the criteria of annex III to that Directive.

31. In 2003, the Directive was amended to align its provisions on public participation with those of the Convention.[14]

[10] Directive of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[11] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control. The Directive constitutes the codified version of the Directive, further to four amendments to the original IPPC Directive (Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control), one of which reinforced public participation in line with the Convention.

[12] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, as amended from time to time (a consolidated version of the Directive is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:02000L0060-20090625:EN:NOT (accessed 19 August 2012).

[13] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended in 1997 (through Directive 97/11/EC) to bring the Directive in line with the ECE Convention on Environmental Impact Assessment in a Transboundary Context; in 2003 (through Directive 2003/35/EC) to bring the Directive in line with the Aarhus Convention; and in 2009 (through Directive 2009/31/EC) to amend annexes I and II to the Directive, by adding projects related to the transport, capture and storage of carbon dioxide.

[14] See footnote 9 above.

Strategic environmental assessment

32. The SEA Directive[15] applies to a wide range of public plans and programmes that are subject to, prepared and/or adopted by an authority at the national, regional or local level and are required by legislative, regulatory or administrative provisions. Contrary to the EIA Directive, the SEA Directive does not include a list of plans and programmes. The conduct of SEA is mandatory for plans and programmes prepared for some sectors, including energy, industry, transport, waste and water management, town and country planning or land use, and which set the framework for future development consent of projects listed in the EIA Directive. It is also mandatory for plans and programmes determined to require an assessment under the EU Habitats Directive.[16] Apart from those plans and programmes for which the conduct of SEA is mandatory, EU member States carry out a screening procedure to determine whether these are likely to have significant effects on the environment.

B. Facts

33. In May 2006, Ireland launched the REFIT I programme, which was approved by the EU for State aid in September 2007 (State aid N 571/2006 Ireland: RES-E support programme). The programme sought to facilitate Ireland in obtaining its targets for renewable energy based on Directive 2001/77/EC.[17]

34. In March 2010, the European Commission selected the Ireland/Wales interconnector (Meath-Deeside) project (interconnector project) for financial support (€110 million), under EEPR. The project was one of the elements of REFIT I and would be carried out by Eirgrid, the State-owned company for energy and operation of grid infrastructure in Ireland.

35. In July 2010, Ireland submitted its NREAP to the Commission. The Commission's evaluation of Ireland's NREAP, based on article 4, paragraph 5, of Directive 2009/28/EC is still pending (as of 19 March 2012).

C. Domestic remedies

36. The communicant has lodged a number of complaints to the Office of the Commissioner for Environmental Information in Ireland with respect to the failure of Irish authorities to provide requested information. Most of the decisions of the Commissioner did not result in access to the information requested on the ground that the requested information did not exist.

37. The communicant refers to a possibility to appeal to the High Court one of the decisions issued by the Commissioner for Environmental Information (CEI/09/0016) as a case against the State for failure to complete the necessary procedures, such as SEA and public participation. This, however, according to the communicant is a costly avenue, which was not pursued.

38. Four complaints are still pending.

[15] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[16] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[17] Directive of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

39. On 13 October 2008 and in June 2009, the communicant submitted two papers to the Joint Oireachtas Committee on Climate Change and Energy Security highlighting the major problems with REFIT I.

40. In November 2009, the communicant contacted the Garda Bureau of Fraud Investigation relating to systematic failures of senior elected and non-elected officials to comply with the legislation on the statute books and a complaint file was opened (FB11/242.09).

41. In January 2010, the communicant lodged a complaint with the EU Ombudsman relating to infringements of environmental and energy legislation in Ireland. The EU Ombudsman's decision on the complaint was issued on 27 September 2011.[18] The Ombudsman concluded that "no further inquiries into the complaint are justified" and closed the case.

42. In March 2010, the communicant submitted a complaint with the EU Commission, which opened a formal complaint (CHAP (2010) 00645) related to compliance with EU environmental legislation. In this regard, the Party concerned emphasizes that it dealt with the complaint with the utmost diligence, but that, despite its enquiries addressed to the applicant/communicant, the allegations were not substantiated. It was not possible to find an infringement of EU law and on 6 April 2011 the file was closed (see annex I to the European Commission's response of 28 June 2011).

D. Substantive issues

General observations on the allegations

43. The initial communication (six pages and attachments) concerns access to information and public participation and alleges:

(a) Non-compliance with article 5 (and possibly 4) by the Party concerned with respect to environmental information with regard to Ireland's NREAP and REFIT I;

(b) Non-compliance with article 7 (and possibly 6) of the Convention with respect to approval of Ireland's NREAP, the approval of State aid by the Party concerned for REFIT I and the funding by the Party concerned of a related project (the interconnector).

44. The additional information provided by the communicant on 21 June 2011 includes a number of new allegations, concerning:

(a) The general failure by the Party concerned to ensure implementation of the EU directives implementing the Aarhus Convention in Ireland (art. 1 and art. 3, paras. 1 and 3);

(b) The failure of the Party concerned to ensure implementation of the access to justice provisions of the Convention, with regard to remedies on access to information and public participation (art. 9, paras. 1 and 2), remedies on failures to comply with environmental law (art. 9, para. 3) and costs (art. 9, paras. 4 and 5).

45. In its letter of 20 July 2011, the Party concerned contends that it did not have an opportunity to respond to the new allegations submitted by the communicant on 21 June 2011.

[18] Decision of the European Ombudsman closing the inquiry into complaint 2587/2009/JF against the European Commission.

46. The Committee, using its electronic decision-making procedure, decided to frame the discussion during the thirty-fourth meeting mainly within the limits of the allegations contained in the original communication (see also para. 8 above). The substantive issues raised below have been selected on the basis of this decision of the Committee.

Admissibility

47. The Party concerned challenges the admissibility of the communication for the reasons explained in the following paragraphs.

48. In its response of 28 June 2011, the Party concerned argues that the communication is inadmissible insofar as it relates to matters outside the scope of the Convention. In particular, with respect to:

(a) The very high costs of the renewable energy programme pursued in Ireland;

(b) The alleged dissemination of false information from Irish authorities;

(c) The obligation of Irish authorities to provide environmental information upon request, when such information does not exist.

49. The Party concerned, in a letter to the Committee dated 20 July 2011, also argues that, while the original communication concerns its responsibility for alleged infringements by Ireland of the Convention in relation to Ireland's policy regarding renewable energy (specifically wind energy), the communicant's response of June 2011 covers matters such as Ireland's climate change legislation, waste, access to justice, etc. Moreover, in the view of the Party concerned, it appears that the communicant also calls on the Committee to examine Ireland's entire environmental policy and the involvement of the Party concerned. According to the Party concerned, the Committee should therefore reject the communication as "manifestly unreasonable", in accordance with decision I/7 (annex, para. 20 (c)).

50. The Party concerned also refers to the fact that the claims of the communicant should be addressed to the Irish courts, while the communicant does not appear to have made use of this forum. In the view of the Party concerned, the Committee should take this into account when deciding on the admissibility of the communication (decision I/7, annex, para. 21).

51. Finally, the Party concerned claims that the allegations of the communicant relating to breach of article 5 of the Convention are not supported by corroborating information, as required (ibid, para. 19). This should also be taken into consideration by the Committee when deciding on the admissibility of the communication.

Applicability of the Convention to Ireland

52. The Party concerned argues that the extent of its competences and liabilities is spelled out in the Declaration made by the then European Community upon ratification of the Convention: the international responsibility of the EU under the Convention for acts and omissions of Ireland is commensurate with the EU competence, namely whether the acts or omissions relate to matters for which the EU is responsible under the Convention.

53. In the view of the Party concerned, the communicant has failed to prove this. Moreover, the Party concerned claims that it has done its utmost so far to pursue alleged or actual breaches of the relevant directives by Ireland.

54. The Party concerned draws attention to the infringement proceedings initiated by the Commission in accordance with articles 258 and 260 of the Treaty on the Functioning of the European Union, which enable it to ensure the application of EU law by its member States. Accordingly, the Party concerned gives a short account of cases which have raised concerns

of non-compliance by Ireland with EU law relating to access to documents, EIA and SEA. The Party concerned submits that it has been highly vigilant with regard to Ireland's implementation of EU environmental law, including provisions within the scope of the Convention, and that in any event, Ireland was not found in non-compliance with the three EU Directives (on access to documents, EIA and SEA).

Access to information

55. The communication alleges that public bodies in Ireland failed to provide key information on REFIT I on request, and routinely engaged in dissemination of false information on the environment in relation to this programme.

56. The communicant also alleges that it has repeatedly requested information from the Irish authorities, which never addressed his requests. In support of his allegations, the communicant refers to requests he made to Ireland's Development Authority, Eirgrid, and the University College of Dublin, without receiving a response. He brought the failure of the Irish authorities to provide the requested information to the attention of the Commissioner for Environmental Information, who decided in favour of the authorities because the information did not exist. He requested to see SEA documentation and a cost benefit analysis for the renewable energy programme, as well as information regarding the economic impacts of the wind energy programme be provided, including its costs, subsidies required for job creation and industrial grants, etc.

57. The Party concerned disagrees with the communicant: according to the Party concerned, Irish authorities published information about the benefits of the renewable energy programme. Whether the communicant believes or not that this information is correct is irrelevant. In the view of the Party concerned, the allegation that Irish authorities disseminated false information is "both lacking in the requisite clarity and wholly unsubstantiated". In addition, "it is not obvious that the EU would have any power to take action against a [m]ember State which broadcasts or publishes information about the advantages of renewable energy".

58. Furthermore, the Party concerned contends that nothing in the Convention requires Parties to prepare the information requested by the communicant from the Irish authorities. Had this information existed, it would qualify as environmental information under article 2, paragraph 3 (b), of the Convention but since this information did not exist, it could not be provided.

Public participation

State aid

59. The communication alleges that the Party concerned has failed to comply with the Convention because the Commission approved State aid for Ireland's REFIT I to support electricity sourced from renewable energy, while Ireland had failed to respect the SEA and EIA Directives by, among other things, not subjecting its NREAP to SEA.

60. The Party concerned claims that the aid scheme was approved upon assessment of relevant provisions applicable at the time, and that none of the Aarhus-related EU directives was infringed. Had this been the case, the Commission would have initiated infringement proceedings pursuant to article 258 of the Treaty on the Functioning of the European Union.

Ireland's renewable energy plan

61. The communicant alleges that the Party concerned failed to comply with the Convention because it failed to ensure that Ireland, in adopting its NREAP under article 4 of Directive 2009/28, complied with the EU SEA and EIA Directives.

62. The Party concerned disagrees with the allegations. It contends that that the adoption of the plan was in accordance with EU legislation and nothing in the Convention precludes the promotion of wind energy. Most importantly, according to EU legislation (specifically Directive 2009/28/EC) these energy plans are attributable to the States and not to the Commission. The latter may issue a recommendation, but does not approve the plans. The Commission recommendation is issued after the Commission evaluates whether the measures envisaged in the plan can ensure that the share of energy from renewable sources equals or exceeds the share shown in the indicative trajectory set out in the Directive.

63. According to the Party concerned, prior to its adoption, the NREAP was subject to a consultation procedure, involving county and city managers as well as other regional and local bodies, while a consultation procedure with the wider public was carried out from 11 to 25 June 2010, during which 58 submissions were received from various stakeholders. This, according to the Party concerned, was in full compliance with article 7 of the Convention.

64. According to the Party concerned, Ireland's NREAP falls outside the scope of article 6 of the Convention.

65. Information about Ireland's NREAP and other relevant information is available on the transparency platform administered by DG Energy. In this respect, the Party concerned disagrees with any allegations of non-compliance with article 5 of the Convention.

66. For all these reasons, the Party concerned argues that, when establishing its NREAP, Ireland was not in breach with any of the provisions of the Convention and that the Party concerned cannot be found in non-compliance with the Convention by reason of any involvement in Ireland's NREAP.

Interconnector between Ireland and the United Kingdom

67. The communicant alleges that the Party concerned failed to comply with the Convention because it provided financial support (€110 million) for the construction of the interconnector, despite Ireland's failure to comply with the Directive on access to information and the SEA and EIA Directives.

68. In the view of the Party concerned these allegations are unfounded for the reasons set out below.

69. In approving funding for the interconnector, the Party concerned took into account EU law and policy relating to the environment (as required by the EEPR Regulation, art. 23, para. 4). In doing so, the Commission found that the project, because of its features, did not fall within the scope of the EIA Directive. Therefore, the Party concerned argues that since it chose not to apply its EIA Directive to this type of project, the project falls outside the scope of article 6, paragraph 1 (b), of the Convention. In addition, the interconnector project falls outside the scope of article 6, paragraph 1 (a), of the Convention, since it is not listed in annex I to the Convention. This means the public participation provisions of article 6 are not applicable to the interconnector, according to the Party concerned.

70. The Party concerned also adds that it would not be reasonable for the communicant to argue that the interconnector would transmit electricity produced by wind farms that were built in breach of the EIA Directive, and that therefore the Party concerned would be

in non-compliance with the Convention (see also annex II to the Party's response of 28 July 2011). The Party concerned confirms that the Commission has not identified any systematic failure to comply with the EIA Directive in relation to wind farms in Ireland and that EIAs were carried out, where mandatory by law.

III. Consideration and evaluation by the Committee

General considerations

71. The EU signed the Aarhus Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005. The EU is a Party to the Convention since 17 May 2005.

72. Ireland, a member State of the EU, is not a Party to the Convention.

73. It should be noted that the communication includes a number of allegations, for example regarding costs of the implementation of the energy policy in question, which are not covered by the Convention. In addition, in its response of 21 June 2011, the communicant included a number of new or expanded allegations that were not contained in its initial allegations concerning non-compliance with articles 5 and 7 of the Convention. After the hearing held on 21 September 2011, the Committee decided to further limit its consideration of the communication and concentrate on the main allegation involving the current legal system in place in the Party concerned, and thus decided to focus its considerations on the NREAP adopted by Ireland on the basis of Regulation 2009/28/EC. It first considers the relevance of article 7 of the Convention and thereafter articles 4, 5 and 9 in relation to the NREAP adopted by Ireland on the basis of Regulation 2009/28/EC.

74. Prior to engaging in these considerations and without examining the legal nature of REFIT I, the Committee finds that in this case the decisions taken by the Party concerned to approve State aid for REFIT I and to approve financial assistance for the interconnector, on their own, do not amount to decisions under articles 6 or 7 of the Convention. Therefore, the Committee decides to focus on NREAP, and to deal with allegations concerning articles 4, 5 and 9 of the Convention only.

Ireland's NREAP

Plan or programme: article 7 of the Convention

75. The Committee finds that Ireland's NREAP constitutes a plan or programme relating to the environment subject to article 7 of the Convention because it sets the framework for activities by which Ireland aims to enhance the use of renewable energy in order to reduce greenhouse gas emissions, based on Directive 2009/28/EC. This view was taken by the communicant and was also confirmed by the Party concerned during the oral hearing and in writing in response to questions by the Committee. It follows from article 7 of the Convention that when an NREAP is prepared by a Party to the Convention, the requirements for public participation set out in article 6, paragraphs 3, 4 and 8, of the Convention apply, albeit that in the context of article 7 of the Convention "[t]he public which may participate shall be identified be the relevant public authority, taking into account the objectives of the Convention".

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.

77. The Party concerned should have in place a regulatory framework to ensure proper implementation of the Convention. The Party concerned chose not to apply the SEA Directive to the adoption of NREAPs by its member States; instead it chose to incorporate a process for public participation in Directive 2009/28/EC. While this is a choice for the Party concerned, it is the task of the Committee to examine whether the Party concerned has indeed properly implemented article 7 of the Convention. The Committee in this respect notes that a framework for implementing the Convention with respect to plans and programmes concerning the environment, including plans and programmes related to renewable energy, should have been in place since February 2005, when the EU became a Party to the Convention.

78. The Committee finds that the Party concerned, through article 4 of Directive 2009/28/EC and the template grounded in that article, and taking into account preambular paragraph 90 of that Directive, has in place a legal framework for implementing article 7 of the Convention. The Party concerned, moreover, by way of the Commission's role in evaluating NREAPs and the fact that the Commission may issue a recommendation to a member State, provides a system for monitoring whether member States, including Ireland, properly implement article 7 of the Convention in developing NREAPs. The Committee first assesses the template and then how the Party concerned fulfilled its monitoring role.

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.

81. In assessing how the Party concerned monitored implementation by Ireland of article 7 of the Convention, the Committee notes that the Party concerned neither in its written statements nor in its oral presentations provided evidence that it evaluated Ireland's NREAPs in the light of the requirements of article 7 of the Convention. The Party concerned instead submits that in this case Ireland, even if not a Party to the Convention, complied with the requirements of article 7 of the Convention by holding both a targeted consultation and a consultation with the wider public, the latter for the duration of a period of two weeks.

82. The communicant submits that the targeted consultation was only open to entities that supported Government policy and that the public was not adequately informed of the public consultation. The Committee takes these allegations to mean that the communicant claims that the targeted consultation was conducted without adequately "taking into account the objectives of this Convention", as required by article 7 of the Convention and that the public consultation was not conducted in conformity with article 6, paragraph 3, of the Convention. However, the Committee was provided with insufficient information by the communicant and the Party concerned to assess whether the targeted consultation conducted by Ireland was conducted without adequately "taking into account the objectives of this Convention", as required by article 7 of the Convention.

83. Nevertheless, with respect to the consultation with the public conducted by Ireland the Committee finds that it was conducted within a very short time frame, namely two weeks. Public participation under article 7 of the Convention must meet the standards of the Convention, including article 6, paragraph 3, of the Convention, which requires reasonable time frames. A two week period is not a reasonable time frame for "the public to prepare and participate effectively", taking into account the complexity of the plan or programme (see findings on communication ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 69). The manner in which the public was informed of the fact that public consultation was going to take place remains unclear; neither the Party concerned nor the communicant provided clarity on the matter. The Committee furthermore points out that a targeted consultation involving selected stakeholders, including NGOs, can usefully complement but not substitute for proper public participation, as required by the Convention.

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.

Article 3, paragraph 1

86. Article 3, paragraph 1, of the Convention requires a Party to the Convention to "take the necessary legislative, regulatory or other measures, including measures to achieve compatibility between the provisions implementing the . . . public participation . . . provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention".

87. Taking into account the distinctive structure of the Party concerned and the allocation of responsibilities between the EU and its member States, the only way for the

Party concerned to implement article 7 by means other than legislative measures would be to provide a clear regulatory framework and/or clear instructions to member States on how to ensure public participation with respect to NREAPs, to be enforced through appropriate measures by the Party concerned. Based on the considerations regarding the lack of an appropriate regulatory framework or evidence of other measures to ensure that public participation takes place in accordance with the Convention, the Committee finds that the Party concerned is also in non-compliance with article 3, paragraph 1, of the Convention, in relation to the adoption of NREAPs by member States on the basis of Directive 2009/28/EC.

Access to information: articles 4 and 5 of the Convention

88. The communicant alleges that Ireland and the Party concerned did not provide access to requested information related to Ireland's NREAP as required by article 4 of the Convention. The communicant also alleges that Ireland and the Party concerned disseminated insufficient or incorrect information about Ireland's NREAP contrary to article 5 of the Convention.

89. The Committee notes that, to the extent that information is available to the Party concerned, that information seems to be readily available to the public, especially through its websites. However, the Committee is not in a position to ascertain whether the technical information disseminated by the Party concerned, or the communicant for that matter, is correct.

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.

91. The Committee thus does not find the Party concerned to be in non-compliance with articles 4 or 5 of the Convention.

Access to Justice: article 9, paragraph 1, of the Convention

92. The communicant alleges that access to justice was deficient both in Ireland and as provided by the Party concerned in relation to the communicant's requests for information on Ireland's NREAP, and thus contrary to article 9, paragraph 1, of the Convention.

93. The Committee notes that the communicant had access to administrative procedures provided by the Party concerned and finds that in these procedures the requests for information, given the information available to the Party concerned at the time of the request, were adequately considered.

94. The Committee, given the legal system in place in the Party concerned, finds that the communicant has not substantiated how allegations of deficiencies regarding access to justice in Ireland are attributable to the Party concerned.

95. The Committee therefore does not find the Party concerned to be in non-compliance with article 9, paragraph 1, of the Convention.

IV. Conclusions and recommendations

96. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

97. The Committee finds that the Party concerned:

(a) By not having in place a proper regulatory framework and/or clear instructions to implement article 7 of the Convention with respect to the adoption of NREAPs by its member States on the basis of Directive 2009/28/EC has failed to comply with article 7 of the Convention (para. 85);

(b) By not having properly monitored the implementation by Ireland of article 7 of the Convention in the adoption of Ireland's NREAP has also failed to comply with article 7 of the Convention (para. 85);

(c) By not having in place a proper regulatory framework and/or clear instructions to implement and proper measures to enforce article 7 of the Convention with respect to the adoption of NREAPs by it member States on the basis of Directive 2009/28/EC has failed to comply also with article 3, paragraph 1, of the Convention (para. 86).

B. Recommendations

98. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to that decision, recommends that the Party concerned adopt a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs. This would entail that the Party concerned ensure that the arrangements for public participation in one of its member States are transparent and fair and that within those arrangements the necessary information is provided to the public. In addition, such a regulatory framework and/or clear instructions must ensure that the requirements of article 6, paragraphs 3, 4 and 8, of the Convention are met, including reasonable time frames, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation. Moreover, the Party concerned must adapt the manner in which it evaluates NREAPs, accordingly.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Thirty-ninth meeting
Geneva, 11–14 December 2012
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union

Prepared by the Compliance Committee and adopted on 29 June 2012

Corrigendum

1. Paragraph 2, last sentence

For because the project was not subject to environmental impact assessment *read* because the project was not subjected to environmental impact assessment

2. Paragraph 73

For Regulation 2009/28/EC *read* Directive 2009/28/EC

Please recycle

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Meeting of the Parties to the Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Thirty-eighth meeting
Geneva, 25–28 September 2012
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2011/57 concerning compliance by Denmark

Adopted by the Compliance Committee on 30 March 2012

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I. Introduction

1. On 26 January 2011, the non-governmental organization (NGO) Dansk Ornitologisk Forening — BirdLife Denmark (DOF) (Danish Ornithological Society) (hereinafter the communicant) submitted a communication to the Committee alleging the failure of Denmark to comply with its obligations under article 9, paragraphs 2, 3, 4 and 5, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. Specifically, the communication alleges that the Party concerned fails to comply with the requirements of article 9, paragraphs 2 to 5, of the Convention because the new fees regime before the Danish Nature and Environmental Appeal Board (NEAB), which came into effect since 1 January 2011, imposes fees on NGOs for bringing appeals to NEAB that are much higher than before and different from the fees imposed on private individuals.

3. At its thirty-first meeting (22–25 February 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 14 March 2011. On the same date, a letter was sent to the communicant. Both parties were invited to answer a question about the average yearly income in Denmark.

5. At its thirty-second meeting (11–14 April 2011) the Committee provisionally agreed that it would discuss the substance of the communication at its thirty-fifth meeting (13–16 December 2011). However, at its thirty-third meeting (27–28 June 2011), the Committee confirmed that it would discuss the communication at its thirty-fourth meeting (20–23 September 2011).

6. On 10 August 2011, the communicant replied to the Committee's question. On 31 August 2011, the Party concerned sent its response to the communication.

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

8. The communicant submitted its responses to the Committee's questions on 23 October 2011. The Party concerned submitted its responses to the Committee's questions on 1 November and 30 November 2011, the latter with additional information concerning an important recent development (see para. 26 below). By letter of 13 December 2011, the communicant provided comments on the letter from the Party concerned on 30 November 2011.

9. The Committee prepared draft findings at its thirty-fifth meeting, completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 10 February 2012. Both were invited to provide comments by 9 March 2012.

10. The communicant and the Party concerned provided comments on 8 and 16 March 2012, respectively.

11. At its thirty-sixth meeting (27–30 March 2012), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee

then adopted its findings and agreed that they should be published as a formal pre-session document to its thirty-eighth meeting (25–28 September 2012). It requested the secretariat to send the findings to the Party concerned and to the communicant. At its thirty-eighth meeting, the Committee reviewed the findings as edited in English and translated into French and English and confirmed their adoption.

II. Summary of facts, legal framework and issues[1]

A. National legal framework

12. NEAB is an independent and impartial tribunal set up to deal with public complaints regarding administrative decisions concerning the environment.

13. Decisions of Danish public authorities can be appealed by natural and legal persons that are affected by those decisions and also by NGOs which are deemed under national law to be members of the public concerned with respect to environmental matters.

14. Until 2004, applicants to NEAB (whether NGOs, enterprises or individuals), were not charged for starting a procedure. In 2004 an upfront DKK 500 fee was introduced for most of the applicants.

15. In 2006, a Danish Livestock Act was introduced. It created a regulatory framework (permitting regime) for the activity of livestock production facilities. The power to issue the final environmental decision was devolved to local authorities. Complaints on these local decisions were free of charge until 1 January 2011.

16. In early 2011, the regime for fees charged for appeals to NEAB changed, according to the following legislation (annexes 1 and 2 to the communication):[2,3]

(a) Act amending the Act on the Nature and Environmental Appeal Board and other Acts (Act No. 1608 of 22 December 2010);

(b) Statutory order No. 1673 of 22 December 2010 on fees for bringing complaints to the Nature and Environment Appeal Board.

17. The stated purpose of these amendments was to enable NEAB to focus more on the most important cases and to ensure fast and efficient consideration of all appeals.[4]

18. The new regime entered in effect as of 1 January 2011. Accordingly, a fee of DKK 500 (approximately €67) is charged for private persons and a fee of DKK 3,000 (approximately €400) is charged for others, such as enterprises, NGOs and public authorities, making appeals.

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

[2] Documentation provided by the Party concerned and the communicant referred to in these findings can be found on the Convention website at http://www.unece.org/env/pp/compliance/Compliancecommittee/57TableDK.html.

[3] Available online from the Convention website or from the Danish Government (https://www.retsinformation.dk), in Danish only.

[4] Paragraph 1, Explanatory notes to the Bill to amend the Act on the Nature and Environmental Appeal Board and the Act to amend the Nature Protection Act, the Environmental Protection Act and various other acts (Differentiated appeal fee) (English translation provided by Party concerned on page 13 of its letter of 1 November 2011).

19. Some complaints concerning access to environmental information are exempted from fees (sect. 18, paras. 2–6, Danish Livestock Act).

20. The fees are returned to the appellant if: (a) as a result of the appeal, the decision at issue is amended or repealed; (b) the complaint is wholly or partly upheld by NEAB; or (c) if the complaint is rejected by NEAB for some procedural reasons (sect. 2 of Statutory order No. 1673).

B. Relevant factual background

21. Between 2007 and 2010, several thousand procedures were initiated before NEAB. For example, in 2008 and 2009, approximately 2,500 appeals were brought before NEAB annually and, in 2010, approximately 3,000 appeals were filed.[5] A large number of these appeals related to administrative decisions issued under the Domestic Livestock Act (for example, in 2009, 14 per cent of cases and, in 2010, 23 per cent of cases related to appeals brought under that Act).[6] The Party concerned estimated that approximately 20 per cent of all cases filed annually before NEAB were brought by NGOs,[7] with 54 to 56 per cent of appeals under the Danish Livestock Act being brought by NGOs.[8] Although the communicant and Party concerned differ on the statistics, on either tally, the success rate of NGO appeals regarding decisions issued under the Danish Livestock Act was high. According to the Party concerned, in a study of 173 appeals under that Act, NGOs succeeded in having the decision annulled or changed in 95 per cent of their appeals, in comparison with the success rate for permit applicants (47 per cent success rate), neighbours (61 per cent success rate) and "others" (57 per cent success rate).[9]

22. In the light of the very large number of cases pending before NEAB, in 2010 the Danish Government considered various measures to speed up the case processing time and to ensure fast and efficient consideration of all appeals. One of the measures proposed was a substantial increase in the fee payable by those other than private persons to appeal to NEAB, to a total of DKK 3,000. In deciding to proceed with this particular measure, the Government's Explanatory Note to the bill imposing the new fees regime stated, inter alia, that "the number of appeals submitted by organizations and enterprises is expected to decrease."[10]

23. The Party concerned has a number of other quasi-judicial administrative bodies that deal with administrative appeals regarding issues somewhat comparable to environmental rights. These include the National Agency for Patients' Rights and Complaints, the Energy Board of Appeal, the Energy Supplies Complaint Board, the Consumer Complaint Board and the Danish National Tax Tribunal. At the present time the fees for appealing administrative decisions before these other bodies are considerably lower than the fee imposed on NGOs seeking to bring an appeal to NEAB. For example, appeals to the National Agency for Patients' Rights and Complaints and the Energy Board of Appeal are free of charge.[11]

[5] Response of the Party concerned of 30 November 2011, table 1, p. 2.
[6] Ibid, table 3, p. 3.
[7] Ibid, table 1, p. 2.
[8] Ibid, p. 3.
[9] Ibid, table 6, p. 6.
[10] See footnote 2, paragraph 4.1.2, of that document.
[11] Response of the Party concerned of 30 November 2011, p. 2.

24. According to the communicant, the average yearly income for men (after taxation) in Denmark is DKK 194,000 and that of women DKK 164,000 (approximately €26,000 and €22,000, respectively, or an average of €24,000 for all individuals).[12]

25. As for NGOs, their income derives from membership fees and donation. By way of indication, the annual fee for members of the communicant is €37.60.

26. By letter of 30 November 2011, the Party concerned informed the Committee that on 29 November 2011 the Danish Government had decided to present a bill before the Danish Folketing (Parliament) to reduce the fee for making complaints to NEAB from DKK 3,000 for those other than private persons (for example enterprises, NGOs, authorities, etc.) to DKK 500. The Party concerned indicated that it is not the intention to change the fee for making complaints for private persons, which will remain DKK 500. The Party concerned indicated that it is the intention to present the bill before the Folketing in February 2012 and the Act is expected to come into force in summer 2012.

C. Substantive issues and arguments of the parties

Article 9, paragraphs 2 and 3

27. The communicant alleges that the new differentiated regime introducing higher fees for NGOs and other non-private persons to appeal decisions by public authorities in environment and nature protection matters is not in compliance with article 9, paragraph 2, of the Convention. The communicant submits that NGOs have limited resources and the new law effectively limits the capacity of NGOs to challenge the substantive and procedural legality of decisions, acts or omissions subject to article 6 of the Convention.

28. The communicant also alleges that the new law is not in compliance with article 9, paragraph 3. Because of their limited resources, NGOs will also be discouraged from challenging acts and decisions of public authorities which contravene provisions of national law relating to the environment.

29. The Party concerned argues that these provisions of the Convention are not relevant in the present case, because the aim of the provisions is to ensure access to review procedures and not to regulate fees.

Article 9, paragraph 4

30. The communicant alleges that the new law is not in compliance with article 9, paragraph 4, of the Convention. The access to justice procedures referred to under article 9, paragraphs 2 and 3, are not fair in Denmark, since they provide for differentiated fees for NGOs, and because in the long run they will be prohibitively expensive.

31. The Party concerned disagrees with the communicant. First, with regard to "prohibitively expensive", it argues that the information on the average income in Denmark (see para. 24), especially compared with other European countries, demonstrates that Denmark is a high-income country.[13] It submits that while the fees charged under the new law may be considered by some as "expensive", they are not "prohibitively" expensive.

32. In support of its views, the Party concerned refers to the findings of the Committee in communication ACCC/C/2008/23 (United Kingdom of Great Britain and Northern Ireland) (ECE/MP.PP/C.1/2010/6/Add.1, para. 49) and ACCC/C/2008/24 (Spain)

[12] The communicant refers to the report ,"Denmark in figures 2011", from *Danmarks Statistik*.
[13] Annex to Party's response of 31 August 2011.

(ECE/MP.PP/C.1/2009/8/Add.1, paras. 106–107). Though the average net incomes in the United Kingdom and in Spain are lower than in Denmark, in neither case did the Committee find non-compliance by the Parties concerned.

33. Given the above, and also considering that complaints on access to information are exempted from any fees and that fees are returned when the appeals are upheld by the Board (see paras. 19 and 20 above), the Party concerned argues that the new fee regime is not prohibitively expensive.

34. Second, with regard to the arguments of the communicant that the remedies are not "fair", the Party concerned argues that the differentiated fees are due to the different solvency of the appellants, because a union of persons (such as an NGO) is normally in a better financial position than a private person.

35. In support of its argument, the Party concerned refers to the annual income of the communicant, which according to its 2010 annual report had over 16,000 members and received DKK 5.4 million from member fees. It also refers to the findings of the Committee in communication ACCC/C/2008/33 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.3, para. 128), in which the Committee in assessing compliance with article 9, paragraph 4, considered the system as a whole and in a systemic manner. The Party concerned submits that, according to the Convention, access to review is to be granted either to a court of law or another independent and impartial body. NEAB is an independent and impartial body and there is broad access to make complaints to it. This means that, in many environmental cases, the financial barrier for access to justice is €67 for private persons and €400 for all others. It is submitted that these are very modest amounts compared to the costs of legal procedures before courts. In addition, there is no requirement to be represented by a lawyer or to have an expert, which means that these costs are saved. Hence, the system in Denmark is fair and in compliance with the Convention.

Article 9, paragraph 5

36. Finally, the communicant alleges that the new fees regime is not in compliance with article 9, paragraph 5, of the Convention, because the Party concerned has not established appropriate assistance mechanisms to remove or reduce the financial barriers for NGOs on access to justice (and in fact it is the purpose of the new regime to establish such a financial barrier).

37. The Party concerned argues that the words "shall consider" in article 9, paragraph 5, means that Parties only have an obligation to "consider" appropriate assistance mechanisms and the Convention leaves a wide discretion to the Parties to design financial assistance mechanisms. In this regard, by establishing a system of bringing cases before NEAB that is widely accessible and inexpensive in relation to the average income and compared to court fees, Denmark considers that it has reduced financial barriers to access to justice. Thus, there is no need to establish an additional mechanism to further reduce these modest fees.

III. Consideration and evaluation by the Committee

38. Denmark ratified the Convention on 29 September 2000. The Convention entered into force for Denmark on 30 October 2001.

39. The Committee finds the communication to be admissible.

Access to justice — article 9 paragraphs 2 and 3

40. The communicant considers that decisions issued by the local authorities according to the Danish Livestock Act are environmental decisions subject to article 6 of the

Convention. During the discussion of this communication at the thirty-fourth meeting, the representatives of the Party concerned agreed with that allegation.

41. Article 9, paragraph 2, provides for access to review procedures for members of the public concerned to challenge the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention. Article 9, paragraph 2 addresses issues such as standing and access to an independent and impartial review procedure, whereas financial barriers are addressed in other provisions of the Convention, for example, article 3, paragraph 4, and article 9, paragraph 5. As both the communicant and the Party concerned agree that in Denmark there is an independent and impartial procedure for appealing article 6 decisions and that the communicant is given standing before this procedure to appeal these decisions, the Committee finds that the Party concerned is not in non-compliance with article 9, paragraph 2 in this case.

42. With respect to the communicant's allegation that the Party concerned fails to comply with article 9, paragraph 3, the Committee notes that article 9, paragraph 3, requires access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment; however, like article 9, paragraph 2, above, the provision does not address financial barriers. These are, again, addressed in other provisions of the Convention. As the communicant has not alleged it is denied standing to challenge acts and omissions by private persons and public authorities which contravene national law relating to the environment, and in the light of the Committee's finding in paragraph 41 above, the Committee finds that the Party concerned is not in non-compliance with article 9, paragraph 3, of the Convention.

Access to justice — article 9, paragraph 4

43. The communicant makes two separate allegations with respect to article 9, paragraph 4. The first allegation relates to the requirement of article 9, paragraph 4, for the access to justice procedures referred to article 9, paragraphs 1, 2 and 3, to be "fair". The communicant submits that by obligating NGOs to pay a fee which is six times higher than the fee individuals must pay for the same procedure, the new fees regime contravenes this requirement. The communicant's second allegation is that in the long run the new fees for NGOs will be "prohibitively expensive", in violation of the related requirement in article 9, paragraph 4.

44. With regard to the communicant's first allegation, the Committee holds that the requirement for fair procedures means that the process, including the final ruling of the decision-making body, must be impartial and free from prejudice, favouritism or self-interest. While the requirement for fair procedures applies equally to all persons, the Committee nevertheless considers that a criterion that distinguishes between individuals and legal persons — like the differentiated fee in the present case — is not in itself necessarily unfair. The Committee does not find that the Party concerned fails to comply with article 9, paragraph 4, on this ground.

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

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".[14] 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.

[14] See footnote 2, paragraph 4.1.2.

Access to justice — article 9, paragraph 5

53. Having found that the Party concerned has failed to comply with article 9, paragraph 4, the Committee does not find it necessary to consider the allegation with respect to article 9, paragraph 5, further.

IV. Conclusions and recommendations

54. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

55. The Committee finds that by introducing a fee of DKK 3,000 for NGOs to appeal to NEAB, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, of the Convention, that access to justice procedures not be prohibitively expensive (para. 52 above).

56. The Committee has taken note of the information provided by the Party concerned in its letter of 30 November 2011 that the Danish ~Government has decided to present a bill before the Danish Folketing to reduce the fee for those other than private persons to make a complaint to NEAB from DKK 3,000 to DKK 500. While welcoming this information, the Committee holds that this development does not change its findings with respect to the situation as it currently stands.

B. Recommendations

57. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the meeting of the Parties to the Convention, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned undertake the necessary legislative, regulatory and administrative measures to ensure that the fees for NGOs to appeal environmental decisions before NEAB are not prohibitively expensive

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Compliance Committee

Fortieth meeting
Geneva, 25–28 March 2013
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2011/58 concerning compliance by Bulgaria

Prepared by the Compliance Committee and adopted on 28 September 2012

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I. Introduction

1. On 9 February 2011, the Balkani Wildlife Society (the communicant), submitted a communication to the Compliance Committee alleging that Bulgaria had failed to comply with its obligations under article 9, paragraphs 2 and 3, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication alleges that the Party concerned fails to implement article 9, paragraphs 2 and 3, of the Convention with respect to access to administrative or judicial review procedures for environmental non-governmental organizations and members of the public to challenge acts that contravene national environmental legislation. The communicant alleges it is not possible to appeal the outcomes of the strategic environmental assessment (SEA) of plans and programmes — "SEA statements" issued under the Environmental Protection Act (EPA). In addition, it alleges that members of the public do not have access to review procedures to challenge orders for the adoption of spatial plans or construction permits and exploitation permits issued under the Spatial Development Act (SDA) that contravene European Union (EU) or national environmental legislation.

3. At its thirty-first meeting (22–25 February 2011), the Committee determined on a preliminary basis that the communication was admissible. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 28 March 2011.

4. By letter dated 16 August 2011, the Party concerned responded to the communicant's allegations. By letter dated 27 September 2011, the communicant provided comments on the response.

5. At its thirty-fourth meeting (20–23 September 2011), the Committee agreed to discuss the content of the communication at its thirty-fifth meeting (13–16 December 2011). In order to guide the discussion, some questions that aimed at framing the upcoming discussion were enclosed with the invitation sent to the parties on 10 November 2011. By letter dated 9 December 2011, the Party concerned addressed the Committee's questions and indicated that it would not participate in the discussion of the communication before the Committee.

6. The Committee discussed the communication at its thirty-fifth meeting, with the participation of representatives of the communicant. The Committee confirmed the admissibility of the communication and expressed its concern that the Party concerned had chosen not to participate in the discussion. At the same meeting, the Committee agreed on a set of questions to be sent to the parties following the meeting.

7. On 10 January 2012, the communicant submitted additional information to complement its position during the discussion regarding the questions sent by the Committee on 10 November 2011.

8. The Party concerned and the communicant both responded to the Committee's questions sent following the discussion at the thirty-fifth meeting on 29 February 2012 and 6 March 2012, respectively.

9. The Committee prepared draft findings at its thirty-seventh meeting (26–29 June 2012), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 24 August 2012. Both were invited to provide comments by 21 September 2012.

10. The communicant provided comments on 21 September 2012.

11. At its thirty-eighth meeting (25–28 September 2012), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the Committee's fortieth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

A. Legal framework

12. Article 5, paragraph 4, of the Bulgarian Constitution provides that international treaties, ratified according to the constitutional order and published and in force for Bulgaria, are part of the national law. They have priority over provisions of the national laws which contravene them.

13. Article 83, paragraph 1, of the Administrative Procedure Code sets out the general standing provisions for judicial review of administrative acts, namely "an appeal against an administrative act may be submitted by interested persons" (see original communication, para. 9).[2]

14. The authorization procedure for plans and projects is divided into two main stages:

(a) For plans:

(i) The issuance of an SEA statement under the EPA;

(ii) The issuance of an order for the adoption of a spatial plan under the SPA;

(b) For projects:

(i) The issuance of an environmental impact assessment (EIA) decision under the EPA (otherwise known as "development consent");

(ii) The issuance of a final construction and/or exploitation permit under the SPA.

The SEA procedure is a necessary step before the elaboration and adoption of spatial plans; and the EIA decision constitutes a mandatory requirement for the issuing of the final permit, which is the one literally "permitting" an activity (under annex I to the Convention). More details on these two stages are provided in the following paragraphs.

1. SEA statements and EIA decisions under the EPA

15. The EPA (which transposes EU EIA[3] and SEA[4] Directives into national legislation) regulates the issuance of SEA statements and EIA decisions and relevant procedures.

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

[2] All documentation concerning the communication, including the various responses from the Party concerned and the communicant, are available from a dedicated page on the Committee's website (http://www.unece.org/env/pp/compliance/Compliancecommittee/58TableBG.html).

[3] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended. (See Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)).

[4] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

Through its provisions, the EPA transposes articles 6, 7 and 9, paragraph 2, of the Aarhus Convention into national law.

16. Articles 87 and 95 of the EPA require public participation in the SEA and EIA procedures, respectively. According to article 99, paragraph 6, stakeholders ("interested parties" according to the translation of the EPA provided by the communicant on 12 January 2012) may appeal a decision on EIA under the Administrative Procedure Code within 14 days from the public disclosure of the EIA decision.

17. According to articles 125, paragraph 6,[5] and 144, paragraph 1 (4),[6] of the SPA, SEA statements and EIA decisions issued by environmental authorities under the EPA are mandatory prerequisites for the final adoption/authorization of spatial plans and development projects; as such they are binding on the authorities issuing the construction permit. In addition, they are binding on the investor/contractor, who has to comply with the conditions and measures set out in the EIA statement during the project's implementation.

2. Spatial plans and construction/exploitation permits under the SPA

18. The SDA regulates urban spatial planning as well as the design and permitting procedures for development projects. In other words, the SDA provides the procedures that lead to the final decisions for the adoption/amendment of:

(a) General Spatial Plans, which define the development framework/guidelines of municipalities, of their various parts and populated settlements and the land use of the area under development;

(b) Detailed Spatial Plans, which define more specifically the planning and building development of a populated settlement area and the land use. These plans cannot contradict the framework set by a General Spatial Plan;

(c) Construction permits, necessary for all kinds of building activities, including those listed in annex I to the Convention;

(d) Exploitation permits for development projects, including those regarding activities set out in annex I to the Convention.

19. A summary of the legal procedures regarding the adoption of spatial plans and the authorization of development projects can be found in the form of a table attached to the original communication.

20. Article 213 of the SDA stipulates that administrative acts under the SDA can be subject to judicial review before a court of law "as to their legal conformity" under the conditions set out in that Act; and when the SDA does not stipulate any conditions, then under the conditions set out in the Administrative Procedure Code. The SDA provisions on

[5] "(6) The [planning proposal] referred to in paragraph (1) shall be submitted to the Ministry of Environment and Water or the respective regional environment and waters inspectorate for clearance and determination of the need of an environmental impact assessment according to the procedure established by the ordinance pursuant to Article 90 of the Environment Protection Act. The environment impact assessment shall be part of the detailed plan." (translation provided by the communicant)

[6] "(1) Any development project designs, which serve as grounds for the issuance of a building permit, shall be approved acting on a written application by the contracting authority and after submission of: ... 4. the administrative acts which, depending on the type and scope of construction, are required as a prerequisite for permission of construction pursuant to the Environment Protection Act or a special law". (translation provided by the communicant)

access to justice with respect to General and Detailed Spatial Plans and construction and exploitations permits are briefly outlined in the following paragraphs.

3. General Spatial Plans

21. Article 215, paragraph 6, of the SDA stipulates that General Spatial Plans are not subject to a review procedure before a court.

4. Detailed Spatial Plans

22. Article 131 of the SDA stipulates that the following persons have the right to express an opinion on and have access to judicial review on Detailed Spatial Plans: the owners of the plot regulated by the Detailed Spatial Plan; the owners of the neighbouring real estate (directly affected by the provisions of the Detailed Spatial Plan); and the owners of real estate in the hygiene-protection zones, if any.

5. Construction Permits/Exploitation Permits

23. Article 149 of the SDA determines that the following parties have the right to express an opinion and have access to judicial review with respect to a construction permit for a development project: the competent public authority (the "contracting authority" according to the translation provided by the communicant); the investor(s); the owner of the land; and the owners of the neighbouring real estate directly affected by the project.

24. The SDA does not mention any possibility to express an opinion or have access to judicial review with respect to an exploitation permit for a development project. However, in accordance with court practice, access to judicial review of exploitation permits is admissible under article 213 of the SDA for those parties considered to be interested parties under its article 131 SDA (see para. 22 above).

B. Substantive issues

25. The communicant's allegations relate primarily to non-compliance of national legislation of the Party concerned with the requirements of article 9, paragraphs 2 and 3, of the Convention. The communicant's allegations can be summarized as follows:

(a) The Party concerned fails to ensure access to justice under article 9, paragraph 2, of the Convention, with respect to SEA statements for plans and programmes under the EPA;

(b) The Party concerned fails to ensure access to justice under article 9, paragraphs 2 and 3, of the Convention, with respect to the adoption and/or amendment of spatial plans and construction and exploitation permits under the SPA.

26. The administrative practice and case-law cited in the communication is, according to the communicant, also in non-compliance with the Convention, as a result of shortcomings in legislation.

27. The communicant accepts that the general provision on standing set out in article 83, paragraph 1, of the Administrative Procedure Code (see para. 13 above) would seem to be "more or less consistent" with the requirements of article 9, paragraphs 2 and 3, of the Convention, and the objective of giving the public concerned wide access to justice within the scope of the Convention. However, it notes that standing with respect to administrative acts under the SDA is regulated by specific provisions of that act, which, in its view, do not provide access to justice in accordance with the Convention (see paras. 35 ff. below).

1. Access to justice with respect to acts under the EPA

(a) Access to justice with respect to EIA decisions

28. The communicant does not allege any breach of article 9, paragraph 2, of the Convention with respect to access to justice to challenge EIA decisions issued according to the EPA. Likewise, the Party concerned asserts that the possibility for stakeholders to appeal EIA decisions as granted in article 99, paragraph 6, of the EPA is in accordance with the requirements of article 9, paragraph 2, of the Convention.

(b) Access to justice with respect to SEA statements

29. The communicant alleges that the Party concerned fails to provide for access to justice with respect to SEA statements for plans and programmes. It contends that the core of the problem is the lack of clear and express wording in the EPA as to whether an SEA statement is an individual administrative act subject to appeal before a court of law under the Administrative Procedure Code. This situation, according to the communicant, has resulted in contradictory and unpredictable practice by administrative authorities and in court jurisprudence. The communicant considers that the EPA and the related court jurisprudence and administrative practice are not in compliance with article 9, paragraph 2, of the Convention with respect to access to justice regarding SEA statements.

30. Moreover, the communicant asserts that neither the EPA nor the SDA specify exactly what the consequences of the SEA statements are, in particular whether they are binding on the authorities approving the General and Detailed Spatial Plans under the SPA. Further confusion, according to the communicant, is caused by article 82, paragraph 1, of the EPA, which stipulates that SEA proceedings "shall be combined (or merged)" with the proceedings for the adoption of General or Detailed Spatial Plans under the SDA. The situation is, according to the communicant, furthermore complicated by the fact that, under certain conditions, the SEA statement for a "small scale" Detailed Spatial Plan can substitute for the EIA decision for projects in the area regulated by the plan.[7] The communicant alleges that this happens also with respect to tourism and recreation projects ("village complexes"), which would otherwise be subject to an EIA procedure according to the EPA,[8] and thus are covered by paragraph 20 of annex I to the Convention.

31. The communicant notes that two provisions of the EPA are in particular unclear: article 82, paragraph 4, and article 88, paragraph 2. These provisions use the wording "становище", which may be translated as either "opinion" or "position". The communicant alleges that national administrative legislation elsewhere uses the word "order" or "decision" to refer to individual administrative acts that are compulsory for their recipients and subject to appeal before a court of law. For example, to describe the final act of the EIA procedure, article 82, paragraph 5, of the EPA refers to a "решение" (decision) and it explicitly stipulates that any EIA decision shall be binding and compulsory for any authorities or other recipients.

32. The communicant submits that, on the basis of the legal principle *per argumentum a contrario*, the use of the word "opinion" or "position" rather than "decision" leaves it open to the implementing authorities to conclude that the SEA statements are not final individual

[7] The communicant refers to article 91, paragraph 2, of the EPA, according to which "Upon request of the developer or upon its own opinion, the competent authority may require the execution of only one of the assessments types (e.g., EIA or SEA) under Chapter Six, when for development project listed in Annexes 1 and 2 hereto, an individual plan or a program under art. 85 (1) and (2) should be prepared" (translation by the communicant).

[8] See article 81, paragraph 4 and annex 2, item 12, of the EPA.

administrative acts, that they are not subject to appeal before a court of law and even that they are not compulsory. The communicant alleges that this is in fact what often happens in practice, i.e., that the courts often hold appeals against SEA statements ("opinions") to be inadmissible on the basis that they are not final administrative acts but rather preliminary ones.[9]

33. The communicant notes that according to article 21, paragraph 5, of the Administrative Procedure Code, the review of the lawfulness of a preliminary act shall be conducted upon appeal against the final act. However, as outlined in paragraphs 21 and 22 above, orders for the adoption of a General Spatial Plan are not subject to appeal and orders for the adoption of a Detailed Spatial Plans may be appealed only by investors and "direct neighbours". According to the communicant, the right of the neighbours to appeal is further limited in some cases, e.g., if the Detailed Spatial Plan provides for a change of designation of the land plot in question. In practice this means that the SEA statements cannot be appealed by the environmental organizations or other members of the public concerned at any stage.

34. The Party concerned claims, in general, that the requirements of article 9, paragraph 2, of the Convention are fully met by the right of the public to appeal the EIA decisions (see para. 28 above). It further explains that while there is no legislation regulating the possibility to appeal the SEA statements, there is no explicit prohibition in that respect and the general provisions of the Administrative Procedure Code are fully applicable. According to the Party concerned, recent case-law of the Bulgarian courts shows that SEA statements are subject to judicial review, and therefore the allegations of the communicant in this respect are "obsolete".

2. Access to justice with respect to acts under the SDA

35. The communicant alleges that as a result of the provisions of the SDA (see paras. 21-23 above) the Party concerned fails to ensure that members of the public have access to review procedures in accordance with article 9, paragraphs 2 and 3, of the Convention. More specifically, it asserts that provisions of the SDA prevent environmental organizations and members of the public from challenging decisions regarding General Spatial Plans, Detailed Spatial Plans and construction and exploitation permits that may contravene national and EU environmental legislation. The communicant provides case-law to illustrate each of its allegations. It remarks that the case law referred to in its communication was selected to provide typical examples from among many other such cases.

(a) Access to justice with respect to General Spatial Plans

36. Among others, the communicant refers to two 2007 court decisions[10] and one 2006 decision[11] in which the courts denied standing to, respectively, a public authority, an environmental organization and individuals who had sought to appeal orders adopting General Spatial Plans or amendments thereto. In all three cases, standing was denied on the grounds that under article 127 of the SDA, the final decision adopting the General Spatial Plan could not be appealed before a court**.**

[9] See, for example, Decision No. 79/15.03.2010 of the Ministry of Environment and Waters (annex 6 to the communication); as well as Decisions of the Supreme Administrative Court (SAC) Nos. 821/23.1.2008 and 11514/3.11.2008 referred to by the communicant in his response received or posted by the secretariat on 28 September 2011.

[10] SAC Decisions Nos.12151/3.12.2007 and 2310/7.3.2007 (annexes 1 and 2 to the communication).

[11] SAC Decision No.10617/31.10.2006 (annex 3 to the communication).

37. The communicant claims that to its knowledge there has been one case only in which the Supreme Administrative Court ruled that an environmental organization had locus standi to seek judicial review of an order adopting a General Spatial Plan.[12] In that 2009 case, the court found that the order for the adoption of the General Spatial Plan was an act which was subject to the provisions of article 6 of the Convention, through paragraph 20 of annex I, and thus also subject to judicial review in accordance with article 9, paragraph 2, of the Convention. The court concluded that article 127 of the SDA contravened article 9, paragraph 2, of the Convention and that legislative amendment was needed.[13] The communicant notes that the court's call for legislative amendment demonstrates that article 9, paragraph 2, is not properly implemented in either the SDA or the EPA. [14]

38. The Party concerned submits that the communicant's allegation of non-compliance regarding article 9, paragraph 3, of the Convention is irrelevant and inapplicable with respect to orders adopting spatial plans. It argues that the fact that decisions related to the adoption of a General Spatial Plans cannot be appealed does not mean that the Party concerned is not in compliance with article 9, paragraph 3, of the Convention, because that provision is not clear and detailed enough. Moreover, the Party concerned states that General Spatial Plans approved under the SDA have "no direct investment application" but only define the general framework and guidelines for land development and construction. It adds that the SDA requires that regulatory procedures for the adoption and amendment of General Spatial Plans include mandatory public consultation with the participation of all relevant stakeholders.

(b) Access to justice with respect to Detailed Spatial Plans

39. The communicant refers to a 2004 case in which the environmental organization sought to appeal an order for the approval of the Regulation and Construction Plan (a type of Detailed Spatial Plan) of Zlatni Pyasatsi Seaside resort. The Plan would affect the Zlatni pyasatsi ("Golden Sands") Nature Park. The court dismissed the application under article 131 of the SDA on the grounds that the organization was not an "interested party" (despite the fact that the association managing the affected nature park was a member of the applicant).[15]

40. The Party concerned states that, with the aim of ensuring the right balance of relevant public interests in the field of spatial planning and construction, the SDA confers a right to contest administrative acts issued within its scope (including the Detailed Spatial Plans) only on persons with a direct and immediate legal interest. Article 131, paragraph 1, of the SDA provides an imperative and exhaustive list of the stakeholders who can contest Detailed Spatial Plans, namely the owners and holders of limited real rights (according to the Land Registry) whose real estates are directly affected by the provisions of the Detailed Spatial Plan.

(c) Access to justice regarding construction permits

41. With respect to access to justice to challenge construction permits granted under the SPA, the communicant refers to a 2008 case in which the Supreme Administrative Court held that. On the basis of article 149 of the SPA, the applicant (a neighbour) was not

[12] See SAC Proceedings of 29 April 2009 (annex 5 to the communication).

[13] Ibid.

[14] In the comments of 21 September 2012, the communicant further informed the Committee that the SAC has overruled its previous interpretation of the Convention as being directly applicable and having priority over the SDA by its Decision No. 9074/2012.

[15] SAC Decision No. 218/14.1.2004 (annex 7 to the communication).

considered an "interested party" who could seek judicial review of a construction permit for a development project.[16] According to the communicant, this approach was in breach of article 9, paragraph 3, of the Convention.

42. The Party concerned responds to this part of the communication in general in the context of its comments regarding access to justice with respect to the Detailed Spatial Plans (see para. 40 above). It stresses the nature of the EIA decision as a mandatory act for both the authority issuing the construction permit and for the developer, and the fact that the EIA decision can be subject to judicial review initiated by members of the public.

(d) Access to justice regarding exploitation permits

43. The communicant refers to two cases in support of its allegation that the Party concerned failed to ensure access to justice also with respect to exploitation permits. In a 2007 case, an environmental organization sought to appeal an exploitation permit for a landfill on the grounds that the landfill had been built and put into operation without an EIA decision, and therefore was in breach of the EPA. The application was dismissed by the Supreme Administrative Court on the grounds that the exploitation permit was granted to the investor and it therefore concerned only the rights of the investor.[17]

44. The second case relates to the construction and exploitation of a lift in Rila National Park (a Natura 2000 zone). Environmental organizations and other members of the public sought to appeal the exploitation permit on the grounds that the lift was built (a) without an EIA decision; (b) without a construction permit; and (c) on an unstable landslide. In their appeals they relied on article 9, paragraph 3, of the Convention, which in their view should be directly applicable by the national courts by virtue of article 5, paragraph 4, of the Constitution (see para. 12 above). However, the Supreme Administrative Court dismissed the applications without referring to article 9, paragraph 3, of the Convention. The court confirmed that the only party having locus standi to appeal an exploitation permit was the project investor.[18]

45. The Party concerned does not respond to these allegations.

(e) General remarks of the communicant with respect to review of the decisions under the SPA

46. With respect to the assertion of the Party concerned that article 9, paragraph 3, is not applicable to orders adopting spatial plans (para. 38 above), the communicant emphasizes[19] that many of the spatial plans mentioned in its communication relate to cases in which spatial plans were authorized without carrying out an SEA procedure and issuing a SEA statement. The communicant alleges that those cases illustrate breaches of national environmental law, namely article 85 of the EPA, which stipulates that an SEA procedure is mandatory for plans and programmes regarding development projects under annexes I and II of that Act.

47. With respect to the argument of the Party concerned that it is appropriate to limit access to justice with respect to spatial planning decisions and construction/exploitation permits to persons with a direct and immediate legal interest (whose property rights or other limited real rights are affected), the communicant alleges that this approach is not in line with the article 9, paragraph 2, of the Convention, namely:

[16] SAC Decision No. 4927/23.4.2008 (annex 8 to the communication).
[17] SAC Decision No. 949/29.1.2007 (annex 9 to the communication).
[18] SAC Decisions Nos. 2397/23.2.2010 and 2155/18.2.2010 (annexes 10 and 11 to the communication).
[19] In the response from the communicant of 28 September 2011.

> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient.

48. The communicant concludes that it would consider the legislation of the Party concerned to be in compliance with the Convention so long as it is amended as follows:

(a) The EPA explicitly allows members of the public concerned to have access to administrative and judicial procedures to challenge SEA statements adopted under the provisions of chapter 6, section 2, of the EPA, concerning environmental assessments on plans and programmes;

(b) The SDA explicitly allows members of the public concerned to have access to administrative and judicial procedures to challenge acts issued under the SDA that they allege contravene provisions of the national environmental law.

III. Consideration and evaluation by the Committee

49. Bulgaria ratified the Convention on 17 December 2003. The Convention entered into force for Bulgaria on 16 March 2004.

50. The Committee notes the information from the communicant that the European Commission has launched infringement proceedings for several of the cases referred to in the communication.

51. The Committee examines the communicant' allegations and the relevant aspects of the legislation and practice of the Party concerned as follows:

(a) Access to justice with respect to SEA statements;

(b) Access to justice with respect to spatial plans;

(c) Access to justice with respect to construction and exploitation permits.

52. When evaluating the compliance of the Party concerned with article 9 of the Convention in each of these areas, the Committee pays attention to the general picture on access to justice, in the light of the purpose also reflected in the preamble of the Convention, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced" (Convention, preambular para. 18; cf. also findings on communication ACCC/C/2006/18 concerning Denmark (ECE/MP.PP/2008/5/Add.4), para. 30). Therefore, in assessing whether the Convention's requirement for effective access to justice is met by the Party concerned, the Committee looks at the legal framework in general and the different possibilities for access to justice, available to members of the public, including organizations, in different stages of the decision-making ("tiered" decision-making).

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).

A. Access to justice with respect to Strategic Environmental Assessment statements

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")[20] 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.

59. The case-law of the Bulgarian courts concerning judicial review of SEA statements as presented to the Committee seems to be contradictory (see para. 32 and footnote 9 above), since the courts do not seem to distinguish between the situations where an SEA statement substitutes an EIA decision for a specific activity and other cases in which SEA statements are issued. In this respect, the Committee is concerned that Bulgarian law does not make fully clear whether judicial reviews of SEA statements as such are admissible.

60. At the same time, the fact that the SEA statement cannot be reviewed separately does not amount to non-compliance with the requirements of article 9, paragraphs 2 and 3, of the Convention, provided that members of the public can actually challenge the SEA statement together with the decision adopting the subsequent plan or programme (e.g., spatial plan). This issue will be further addressed in the next section.

[20] See EPA article 82, paragraph 4 (translation provided by the communicant).

B. Access to justice with respect to spatial plans

61. The communicant asserts that neither the legislation (relevant provisions of the SPA) nor prevailing case-law ensure that environmental organizations and other members of the public have access to judicial review procedures to challenge spatial plans, which is, according to the communicant, not in compliance with article 9, paragraph 3, of the Convention. The Party concerned contends that the Convention does not require that environmental organizations or other members of the public have standing to challenge either General or Detailed Spatial Plans in court.

1. General Spatial Plans

62. Based on the information received from the Party concerned and the communicant, the Committee understands that the General Spatial Plans provide a basis for the overall planning of spatial development of municipalities or their sections: they determine the general structure and the prevailing purpose of the spatial development of the area and provide the framework for the future development of the respective areas.

63. On the basis of these characteristics, the Committee concludes that the General Spatial Plans do not have such legal functions or effects so as to qualify as "decisions on whether to permit a specific activity" in the sense of article 6, and thus are not subject to article 9, paragraph 2, of the Convention.

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.

65. While referring to "the criteria, if any, laid down in national law" in article 9, paragraph 3, the Convention neither defines these criteria nor sets out the criteria to be avoided and allows a great deal of flexibility in this respect. 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 other the 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 such strict criteria that they effectively bar all or almost all members of the public, especially environmental organizations, from challenging acts or omissions that contravene national law relating to the environment. The phrase "the criteria, if any, laid down in national law" indicates that the Party concerned should exercise self-restraint not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception (cf. findings on communication ACCC/C/2005/11 concerning Belgium, paras. 34–36).

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

2. Detailed Spatial Plans

67. As the Committee understands, the Detailed Spatial Plans provide details for the development of specific areas. These Plans are mandatory for the development projects and the permits which are necessary for the implementation of such projects.

68. Under the law of the Party concerned, the Detailed Spatial Plans do not have the legal nature of "decisions on whether to permit a specific activity" in the sense of article 6 of the Convention, as a specific permit (construction and/or exploitation permit) is needed to implement the activity (project). Therefore, article 9, paragraph 2, of the Convention, is not applicable.

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).

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.

C. Access to justice with respect to construction and exploitation permits

72. With respect to activities listed in annex I to the Convention, members of the public concerned, including environmental organizations, can challenge before the courts the relevant EIA decisions issued by the environmental authorities according to the EPA. To that extent, according to the communicant, Bulgarian legislation is in compliance with the Convention. 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.

73. The communicant emphasizes that although all environmental aspects of the project are evaluated and decided upon at the stage of issuing the EIA decision, it is only the permit

issued according to the SDA which finally approves the activity. All the requirements and conditions of the EIA decision should be incorporated into this final permit. After the construction or exploitation permit is issued, the EIA decision is not independently enforceable (it is subsumed by the subsequent permit). 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.[21] 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.

74. The Party concerned stresses that the developer, as well as the administrative authority issuing the final permit, must comply with all the conditions, clauses and measures of the EIA decision. The Party concerned is therefore convinced that, as members of the public concerned, including environmental organizations, can challenge the EIA decisions in court, it is not contrary to the Convention that they cannot appeal the subsequent permits, authorizing the activities listed in annex I of the Convention.

75. The EIA decisions, issued for the activities listed in annex I to the Convention and the subsequent decisions issued according to the SPA, form different stages of a tiered decision-making. The Committee has dealt with the concept of tiered decision-making in a number of its findings, with respect to the requirements in article 6, paragraph 4, of the Convention, regarding "early public participation when all options are open". In that respect, the Committee holds that each Party has certain discretion as to which range of options is to be discussed at each stage of the decision-making. Nevertheless, as each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage, the Parties must, to comply with the requirement of article 6, paragraph 4, of the Convention, provide for early public participation in every procedure where some decision concerning relevant options is taken (cf. findings on communication ACCC/C/2006/16 concerning Lithuania, para. 71). A mere formal possibility, de jure, to turn down an application at the latter stage of the tiered decision-making is not sufficient to meet the criteria of the Convention if, de facto, that would never or hardly ever happen (cf. findings on communication ACCC/C/2007/22 concerning France (ECE/MP.PP/C.1/2009/4/Add.1), para. 39 and findings on communication ACCC/C/2009/41 concerning Slovakia (ECE/MP.PP/2011/11/Add.3), para. 63).

76. In the present case, since the communicant does not allege non-compliance with article 6 of the Convention with respect to the final stage of the tiered decision-making for the activities listed in annex I to the Convention, i.e., the permits according to the SPA, the Committee will not deal with this issue. However, it is appropriate to apply the above reasoning concerning the tiered decision-making also when examining which decisions, issued in the tiered decision-making processes, shall be subject to judicial review upon an appeal by the members of the public concerned. For this examination, article 9, paragraph 4, of the Convention, according to which the procedures for challenging acts and omissions that may contravene national law relating to the environment must provide adequate and effective remedies, is also relevant (cf., e.g., findings on communication ACCC/C/2004/6 concerning Kazakhstan (ECE/MP.PP/C.1/2006/4/Add.1), para. 31).

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

[21] See examples provided by the communicant gives examples in its letter of 6 March 2012.

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.

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 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.

IV. Conclusions and recommendations

82. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

83. The Committee finds that:

(a) By barring all members of the public, including environmental organizations, from access to justice with respect to General Spatial Plans (para. 66), the Party concerned fails to comply with article 9, paragraph 3, of the Convention;

(b) By barring almost all members of the public, including all environmental organizations, from access to justice with respect to Detailed Spatial Plans (para. 70), the Party concerned fails to comply with article 9, paragraph 3, of the Convention;

(c) By not ensuring that all members of the public concerned having sufficient interest, in particular environmental organizations, have access to review procedures to challenge the final decisions permitting activities listed in annex I to the Convention, (paras. 79–81), the Party concerned fails to comply with article 9, paragraph 2, in conjunction with article 9, paragraph 4, of the Convention.

B. Recommendations

84. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the meeting of the Parties to the Convention, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned undertake the necessary legislative, regulatory and administrative measures to ensure that:

(a) Members of the public, including environmental organizations, have access to justice with respect to General Spatial Plans, Detailed Spatial Plans and (either in the scope of review of the spatial plans or separately) also with respect to the relevant SEA statements;

(b) Members of the public concerned, including environmental organizations, have access to review procedures to challenge construction and exploitation permits for the activities listed in annex I to the Convention.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-second meeting
Geneva, 24–27 September 2013
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2010/59 concerning compliance by Kazakhstan

Adopted by the Compliance Committee on 28 March 2013

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I. Introduction

1. On 13 March 2011, the Kazakh public association, National Analysis and Information Resource (the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging a failure of Kazakhstan to comply with its obligations under article 6, paragraphs 7, 8 and 9, of the Convention.

2. The communication alleges that by limiting the communicant's opportunity to participate in the decision-making on and to express its opinion during the conduct of the state environmental review (*expertiza*) for the "South West Roads Project: Western Europe-Western China International Transit Corridor" (Road Corridor Project), in the South Kazakhstan Oblast, a project financed by the International Bank for Reconstruction and Development (IBRD), among others, the Party concerned failed to comply with the provisions of article 6, paragraphs 7, 8 and 9, of the Convention.

3. At its thirty-second meeting (11–14 April 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 13 May 2011. On the same date, a number of questions were sent to the communicant soliciting clarification and additional information on a number of issues in the communication.

5. At its thirty-fourth meeting (20–23 September 2011), the Committee agreed to discuss the content of the communication at its thirty-fifth meeting (13–16 December 2011).

6. The communicant responded to the Committee's questions on 11 October 2011. The Party concerned responded to the allegations contained in the communication on 12 October 2011.

7. The Committee discussed the communication at its thirty-fifth meeting, with the participation of representatives of the communicant. The Committee confirmed the admissibility of the communication and expressed its concern that the Party concerned had chosen not to participate in the discussion of the communication. At the same meeting, the Committee agreed on a set of questions to be sent to the parties.

8. The communicant and the Party concerned addressed the Committee's questions on 28 and 29 February 2012, respectively.

9. The Committee prepared draft findings at its thirty-ninth meeting (11–14 December 2012), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 19 February 2013. Both were invited to provide comments by 19 March 2013.

10. The communicant and the Party concerned provided comments on 6 and 20 March 2013, respectively.

11. At its fortieth meeting (25–28 March 2013), the Committee adopted its findings and agreed that they should be published as a formal pre-session document for the Committee's forty-second meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

A. Legal framework

Public associations

12. The Environmental Code (Act No. 212–III of 9 January 2007, amended on 27 July 2007),[2] provides for the rights and duties of public associations in Kazakhstan in the sphere of environmental protection. Accordingly, public associations have the right to participate in decision-making processes of State bodies on matters concerning environmental protection under the procedure set forth in the legislation and to receive from State bodies and organizations timely, full and reliable environmental information (Environmental Code, art. 14).

Review procedures on access to information

13. When public authorities refuse to provide environmental information, provide incomplete or misleading information or illegally limit access to environmental information, which should normally be public (Environmental Code, art. 167, para. 4), members of the public have access to review procedures before the superior authority and the courts.

Development control framework

14. The development control system in Kazakhstan follows the model applied in many countries of Eastern Europe, the Caucasus and Central Asia whereby, the decision-making process includes an OVOS (*Оценка воздействия на окружающую среду* (OVOS)) procedure carried out by the developer and the State environmental *expertiza* conducted by the competent authority. The OVOS procedure starts with the developer submitting the application to proceed with the project (*заявка*), continues with the developer commissioning the preparation of the OVOS report, including the organization of public participation, and ends with the developer submitting the final OVOS report (*отчет по оценке воздействия на окружающую среду*), including the report on public participation, to the authorities responsible for the *expertiza*. The competent authority considers the project design, including the OVOS report, and issues its *expertiza* conclusions which, together with the construction permit, constitute the decision of a permitting nature. In the end, it is the conclusions of the environmental *expertiza* that are considered as a decision whether to permit a project and the positive *expertiza* conclusion is a compulsory condition for the banks and other financial institutions to approve funding for economic or other activities (see also Environmental Code, art. 51, para. 4).

Public participation provisions

15. Public participation in the preparation of the environmental impact assessment is regulated by Order No. 204– П of the Ministry of Environmental Protection of 28 June 2007 on the Approval of the Instructions for the Conduct of Environmental Impact

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

[2] The communication and other documentation submitted by the parties concerned is available on a dedicated web page for the communication on the Committee's website (http://www.unece.org/env/pp/compliance/Compliancecommittee/59TableKZ.html). References to national laws herein rely on the information contained in this documentation.

Assessment of Planned Economic or Other Activities during the Drafting of Pre-Plan, Plan, Pre-Oroject and Project Documentation (2007 OVOS Instructions).[3] Specifically, chapter 8 (paras. 51 and 58–61), provide the following:[4]

> 51. Public opinion shall be considered during the drafting of OVOS materials for pre-plan, plan, pre-project or project documentation for an economic or other activity.
>
> …
>
> 58. The following public consultation procedure must be carried out:
>
> From the date of the announcement of the organization of a public consultation on the draft OVOS report, the developer (drafter) shall ensure access by public representatives to the draft OVOS report and the reception and registration of comments and suggestions.
>
> …
>
> 60. Procedure for public consultation through collection of written suggestions (including through a survey). In this procedure the developer (drafter) shall:
>
> - Organize premises (an office) where public representatives are granted access to the draft OVOS report for inspection.
> - Organize the registration of written suggestions from the public on the draft OVOS report (including the reception of the survey).
> - Analyse comments and suggestions from the public on the draft OVOS report and take a decision on amending the draft OVOS report to take public opinion into account.
> - Submit for State environmental expertiza, together with the OVOS materials, copies of suggestions from the public in the form of a record, as well as a commentary on suggestions from the public.
>
> 61. The developer (drafter) shall ensure that the public consultation process is documented (in the form of stenographic records, photographs and video recordings, audio recordings and other materials), including:
>
> - The making of an announcement on the conduct of a public consultation.
> - The provision of information to the media on the outcomes of the OVOS.
> - The registration of people inspecting the draft OVOS report.
> - The listing of participants in public hearings.

[3] The development control systems in most former Soviet countries are largely based on an OVOS/expertise (*expertiza*) mechanism with OVOS preceding the State environmental expertise. "OVOS" is an acronym the terms of which in direct translation can be rendered as "assessment of impact upon the environment". The OVOS, however, should not be understood as an environmental impact assessment as it is used in EU legislation. The OVOS and *expertiza* stages are closely interlinked and together constitute the system of environmental decision-making. The *expertiza* is to review the OVOS statement by the competent public authority and issue a positive or negative conclusion which has a permitting nature.

[4] English translation based on the translation provided by the communicant in the original communication of 1 June 2011. Some terminology was customized.

- The registration of written suggestions and comments on the draft OVOS report.
- The compilation of a record of public hearings which establishes the main subjects of discussion and dispute between the public and the developer.
- The preparation of a commentary on the consideration of suggestions and comments from the public in the project documentation.

16. In particular, the procedure for the public hearings is established by Order No. 135–Па of the Minister of Environment of 7 May 2007 on Approval of Rules for Public Hearings. Specifically (chap. 1, paras. 4, 6 and 9; and chap. 2, paras. 16–20):[5]

> 4. Public hearings are carried out for the projects, implementation of which may directly impact the environment and health of citizens.
>
> ...
>
> 6. Public hearings presuppose equal rights for all to express his/her reasoned opinion on the subject under discussion, based on the study of relevant documentary information, which does not contain confidential information.
>
> ...
>
> 9. The developer pre-negotiates with local agencies the time and place for public hearings and publishes an announcement in the media to hold public hearings on the content of OVOS materials of planned economic activities on the environment, setting out the time and locations. An announcement should be published in the national and Russian languages 20 days prior to the date of public hearing.
>
> …
>
> 16. According to the established regulation, everyone is granted the opportunity to express his/her view at the public hearing and pose questions to the responders. Responders answer the questions of the representatives of the public.
>
> 17. The developer arranges the recording and collecting of reports, questions, answers and speeches. Audio and video recordings are also possible.
>
> 18. The results of public hearings are incorporated in the protocol signed by the chairman and secretary. A copy of the protocol is transmitted to the local executive bodies.
>
> 19. The developer conducts an analysis of the results of the public hearings and decides on the finalization of the project, taking into account the opinions expressed.
>
> 20. The developer submits for State environmental *expertiza* the protocol of the public hearings and the draft proposal with OVOS results, revised in the light of the comments of the public, if made on a qualified basis, according to normative legal acts of Kazakhstan, as well as comments on the suggestions by the public that the developer considers to be an unreasonable basis for making changes or additions to the project.

17. By the Order of the Environmental Protection Minister of 2 April 2012, No. 88–П On Introducing Amendments into the Order of the Environmental Protection Minister of

[5] English translation based on the translation provided by the communicant during the discussion with the Committee on 14 December 2011. Some terminology was customized.

7 May 2007, No. 135-П On Approval of Rules for Public Hearings, changes and additions were made to the existing regulation, specifically:[6]

- All participants of the public hearing should be informed if an audio- or video recording is being made by official mass media representatives.
- Requirements are established providing for: (1) the submission to the local executive authorities of a copy of the protocol on the results of projects the implementation of which may directly impact on the environment and health of citizens; (2) the submission of a draft plan of activities aimed at environmental protection to the body responsible for issuing permits in accordance with clause 3 of article 71 of the Environmental Code of Kazakhstan.
- The provision requiring publication of the announcement of the public hearing 20 days prior to the hearing date is omitted (para. 9 in the earlier Order).
- The provision which prescribed which project-related documentation needed to be submitted for State environmental *expertiza* is also omitted (para. 20 in the earlier Order).

18. In addition, Order No. 238-п of the Minister of Environment of 25 July 2007 on Approval of Rules of Access to Environmental Information Relevant to the OVOS Procedure and Decision-making Process on Proposed Economic and Other Activities (2007 Rules on OVOS-related Environmental Information) establishes requirements for the public participation procedure:

> 4. The developer of an economic or other type of activity publishes information in special environmental publication sources, as well as on the website of the Ministry of Environmental Protection of Kazakhstan, concerning the submission of the draft OVOS report to the State environmental *expertiza*.
>
> ...
>
> 8. Interested persons may submit written suggestions and comments to the authority on the draft OVOS report. The written comments and suggestions should contain … reasoned suggestions and comments.
>
> 9. The competent body, in accordance with the Law, within 15 calendar days, shall review the application and provide an answer. If the case requires additional investigation, the consideration period may be extended for no more than 30 calendar days from the notification of the applicant, allowing three days for receipt of the notice.

Environmental *expertiza* and review procedures

19. Concerning the transparency of the State environmental *expertiza* and public access to decisions, "all interested citizens and public associations shall be granted the opportunity to express their opinion during the period of conduct of State environmental *expertiza*" (Environmental Code, art. 57, para. 2); and "after a decision has been made on the conclusion of the State environmental *expertiza*, all interested parties shall be granted the opportunity to receive information on the subject of *expertiza* under the procedure set forth in this Code" (ibid., para. 5).

20. With respect to disputes relating to the State environmental *expertiza*, the Environmental Code (art. 58) provides that these should be examined through negotiations

[6] Adapted from an English translation of the original Russian provided by the Committee.

or in court proceedings. Negotiations are carried out by the competent body for environmental protection at the request of any interested party, including the developer of the planned activity or the local government body. However, a negative conclusion of the State environmental *expertiza* is not subject to review.

B. Facts

21. The Road Corridor Project is a carried out by the Party concerned through its Ministry of Transport and Communication and financed, inter alia, by IBRD. Under the terms of the Loan Agreement concluded on 13 June 2009 between the Party concerned and IBRD, the Party concerned is to carry out the Road Corridor Project in compliance with the requirements, criteria, organizational mechanisms and operational procedures set out in the project documentation, including the Resettlement Policy Document and the draft OVOS report, and it cannot transfer, introduce changes to, revoke or waive any position of the project documentation without the prior agreement of the Bank.

22. The Loan Agreement contains provisions for the preparation of the final OVOS report (section I.5, appendix) and the requirements for the project implementation in accordance with the requirements, criteria, organizational arrangements and operating procedures specified in the OVOS report (section I.1).

23. In October 2010, GradStroi EkoProekt limited liability partnership (Ekolog), the project developer, sent an OVOS report on the Road Corridor Project to the South Kazakhstan Oblast Directorate for Natural Resources and Regulation of Natural Resource Use of the Chu-Talas Department of Environmental Protection of the Ministry of Environmental Protection (Directorate of Natural Resources), the authority responsible for issuing the State environmental *expertiza*.

24. The notice that the OVOS documentation was available for the public to inspect was published in the regional social and political newspaper *Yuzhny Kazakhstan* (No. 128 of 6 October 2010) and in *Ontustik Kazakhstan* (No. 151 of 7 October 2010). The OVOS documentation was made available in the reading room of a research library.

25. Based on the review of the OVOS documentation, the communicant formed the view that the OVOS report did not comply with the 2007 OVOS Instructions and World Bank Operational Policy (OP)/Bank Procedure (BP) 4.01 on Environmental Assessment of January 1999.

26. By letter of 29 October 2010, the communicant's representative, Mr. Issaliyev, sent comments on the OVOS report to the Directorate of Natural Resources and suggested that the report should be returned to Ekolog for further research and environmental impact assessment in line with Bank's requirements and Kazakh legislation.[7] The Directorate responded by letter of 2 November 2010.

27. Separately, by letter of 1 November 2010, another representative of the communicant, Mr. Moldabekov, also sent comments on the OVOS report to the Directorate of Natural Resources. The Directorate responded by letter of 4 November 2010.

[7] The communicant copied the letter to the Highways Committee of the Ministry of Transport and Communications, the South Kazakhstan Oblast Highways Department, the main contracting organization for the project (Dongsong Engineering) and its subcontractor (Doris TOO Ltd.), which had been commissioned to carry out the research on the OVOS statement.

28. On 25 November 2010, the communicant's representative Mr. Issaliyev, sent an e-mail to the Deputy Director of the Directorate of Natural Resources,[8] requesting information on the outcome of the Directorate's consideration of the communicant's comments on the OVOS report and, if an *expertiza* conclusion had been reached, a website address where the conclusion would be made available to the public. The communicant received the response of the Directorate by letter dated 7 December 2010, stating:

> The detailed design for the construction of the Temirlanovka By-pass section of the highway is currently undergoing a State environmental *expertiza*. Under article 50 of the Environmental Code, the State environmental *expertiza* must take place within three months of submission of the application. We also bring to your attention that under article 53 of the Environmental Code and article 9 of the Civil Service Act, and also the job descriptions laid down in Provisions of the Directorate, a civil servant who is an expert carrying out the State environmental *expertiza* must keep documentation secure and not allow the disclosure of information entrusted to him, and carry out the orders and instructions of managers and decisions and directions of higher authorities within the scope of their competence.

C. Substantive issues

29. The communicant alleges that it was denied its rights under article 6, paragraphs 7, 8 and 9, of the Convention with respect to the decision-making for the construction of a road corridor. In particular, the communicant's allegations relate to the decision-making for the section of the Western Europe-Western China Road Corridor known as the Temirlanovka By-pass (kilometres 2,217–2,231 of the Corridor) between the Russian border (Samara) and Shymkent.

30. The communicant alleges that it is the content of the letter of the Directorate of 7 December 2010 that constitutes the basis of its communication to the Committee. The communicant alleges that the mandated body, the South Kazakhstan Oblast Department of the Roads Committee of the Ministry of Transport (Roads Committee), has failed to fulfil the requirements of the 2007 OVOS Instructions and article 6, paragraphs 7, 8 and 9, of the Convention, for the following reasons:

(a) It did not confirm registration of the letters containing comments from the communicant's representatives;

(b) It did not analyse the comments and proposals from the public;

(c) It did not draw up the corresponding record;

(d) It did not provide its own comments on the suggestions from the public.

31. The Party concerned contends that it did not fail to comply with article 6 of the Convention with respect to the Road Corridor Project. The Party concerned concedes that the "working project" (i.e., the documentation required, along with the OVOS report for submission to State environmental *expertiza*, including construction documentation, studies and documents related to public participation procedure), "Reconstruction of the road: Samara (Russian border)-Shymkent ... by-passing Temirlan Village", was returned twice for revision due to a failure to hold public hearings in accordance with the regulations for public hearings . However, public hearings were subsequently conducted (annex 2 to the response of the Party concerned of 12 October 2011). The Party concerned informed the

[8] Annex 5 to the communicant's additional information submitted on 11 October 2011.

Committee that, as a result of those public hearings, it was decided to move the axis of the route, by-passing the section of Temirlan Village.

32. The Party concerned also reported that, on 26 March 2010, the Director of the Roads Committee, a representative of the communicant, Mr. Issaliyev, and a representative of the Consultant on Project Management (SNC-Lavalin) signed an agreement to establish a consultative body to discuss and monitor the implementation of the project (annex 3 to the response of the Party concerned of 12 October 2011).

33. The Party concerned asserts that the communicant's comments on the OVOS report sent by letters of its representatives on 29 October and 1 November 2010 were taken into account. On 7 December 2010, the State environmental *expertiza* reached a positive conclusion.

34. The Party concerned also notes that the project website,[9] available on the Internet since 1 July 2010, provides general information about the project, as well as more specific information on environmental protection, the acquisition of land and real estate, public relations, etc.

Use of domestic and other international procedures

35. At the time the communicant submitted its communication to the Committee, it had not been provided with the State environmental *expertiza* conclusion, and hence there was no document for it to challenge before the court. However, the communicant mentioned at the hearing that it might consider the possibility of challenging the conclusion of the State environmental *expertiza* before the court.

36. The Party concerned contends that the communicant did not exercise its rights under national law to use domestic procedures. In particular, the communicant did not exercise its rights under the article 58 of the Environmental Code to request that its disagreement with the State environmental *expertiza* be examined by the mandated body for environmental protection (in this case, the Ministry of Environmental Protection) or the courts. Nor did it exercise its rights under article 167, paragraph 4, of the Environmental Code (see para. 13 above) to challenge the alleged refusal of the authorities to provide information or the alleged provision of incomplete or misleading information before the Ministry of Environmental Protection. Similarly, the communicant did not attempt to seek access to judicial review in accordance with article 9, paragraph 1, of the Convention.

37. With respect to other international procedures, on 5 February 2010 the communicant's representative, Mr. Issaliyev, and another individual, Ms. Shevtsova, filed a request to the World Bank Inspection Panel for inspection of the related IBRD-financed project to determine whether IBRD had complied with its operational policies and procedures (including social and environmental safeguards, such as World Bank OP/BP 4.01), and to address any harm that might have been caused. The request was supported by 45 families from the village of Birlik, Karashik rural district of Turkestan, South Kazakhstan Oblast. After receiving the Bank Management's response and undertaking a fact-finding mission in the field, on 28 June 2010 the Inspection Panel recommended that an investigation not be undertaken with respect to the allegations contained in the request, because it appeared that any disagreement was minor and that steps had already been taken to address them (see also annex 4 to the communicant's response of 11 October 2011).

[9] See www.europe-china.kz (in Russian and English).

38. The communicant filed a second request with the Inspection Panel, on 15 June 2011, which specifically related to the Temirlankova road segment. The Inspection Panel, after receiving the Management's response and undertaking another mission in the field, issued its report on 18 October 2011. It considered that no further investigation was necessary, because, although there had been agreement between the requesters and IBRD management that there had been flaws in the environmental impact assessment procedure, steps were already under way to address them.

III. Consideration and evaluation by the Committee

39. Kazakhstan deposited its instrument of ratification of the Aarhus Convention on 11 January 2001. The Convention entered into force for Kazakhstan on 30 October 2001.

A. The scope of the considerations of the Committee

40. The communicant's allegations relate to the application of the Convention with regard to a specific project and do not pertain to the compliance in general of the relevant national legal framework with the provisions of the Convention.

41. The Committee notes that the communicant did not use domestic remedies, but in its oral submission during the discussion of the case it did not exclude the possibility of doing so in the future. The Committee welcomes the efforts of the Party concerned and the communicant to start a dialogue, though this began after the submission of the present communication.

42. Since the communicant did not use available domestic remedies, the Committee, rather than examining issues arising from the decision-making concerning the Road Corridor Project, decides to examine some general features of the relevant national legal framework in the light of recent legal developments. However, the Committee considers it necessary to examine also the specific allegations raised with respect to article 6, paragraphs 6 and 8, in order to assess how the regulatory scheme works in practice.

B. General considerations on the application of article 6

43. Under national law, the Road Corridor Project is subject to mandatory OVOS/State environmental *expertiza*, including public participation. The Road Corridor Project is also an activity within the ambit of article 6, paragraph 1 (a), of the Convention, on the basis of paragraph 8 of annex I to the Convention. Therefore, the public participation provisions of article 6 apply.

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.

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).

46. The Committee notes that despite similarities to the OVOS/*expertiza* system, the law of the Party concerned has specific features, since it provides for some possibilities for the public to participate also at the *expertiza* stage, by granting an opportunity to all interested citizens and public associations to express their opinion while the State environmental *expertiza* is being conducted by submitting written suggestions and comments directly to the competent authority.

47. The Committee notes that the legislation of the Party concerned, in addition to the terms "the public" (*общественность*) and "the public concerned" (*заинтересованная общественность*), for the purpose of public participation also uses the term "interested persons" (*заинтересованные лица*). Since "interested persons" is not defined and there are no criteria to distinguish it from the other two terms, this, in the view of the Committee, may lead to confusion.

C. Notification of the public (art. 6, para. 2)

48. The Committee notes that the rules on public hearings, as amended in 2012, do not provide for any mandatory requirement for the public notification to be timely. In contrast, the previous regulation of 2007 established a 20-day period prior to the public hearing for the public notification to be made. Therefore the Committee finds that the new regulation of the Party concerned does not meet the requirements of article 6, paragraph 2, of the Convention, in terms of timely notification.

49. The Committee further notes that there are different legislative arrangements for informing the public at the OVOS stage and at the *expertiza* stage.

50. At the OVOS stage, Kazakh legislation does not provide for any detailed mandatory requirements regarding methods of informing the public about the public participation procedure other than publication of an announcement in the mass media. Other sources for public notification may be used on a voluntary basis. Although in the present case the public was informed about the project by the notice in two newspapers, and also through the information on the website of the developer, the Committee considers that the Party concerned failed to establish detailed mandatory requirements regarding public notice to ensure that the public is informed in an adequate, timely and effective manner (cf. ECE/MP.PP/2011/11/Add.2, paras. 83, 86).

51. For the *expertiza* stage, the legislation of the Party concerned requires the developer to ensure publication of information in special environmental publication sources, as well as on the website of the Ministry of Environmental Protection, concerning the submission of the draft OVOS report to the State environmental *expertiza*.

52. The Committee considers that, although the obligation of the developer to publish information on the website of the Ministry of Environmental Protection at the *expertiza* stage carries elements of public notification, it is not sufficient to ensure effective public participation. The submission of the draft OVOS report to the State environmental *expertiza*

appears later in the decision-making procedure, and does not compensate for the insufficient public notification at the OVOS stage. Therefore, the Party concerned fails to comply with article 6, paragraph 2, of the Convention.

D. Provision of information to the public (art. 6, para. 6)

53. Under the law of the Party concerned, "interested persons" are able to access general information about the project — including the final OVOS report, as well as more specific information about issues relating to the environment and the acquisition of land — via the website of the project proponent only, and not via the website of the competent public authority. The Committee notes, in this connection, that the relevant information for the construction of the Temirlanovka by-pass segment of the Road Corridor Project was not made available in parallel on the website of the public authority responsible for decision-making, as required by article 6, paragraph 6, of the Convention.

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.

E. Procedures for public participation — submission of comments (art. 6, para. 7)

55. The legislation of the Party concerned provides for opportunities for members of the public to submit comments, information, analysis or opinions at both the OVOS and the State environmental *expertiza* stages.

56. According to the 2007 OVOS Instructions, comments by the public at the OVOS stage can be submitted during the public consultation period, which includes public hearings and the collection of written suggestions, including a survey of public opinion.

57. According to the 2007 Rules on OVOS-related Environmental Information, at the stage when the final OVOS report along with project-related documentation is submitted to the competent authority for State environmental *expertiza*, interested persons may submit to the authority written suggestions and comments on the OVOS report. The public authority has to review the application and provide a response within 15 calendar days — or longer if additional investigation is required. This regulation limits the right of the public, which may submit comments only on the OVOS report but not on all the project-related documentation relevant for decision-making which has a wider meaning than the OVOS report alone. Therefore, the current legal arrangements, which narrow the right of the public to submit comments only on the OVOS report, are not in line with the requirements of the article 6, paragraph 7, of the Convention.

58. In addition, the Committee notes that the legislation of the Party concerned regulating the procedure for public hearings requires the public comments to be reasoned and based on the study of documentary information that has been legally received relevant to the matter. At the stage of State environmental *expertiza* the scope of written comments is also limited to reasoned ones. On this occasion, the Committee recalls its previous observation that when national legislation requires that comments are "motivated proposals", i.e., containing reasoned argumentation, then the law fails to guarantee the full scope of the rights envisaged by the Convention (cf. ECE/MP.PP/2008/5/Add.6, para. 80).

59. Considering the legislative arrangements of the Party concerned, both in terms of limiting the opportunity of the public to submit comments only on the final OVOS report at the *expertiza* stage and the application of criteria for the consideration of the comments submitted (i.e., they must be "reasoned"), the Committee finds that the Kazakh legislation fails to guarantee the full scope of the rights envisaged by the Convention and therefore, does not comply with article 6, paragraph 7, of the Convention.

F. Due account taken of the outcome of public participation (art. 6, para. 8)

60. According to the 2007 OVOS Instructions the developer is responsible for gathering, registering, compiling and analysing the results of public participation which should be taken into due account and, if necessary, the OVOS report should be amended. The developer is also in charge of transmitting the outcome of the public participation procedure to the public authority mandated to issue a conclusion on the State environmental *expertiza*.

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.

G. Prompt information on the final decision (art. 6, para. 9)

63. The legislation of the Party concerned does not establish a clear requirement to inform the public of when the State environmental *expertiza* conclusions are issued and the possibilities for accessing the text of the conclusions along with the reasons and considerations upon which they are based. The Environmental Code provides that "after a decision has been made on the conclusion of the State environmental *expertiza*, all interested parties shall be granted the opportunity to receive information on the subject of the *expertiza* under the procedure set forth in the Code". This provision does not meet the requirement of article 6, paragraph 9, of the Convention, which creates a straightforward obligation for public authorities to promptly inform the public of the decision and to make accessible to the public the text of the decision along with the reasons and considerations upon which the decision was made. The present communication shows that when the communicant requested information on the decision by letter of 25 November 2010, the authorities in their response of 7 December 2010, instead of facilitating access to the positive conclusion of the *expertiza* issued on that same day, did not disclose it, by referring to limitations set in the Environmental Code and the Civil Service Act.

64. The Committee finds that by not establishing appropriate procedures to promptly notify the public about the environmental *expertiza* conclusions and by not establishing appropriate arrangements to facilitate public access to these decisions, the Party concerned fails to comply with article 6, paragraph 9, of the Convention.

IV. Conclusions and recommendations

65. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

66. The Committee finds that by not providing the requirement for informing the public in a timely manner, and by not specifying the means of informing the public other than publication in the mass media, the Party concerned fails to ensure that the public is informed in an adequate, timely and effective manner and thus fails to comply with article 6, paragraph 2, of the Convention (paras. 47 and 51 above).

67. The Committee finds that the Party concerned, by not establishing consistent and clear legal requirements for making the information relevant to decision-making accessible for the public, fails to comply with article 6, paragraph 6, of the Convention (para. 53 above).

68. The Committee further finds that by allowing the submission of public comments only on the OVOS report at the stage of State environmental *expertiza*, and by limiting the range of the public comments only to those containing reasoned argumentation, Kazakh legislation fails to guarantee the full scope of the rights envisaged by the Convention and thus fails to comply with article 6, paragraph 7, of the Convention (paras. 56 and 58 above).

69. The Committee also finds that the Party concerned, by not establishing appropriate procedures to promptly notify the public about the environmental *expertiza* conclusions and by not establishing appropriate arrangements to facilitate public access to these decisions, fails to comply with article 6, paragraph 9, of the Convention (para. 63 above).

B. Recommendations

70. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) and (c) of the annex to decision I/7, recommends that the Party concerned:

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that:

(i) Mandatory requirements for the public notice are detailed by law, such as the obligation to inform the public in a timely manner and the means of public notice, including the obligation that any information relevant for the decision-making is also available on the website of the public authority competent for decision-making;

(ii) There is a clear possibility for any member of the public concerned to submit any comments on the project-related documentation at different stages of the public participation process, without the requirement that these comments be reasoned;

(iii) There is a clear responsibility of the relevant public authorities to:

a. Inform the public promptly of the decisions they have taken and of how the text of the decisions can be accessed;

b. Maintain and make accessible to the public, through publicly available lists or registers, copies of the decisions taken and other information relevant to the decision-making, including evidence of having fulfilled the obligation to inform the public and provide it with opportunities to submit comments;

(b) Pursuant to paragraph 37 (c) of the annex to decision I/7, draw up an action plan for implementing the above recommendations with a view to submitting it to the Committee by 30 November 2013.

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Compliance Committee

Forty-second meeting
Geneva, 24–27 September 2013
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2011/59 concerning compliance by Kazakhstan

Adopted by the Compliance Committee on 28 March 2013

Corrigendum

The title of document ECE/MP.PP/C.1/2013/9 should read as above.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

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

Findings and recommendations with regard to communication ACCC/C/2011/61 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*

Adopted by the Compliance Committee on 28 June 2013

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

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I. Introduction

1. On 21 August 2011, a member of the public, Mr. Terence Ewing (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the United Kingdom of Great Britain and Northern Ireland had failed to comply with its obligations under Convention.

2. The communication alleges a failure of the United Kingdom to comply with provisions of the Convention on public participation and access to justice in relation to the planning and construction of the Crossrail project in the metropolitan London area. In particular, the communication alleges that the Crossrail Act 2008 misapplied the requirements for obtaining consent relating to conservation areas and listed buildings, which normally provided for public participation, and thus that the Party concerned is not in compliance with article 6, paragraph 7, of the Convention. The communication also alleges that this constitutes non-compliance with article 3, paragraphs 1 and 9, of the Convention. In addition, the communication alleges that as a result of the Crossrail Act misapplying the requirements for obtaining consent relating to conservation areas and listed buildings, there were no planning or Conservation Area Consents or Listed Building Consents to challenge and this, according to the communication, constitutes non-compliance with article 9, paragraphs 2, 3 and 4, as well as with article 3, paragraph 1, of the Convention.

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

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 18 October 2011.

5. After its thirty-fifth meeting (13–16 December 2011), the Committee asked the communicant to respond to some additional questions. The communicant responded on 4 March 2012.

6. The Party concerned responded to the allegations of the communication on 16 March 2012.

7. At its thirty-sixth meeting (27–30 March 2012), the Committee decided that it would discuss the substance of the communication at its thirty-seventh meeting (Geneva, 26–29 June 2012), with the exception of any allegations concerning the lack of a right of appeal for members of the public to challenge planning decisions, in particular in comparison to the rights of appeal enjoyed by applicants for such planning decisions, as that allegation would already be considered by the Committee in the framework of joined communications ACCC/C/2010/45 and ACCC/C/2011/60.

8. Additional submissions were provided by the communicant on 1 June 2012.

9. The Committee discussed the communication at its thirty-seventh meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.

10. Further to the Committee's request, the Party concerned submitted information on 1 October 2012. The communicant commented on that information on 17 and 19 October 2012.

11. The Committee prepared draft findings at its fortieth meeting (25–28 March 2013), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were

then forwarded for comments to the Party concerned and to the communicants on 1 May 2013. Both were invited to provide comments by 29 May 2013.

12. The Party concerned and the communicant provided comments on 7 June 2013. A revised version of the comments by the communicant was received on 26 June 2013.

13. At its forty-first meeting (25–28 June 2013), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the Committee's forty-third meeting. It requested the secretariat to send the findings to the Party concerned and the communicants.

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

A. Legal framework

Planning applications — listed buildings

14. The communication is limited to England and Wales. The Town and Country Planning Act 1990 (sections 70–75) and the Town and Country Planning General Regulations 1992 govern planning applications in England and Wales. In addition, the Planning (Listed Buildings and Conservation Areas) Act 1990 along with the Planning (Listed Buildings and Conservation Areas) Regulations 1990 governs planning applications concerning listed buildings and conservation areas.

15. Third party objectors have the right to make written representations to planning applications to local authorities for the general planning permission under regulation 19, paragraph 1, of the Town and Country Planning (General Development Procedure) Order 1995; and specifically with respect to listed building and conservation area consents, under the Planning (Listed Buildings and Conservation Areas) Regulations 1990.

16. Planning applications are usually considered by the local authorities in written form. More important applications, including applications relating to conservation areas and listed buildings, are referred to planning committees. The latter are composed of locally elected councillors of the local authority concerned.

17. The local authority planning officer prepares a report on the application, which the committee may follow or not. At the end of the presentation of the report, the committee votes on the application.

18. Each local authority adopts its own procedures for the functioning of the planning committees. Therefore, rules and regulations vary in England and Wales.

19. The right of third parties, i.e. persons other than the applicant, to make an oral presentation before the planning committee depends on the rules adopted by the local authorities. Most local authorities permit members of the public who give notice prior to the Committee's meetings to address the committee orally, along with the applicant. Both parties have a five-minute slot, but if there is more than one objector, then the time is split between them, or the chair of the planning committee determines who is going to speak. Other local authorities (such as Wandsworth Council and the City of Westminster Council), do not allow for any third party oral presentations. These authorities, however, are required to accept written objections and to take them into account, according to the statutory requirements.

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

Hybrid bill process and petitions

20. Under the law of the Party concerned, a hybrid bill is a bill that mixes the characteristics of public and private bills.[2] Public bills introduce legislative changes applicable to all, while private bills only change the law as it applies to specific individuals or organizations, rather than the general public. A hybrid bill is a public bill that affects private interests of an individual, a group of individuals or an entity. The procedure for a hybrid bill likewise combines elements applicable to both private and public bills. The process is usually used by the Government on behalf of private sector investors to obtain authorization of large-scale projects that are of national interest but may widely affect private interests. For instance, the process has been used for the authorization and construction of the Channel Tunnel and recently the Crossrail project (the subject of the present communication).

21. The Public Bill Office decides when a bill is a hybrid bill and the parliamentary process is longer than for regular public bills. Natural and legal persons who are "specially and directly affected" by a hybrid bill are entitled to oppose the bill or to seek amendments before a select committee appointed by the House of Commons. The select committee is appointed to examine the bill in detail, check and report on it, including reviewing the petitions by those "specially and directly affected". Persons "specially and directly affected" are also entitled to petition and appear before a further select committee appointed by the House of Lords later in the procedure.[3]

22. Petitions are processed under a quasi-judicial procedure by the select committee of each House, which act in a manner as a planning committee under regular planning applications. Unlike the consideration of petitions against public bills, in which case it is at the chair's discretion whether the objector should be heard, there is an obligation for the select committee to hear all objectors, unless they state that they do not wish to be heard or unless they decide to withdraw their petition. Under the hybrid bill process, the select committee reports on what they heard and what they deem necessary to be done to address the concerns and move the process forward.

23. A hybrid bill may be challenged before a court of law when there is a claim for a declaration of incompatibility with the Human Rights Act 1998 or of breach of European Union (EU) law.

The Crossrail Act

24. On 22 February 2005, the Crossrail Bill was introduced in Parliament by the Secretary of State (see annex 1 of the Party's response of 16 March 2012 for a chronology of the Bill's passage from Parliament).[4] The Bill authorized the construction of a high-frequency railway for London and the South-East from Maidenhead Berkshire and Heathrow Airport in the west, through central London to Shenfield and Abbey Wood in the east. The Bill, following a three-year hybrid bill process, passed through the House of Commons and then the House of Lords, received royal Assent on 22 July 2008 and became an Act of Parliament.

25. As an alternative to the hybrid bill process, the scheme could have been promoted by a third party under the Transport and Works Act 1992. According to the Party concerned

[2] For a general overview of the categories of bills (draft laws) and the parliamentary process in the United Kingdom, see http://www.parliament.uk/about/how/laws/bills/.

[3] The House of Commons and the House of Lords together constitute the Parliament.

[4] Documentation on the communication, including submissions by the communicant and the Party concerned, is available on a dedicated web page on the Committee's website (http://www.unece.org/env/pp/compliance/compliancecommittee/61tableuk.html).

this would have had a number of drawbacks. It would not have allowed the Government to publicly state support for the scheme in advance and the Secretary of State for Transport would have been required to decide the application on a quasi-judicial basis. In addition, an order under the Transport and Works Act could not, on its own, secure all the necessary powers and consents required to build the Crossrail. This is because the Crossrail project required provisions to be made relating to the way that railways are regulated as well as planning permission for the railway itself. A hybrid bill allowed both of these things to be achieved in a single bill and so for the railway and its impacts to be properly considered in totality. Moreover, the process of securing the necessary powers and awarding the contract might have taken up to three years longer using the Transport and Works Act procedure than using the hybrid bill process, which would have unnecessarily delayed progress with the scheme and extended the uncertainty for those people affected by the project.

26. Under section 10 of the Crossrail Act "planning permission shall be deemed to be granted under Part 3 of the Town and Country Planning Act 1990 for the carrying out of development authorised by this Act". The usual process for granting planning permission under the Town and Country Planning Act 1990 and/or conservation area consent under the Planning (Listed Buildings and Conservation Areas) Act 1990 was therefore changed.

27. With respect to environmental impact assessment (EIA), projects authorized under the hybrid bill procedure are considered to be outside the scope of the amended EU EIA Directive.[5] However, national legislation requires that House of Commons Standing Orders relating to private business apply to hybrid bills, including the Standing Order 27A which provides for the deposit of an Environmental Statement at the time the bill is deposited at the Private Bill Office. Environmental Statements are available for inspection.

B. Facts

28. The project relating to the Crossrail — currently under construction — included the building of stations in several areas of London to serve the Crossrail link. It was processed under the hybrid bill procedure. Consultations had started before the introduction of the Bill to Parliament. Information about the process and the impact of the project, including revisions of the project documentation (such as proposals for amendments and supplementary environmental statements), was available on the Internet[6] and in the press. Also, the Crossrail Project Bulletin was published quarterly to provide progress about the project.

29. The development site is within the boundary of the Soho Conservation Area and adjoins the Hanway Street Conservation Area on the opposite side of Oxford Street and the Bloomsbury Conservation Area of the London Borough of Camden on the other side of St Giles Square.

30. Prior to 2010, a Victorian terrace of shops stood at the junction of Charing Cross Road and Oxford Street. In addition, further down Charing Cross Road, there was the adjoining Astoria building, which had been used for entertainment venues and had hosted a number of alternative lifestyle club events. According to the communicant, both were held to have made a "positive contribution" to the Soho Conservation Area in the City of Westminster.

[5] See article 1, paragraph 4, of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification).

[6] See http://www.crossrail.co.uk/; updated information was also posted on the Parliament website (www.parliament.uk).

31. Starting in mid-2010, the Victorian buildings on the corner of Oxford Street and Charing Cross Road and also further down Charing Cross Road, including the Astoria building, were demolished or dismantled, a process that was completed in early 2011.

32. The Select Committee in the House of Commons sat in public for 84 days of hearings and heard 205 of the 466 petitions against the Bill between 17 January 2006 and 18 October 2007. Among the petitions, there were three petitions which related directly to the Astoria theatre (one of the buildings of concern named in the communication). As a result of the procedure, a number of amendments were made.

33. Upon the Bill having its first reading at the House of Lords in December 2007, a second petitioning period was triggered, which lasted from 8 January to 30 January 2008, during which the Select Committee of the House of Lords heard 45 of 113 petitions submitted.

34. The project findings of the EIA procedure were reported in an environmental statement which was submitted to Parliament. A press notice was issued in April 2005 and comments could be submitted until 17 May 2005. Supplementary environmental statements were also published as amendments were made to the Bill.

C. Substantive issues

Public participation

35. The communicant alleges that the only public participation that took place on the Crossrail project was during the Parliamentary procedures for the adoption of the Crossrail Bill, with petitions to the House of Lords, etc., including one from the City of Westminster, but, that no public participation took place concerning the demolition of listed buildings, as required by the specific acts. The communicant thus alleges that by removing the requirements for obtaining consents for conservation areas and listed buildings through the Crossrail Act (section 10), the Party concerned did not allow for any written or oral representations under the ordinary public participation procedures (Town and Country Planning Act 1990 and Planning (Listed Buildings and Conservation Areas) Act 1990), and thus that it failed to comply with article 3, paragraphs 1 and 9, of the Convention. Also, since the demolition of the buildings falls under article 6, paragraph 1 (b) of the Convention, the communicant alleges that the Party concerned failed to comply with article 6, paragraph 7, of the Convention.

36. At the discussion of the communication with the Committee on 25 September 2012, the communicant conceded that the Party concerned had complied with all elements of article 6 of the Convention, with the exception of the public notice. As a result of the deficient public notice, the communicant alleges that he was not aware of the ongoing process and was not able to submit his objections relating to the demolition of the buildings.

37. The Party concerned points to the fact that the definition of public authorities in article 2 of the Convention excludes legislative bodies, and that the Crossrail Bill was outside the scope of article 6 and the Convention in general. The Party concerned refers to the Aarhus Convention Implementation Guide,[7] which, with respect to article 2, paragraph 2, of the Convention states that "elected representatives are more directly

[7] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, second edition (2013). A text only version is currently available online from http://www.unece.org/index.php?id=32764.

accountable to the public through the election process", and also to the recent jurisprudence of the Court of Justice of the EU in *Boxus and others* v. *Région wallonne* (C-128/09).

38. In any event, since the whole project was subject to an Environmental Statement (according to Standing Order 27A), the Party concerned strongly advocates that there was a full public participation process and that the supply of information to the public was such as to satisfy the requirements of the Convention.[8] Therefore, the Party concerned contends that the legislative process that was followed for the Crossrail Act 2008 gave the public sufficient opportunity to participate in the decision-making process. Members of Parliament were provided with a number of documents to enable them to form an informed opinion about environmental issues relating to the project, such as the environmental statement on the likely environmental impact of the project; and they had plenty of time to examine and consider the proposed project.

39. The Party concerned notes that the Bill was subject to Parliamentary scrutiny and that the communicant had the opportunity to participate in, and comment on, the proposals for the project and also the Bill both prior to the Bill's introduction to Parliament and during the Bill's progress through Parliament, before it received Royal Assent on 22 July 2008.

40. In particular, the Party concerned notes that the communicant had an opportunity prior to the Bill receiving Royal Assent to participate in the process which led to the powers which were the subject of the communication being approved by Parliament, while the Select Committee process demonstrated a further aspect of the Parliamentary scrutiny to the which the Bill was subject. It further notes that consultation had been held in relation to the EIA and the supplementary environmental statements, and that the communicant had the opportunity to comment on the environmental impact of the project before the Act received Royal Assent.

41. In particular with respect to public notice, the Party concerned notes that, apart from information made available by the press and a website dedicated to the project, there were more than 100 information centres along the route of the project.

Access to justice

42. The communicant alleges that it is not possible to either judicially review or otherwise subject an Act of Parliament (such as the Crossrail Act) to any legal challenge, unless there is claim through the 1998 Human Rights Act for breach of "convention right" or "declaration of incompatibility".

43. The Party concerned contends that an act may be challenged before courts, also in case of a breach of EU law.

44. According to the communicant, the rights of the public to access to justice are limited to these two possibilities.

45. The communicant also alleges that the Party concerned, by removing the requirements for obtaining consents regarding conservation areas and listed buildings, eliminated the possibility for members of the public to obtain judicial review. Thus, the Party concerned failed to comply with article 3, paragraph 1, and article 9, paragraphs 2, 3 and 4, of the Convention.

[8] See also closing submissions of the Promoter following the completion of hearings into Petitions against the Bill and three sets of additional provisions (the Crossrail Bill, House of Commons Select Committee) of 28 March 2007, submitted by the Party on 25 June 2012.

46. The Party concerned contends that the aims of the Convention with respect to access to justice were fully met through the legislative process. According to the Party concerned, since the Crossrail is not a project under article 6, the access to justice provisions under article 9, paragraph 2, do not apply. In addition, since the Parliament is not a private person or a public authority under article 2, paragraph 2, of the Convention, article 9, paragraph 3, does not apply. The Party concerned also stresses that should article 9 apply, the possibility for review of the hybrid acts for breach of the Human Rights Act 1998 or EU law, although limited due to the fact of the nature of the act as a legislative act and the direct accountability of the electorate, is still in compliance with the Convention.

47. Moreover, the Party concerned underscores that in the review of petitions, the criterion of "specially and directly affected" (see para. 21 above) was not considered at all and all petitions were admitted and heard.

III. Consideration and evaluation by the Committee

48. The United Kingdom ratified the Aarhus Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

49. The Committee notes that the communicant's allegations regarding the failure of the Party concerned to comply with the public participation provisions of the Convention do not relate to the whole project, but to the demolition of certain buildings as part of the project, as required by specific acts. The Committee does not consider the specific demolitions that were of concern for the communicant, but rather the application of the Convention in the hybrid bills system of the Party concerned.

50. As already stated above, the Committee will not consider any allegations relating to the right of third parties to judicial review under the ordinary planning procedures, as those allegations are also considered in the context of communications ACCC/C/2010/45 and ACCC/C/2011/60 (see ECE/MP.PP/C.1/2013/12).

51. In addition, the Committee will not consider any allegations of non-compliance with article 3, paragraphs 1 and 9, of the Convention as these were not substantiated by the communicant.

Crossrail Act — categorization under the Convention

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.

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. The fact that the Party concerned has in place an integrated procedure for "hybrid bills" in order for the Government to secure all powers and consents necessary for the authorization of major projects, instead of having fragmented procedures going through a number of different public authorities, central and/or regional, does not change the nature of the act as a decision permitting the project. The Committee observes that if all large-scale projects were subject to parliamentary authorizations procedure and evoked article 2, paragraph 2, of the Convention, then there is a risk that important projects would never be subject to the public participation requirements of the Convention and this would run counter its objectives.

55. The project concerns the construction of a high-frequency railway, from east to west, across London and with connections to the underground rail network. The legislation of the Party concerned (Standing Order 27A) requires an EIA procedure and the deposit of an Environmental Statement. Therefore, the project is an activity under article 6, paragraph 1 (a), in conjunction with paragraph 20 of annex I to the Convention.

56. It is noted that processes similar to the hybrid bill process, under a different label, exist under the jurisdictions of other Parties to the Convention (see, e.g., the recent jurisprudence of the Court of Justice of the EU concerning Belgium: *Boxus and others* v. *Région wallonne*, C-128/09 (2012) and *Solvay* v. *Région wallonne*, C-182/10 (2012)). While such processes are a reasonable way for Governments to deal with permitting large projects of significant national and also transboundary impact (e.g., the Channel Tunnel), the Committee underlines that the process of adopting projects by such means still have to be considered within the provisions of the Aarhus Convention, and thus that the Party concerned has to ensure adequate opportunities for public participation. Although the Party concerned refers in the case of the Crossrail Act to a "specific legislative act", the Committee holds that the process adopting the Crossrail Act by means of a hybrid bill falls within the scope of article 6 of the Aarhus Convention as it serves as a decision to permit a specific activity.

Notification of the public participation procedure — article 6, para. 2

57. As a project under article 6, paragraph 1 (a), in conjunction with paragraph 20 of annex I, the public participation provisions of article 6 apply. During the hearing, the communicant submitted that all public participation requirements under article 6 were complied with, with the exception of the public notice, under article 6, paragraph 2. Due to the failure of the Party concerned to inform the public in a sufficient manner, the communicant alleges that he was not aware of the ongoing process, including the decisions for demolition of the buildings he was interested in, and missed the opportunity to submit his objections.

58. On the basis of the information received, and taking into account the statement from the communicant that public participation, with the exception of public notice, was fulfilled, the Committee does not examine whether each of the requirements of article 6, paragraphs 3–9, was satisfied.

59. With regard to the public notice, the Committee notes that information about the project and the elements of article 6, paragraph 2, of the Convention were available for the public early on during the permitting procedure, on the Internet (via the websites of the developer and the Parliament), in the press and also at the information centres set up along the route of the project. The number of petitions objecting to the project, including to the

demolition of buildings, shows that members of the public were adequately informed. Therefore, the Committee finds that the Party concerned did not fail to comply with article 6, paragraph 2, of the Convention.

Access to review procedures — article 9, para. 2

60. Article 9, paragraph 2, of the Convention requires Parties to ensure access to procedures for review of decisions, acts and omissions subject to article 6. This provision addresses standing, as well as the scope of review, that should comprise the substantive and procedural legality of the act. To comply with the Convention, the Party concerned must ensure that within its domestic legal system all criteria required under article 9, paragraph 2, of the Convention, also those extending beyond EU law and the 1998 Human Rights Act, are met in regard to hybrid bills processes.

61. The Committee examines in particular the scope of the review procedures after the adoption of the Crossrail Act (or any act adopted further to a hybrid bill procedure authorizing a specific activity). In the case of the Crossrail Act no such challenge was brought before a court of law. Thus, the Committee is not in position to determine whether the legal remedies available under the law of the Party concerned would have enabled members of the public concerned to challenge the Crossrail Act as required under article 9, paragraph 2, of the Convention.

IV. Conclusions and recommendations

62. Having considered the above, the Committee concludes that by adopting the Cross Rail Act through the hybrid bill process the Party concerned was not in non-compliance with article 6 paragraph 2. Furthermore, the Committee holds that due to the lack of sufficient information about the practice on legal remedies concerning hybrid bills, the Party concerned is not in non-compliance with article 9, paragraph 2, of the Convention.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

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

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

Adopted by the Compliance Committee on 28 June 2013

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

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I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Legal framework

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

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

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

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

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

B. Facts

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

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

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

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

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

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

22. Specifically, the Court of Cassation noted that:

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

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

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

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

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

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

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

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

C. Substantive issues

Access to justice — article 9

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

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

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

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

D. Domestic remedies

29. The communicant has exhausted all domestic remedies.

III. Consideration and evaluation by the Committee

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

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

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

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

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

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

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

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

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

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

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

Timely procedures — article 9, para. 4

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

IV. Conclusions and recommendations

39. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

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

B. Recommendations

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

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

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

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

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-fourth meeting
Geneva, 25–28 March 2014
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2011/63 concerning compliance by Austria

Adopted by the Compliance Committee on 27 September 2013

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I. Introduction

1. On 1 December 2011, the non-governmental organization (NGO) Vier Pfoten — Stiftung für Tiershcutz gemeinnützige Privatstiftung (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Austria had failed to comply with its obligations concerning the access to justice provisions of the Convention.[1]

2. Specifically, the communication alleges that the Party concerned fails to provide for access to justice for members of the public, including NGOs, in administrative penal and judicial criminal proceedings in respect of contraventions of national law relating to the environment. Therefore, according to the communication, the Party concerned is not in compliance with article 9, paragraphs 3 and 4, of the Convention.

3. At its thirty-fifth meeting (Geneva, 13–16 December 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 22 December 2012.

5. By letter of 10 January 2012, the Party concerned requested the Committee to reconsider the preliminary admissibility of the communication in the light of the Committee's findings on communication ACCC/C/2010/48 (Austria) (ECE/MP.PP/C.1/2012/4). By letter of 19 January 2012, the communicant expressed its views on that request of the Party concerned. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee took note of the letters from the Party concerned and the communicant and confirmed its decision on the communication's preliminary admissibility.

6. At its thirty-seventh meeting (Geneva, 26–29 June 2012), the Committee agreed to discuss the content of the communication at its thirty-eighth meeting (Geneva, 25–28 September 2012).

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

8. The Party concerned and the communicant submitted their response on 5 and 12 November 2012, respectively. In its response, the Party concerned included an overview of the steps taken and to be taken in view of the recommendations on communication ACCC/C/2010/48.

9. The Committee prepared draft findings at its forty-first meeting (Geneva, 25–28 June 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 18 July 2013. Both were invited to provide comments by 15 August 2013.

[1] Communication ACCC/C2011/63 and documents related to it, including responses from the communicant and the Party concerned, are available on the Committee's website from http://www.unece.org/env/pp/compliance/compliancecommittee/63tableat.html.

10. The Party concerned provided comments on 23 August 2013. The communicant acknowledged receipt of the draft findings on 24 July 2013 but did not provide substantive comments.

11. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-fourth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[2]

A. Legal framework

Administrative penal proceedings — standing

12. The Administrative Penal Act (*Verwaltungsstrafgesetz*) in conjunction with the Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) provide legal standing in administrative penal proceedings to persons who are involved in the matter on the basis of a legal title or interest (Administrative Procedure Act, art. 8), the accused (Administrative Penal Act, art. 32, para. 1), i.e., the private party, and the private prosecutor.

13. The possibility to participate as a private party depends on the applicable sectoral laws.

14. Administrative offences are prosecuted ex officio (Administrative Penal Act, art. 25) (*Offizialmaxime* — "principle of investigation ex officio") and in administrative penal proceedings, the competent authority has a dual function ("principle of inquisition"), as a prosecutor and a judge. In case of suspicion, the competent authority is obliged to initiate and conduct proceedings, and has a duty to determine the circumstances of the case.

Judicial criminal proceedings — standing

15. The Code of Criminal Procedure (*Strafprozessordnung*) defines the parties to criminal proceedings (art. 22), including the public prosecutor, the accused, the liable stakeholder, the private prosecutor, the subsidiary prosecutor and the private party. Most of them may appeal the procedure.

16. The objective of the mandatory prosecution principle in judicial criminal proceedings is to guarantee the equality of all persons and to ensure that no political or other discretionary criteria are used. NGOs have the possibility to report contraventions of environmental law to criminal investigation/public prosecution. Based on the circumstances, the evidence and the law, the prosecutor decides whether further prosecution is needed or whether the case should be closed. The principle of publicity (*Őffentlichkeitsgrundsatz*, Federal Constitution, art. 90, para. 1), applies to most of the judicial criminal proceedings, such as the hearings, but does not apply to the investigation stage.

17. The definition of the victim (Code of Criminal Procedure, art. 65, para. 1) encompasses victims that are or have been exposed to a particular emotional burden and victims that have suffered damage and seek redress. Victims are entitled to participate in

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

the criminal proceedings: they can be informed about their procedural rights, heard during the trial and inspect the files, if relevant interests are affected.

18. Victims and persons that have a legal interest, as defined by law, have access to review procedures, including the possibility to request the continuation of a case that has been suspended (see Code of Criminal Procedure, art. 195 in conjunction with arts. 190–192).

19. When a victim makes a declaration of participation in the criminal proceedings, then it becomes a private party (*Privatbeteiligter*) and may receive compensation for damages. If there is no apparent legal interest, victims have to demonstrate the correlation between the criminal offence and damage. Private parties have the right to access documentary evidence from criminal investigation/public prosecution.

NGO standing in criminal/penal proceedings

20. Under some environmental laws, such as those concerning trade in wildlife or animal welfare, violations are pursued through penal administrative or criminal judicial proceedings only. There is no other avenue in administrative and civil proceedings.

21. Due to the exclusive definition of "parties" in penal administrative or judicial criminal proceedings, NGOs cannot participate in those proceedings following a violation of some environmental laws, and they are not recognized as private parties having a legal interest or as "victims" on behalf of nature, biodiversity or species, even if their objectives are related to the protection of the environment.

B. Facts

22. One of the main activities of the communicant relates to campaigning for animal and endangered species protection. In doing so, the communicant reports contraventions of animal and species protection legislation by individuals to the competent administrative authorities or to the prosecution services, depending on the nature of the offence. The offences reported by the communicant have, among others, related to:

(a) Section 7 of the Wildlife Trade Act (*Artenhandelsgesetz*), which penalizes, among others, the import and export of wild species without the necessary licence;

(b) Sections 9 and 10 of the Vienna Nature Conservation Act (*Naturschutzegesetz*), which penalize several severe offences to habitats and species, such as being present in protected habitats without permission or collecting protected plants;

(c) Sections XIV to XVI of the Nature Conservation and Landscape Care Act of one of the Austrian provinces (*Burgenland Naturschutz- und Landschaftspflegegesetz*), which penalize acts that may jeopardize habitats and species, such as significantly removing waters and altering moorlands and wetlands environments and the surrounding area;

(d) The Animal Protection Act (*Tierschutzgesetz*), penalizing, for instance, acts that inflict pain, injury or other suffering to animals.

23. After reporting the alleged offences, the communicant has attempted to enquire with administration or prosecution, as appropriate, whether any action had been taken against the offenders.

24. Where administrative penal proceedings were brought, the communicant was not able, as a third party, to have access to the proceedings and related information, because the parties are the authority and the offender. In addition, the communicant did not have standing to challenge any action or omission of the public authority, after reporting the offence.

25. Similarly, for allegations giving rise to judicial criminal proceedings, the communicant attempted to participate in the proceedings as a private party but was never granted standing, on the grounds that it had not suffered damages eligible for compensation. As a consequence, the communicant was denied access to documentary evidence relating to the cases it had reported.

26. The communicant also attempted to participate in judicial criminal proceedings and to access the related documentation as a "victim" (Code of Criminal Procedure, art. 65, para. 1 (c)). It argued that a "victim" is not only the one who has suffered harm as a result of a criminal offence, but also anyone whose judicially protected interests could be impaired by that offence, and as an environmental organization devoted to animal and species protection its judicially protected interests were impaired by offences to species and animal protection. The communicant was never granted standing.

27. The communicant provides a specific example relating to reporting alleged contraventions of section 7 of the Wildlife Trade Act, i.e., the import of protected Egyptian vultures. On 2 February 2011, the communicant submitted a statement of facts to the Wiener Neustadt prosecution service and gave notice of its intention to join the proceedings as a private party, on the basis of the very high costs incurred upon it due to the frequent contraventions by the offender of the Animal Protection Act, the Wildlife Trade Act and the Criminal Code. On 8 June 2011, the communicant filed an application for inspection and transcription of documentary evidence. On 16 June 2011, the prosecution service rejected both the communicant's declaration to join the proceedings as a private party and its application to access documentary evidence. The rejection was based on the grounds that the communicant was not a victim in the meaning of article 65, paragraph 1 (c), of the Code of Criminal Procedure as it had not suffered damages eligible for compensation, and it did not have a legitimate interest as required in article 77, paragraph 1, of the Code. In the view of the prosecution service, the pursuit of the communicant's objective of animal protection did not represent a legitimate and recognized legal interest under the applicable law of the Party concerned.

28. The communicant appealed this decision of the prosecution service to the provincial (Wiener Neustadt) court. It argued that it was a victim as defined in the Code, since its interests in animal and environmental protection were legally protected by section 7 of the Wildlife Trade Act. Due to the purposes of its activities, as reflected in its by-laws, it was more directly concerned than any other member of the public and the alleged contraventions impaired its legally protected interests.

29. On 19 August 2012, the Wiener Neustadt Provincial Court dismissed the application, on the grounds that the communicant was not a victim under the Code, that it had suffered no damages eligible for compensation and that was not otherwise impaired in its judicially protected interests. The Court also found that the communicant did not have a legal interest required to access documentary evidence.

30. On 31 August 2012, the communicant appealed against that decision to the provincial court of appeal in Vienna. In its appeal, the communicant referred to the obligations arising from article 9, paragraph 3, of the Convention, as well as to the findings of the Committee with regard to communication ACCC/C/2010/48. In this context, and for the purpose of proceedings concerning provisions of national law relating to the environment, the communicant noted that the definition of the victim under the Code of Criminal Procedure should be interpreted in a manner comprising environmental organizations.

31. The Vienna Provincial Court of Appeal dismissed the appeal by its decision of 10 October 2011,[3] and confirmed the ruling of the court of first instance. The Court of Appeal also noted that: (a) following the "mischief rule", the parliament had not intended the definition of victim under the Code to be interpreted broadly; (b) that international conventions, such as the Aarhus Convention, generally did not apply directly, but had to be transposed into national law to be binding on individuals; (c) that no transposition of the European Union (EU) directives relating to the Convention had occurred in the sphere of criminal law, including the law relating to judicial procedure, which meant that the Convention had no direct effect on the legal status of victims under the Code; and (d) that the Convention and the EU directives were very vague, leaving it to the discretion of the member States to implement them, and thus the definition of the "victim" under the Code remained unaffected.

32. There were no other possibilities for the communicant to challenge the violations, either by challenging the acts by persons or by challenging the omission of the competent authorities to pursue the violations.

C. Domestic remedies and admissibility

33. To illustrate its allegations and also to show that domestic remedies were not available, the communicant provides the example of its attempts to join judicial criminal proceedings for reported contraventions of the Wildlife Trade Act. It also mentions that no further remedies are available.

34. In its response, the Party concerned questions the admissibility of the communication, first because of its relationship to communication ACCC/C/2010/48 and secondly because the communicant failed to use the existing domestic remedies.

35. The Party concerned recalls the Committee's findings on communication ACCC/C/2010/48, which covered standing for NGOs in environmental law with respect to permitting procedures, sectoral administrative procedures and civil law. It asserts that the aspects of administrative proceedings raised in the present communication were already covered by communication ACCC/C/2010/48, while the issue of participatory rights of NGOs and other members of the public in criminal or administrative penal proceedings is beyond the scope of rights granted under the Convention.

36. The Party concerned also notes that the communicant did not use the existing legal remedies provided under the environmental liability and environmental information laws.

37. The Party concerned first refers to the applicable EU law on environmental liability. According to article 2, paragraph 1 (a), of EU Directive 2004/35/CE on environmental liability (Environmental Liability Directive),[4] "environmental damage" means "damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species". The Directive further defines protected species and natural habitats (art. 2, para. 3) referring to the EU Birds and Habitats Directives.[5] Therefore, the Environmental Liability Directive covers matters on wild birds, natural habitats and wild fauna and flora. Provincial environmental liability acts, such as the Vienna and the Burgenland Environmental

[3] See annex 1 to the communication (translation of the decision provided by the communicant).

[4] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

[5] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (this is the codified version of Directive 79/409/EEC as amended); and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

Liability Acts have transposed EU law into the domestic legal order and NGOs may submit a request for action and also have access to a court of other independent and impartial public body, such as the Independent Administrative Senate (*Unabhängiger Verwaltungssenat*). The Party concerned also indicates that it is currently considering broadening the scope of applicability of the Environmental Liability Directive.

38. According to the Party concerned, the communicant could also have filed a request to obtain information on the "natural sites", the "biological diversity and its components" and the "measures or activities designed to protect these elements" under the Environmental Information Act.

D. Substantive issues

39. The communicant alleges that it is completely impossible for NGOs and other members of the public to have access to justice in administrative penal and judicial criminal proceedings concerning contraventions of provisions of national law relating to the environment. The experience of the communicant reveals that in case of administrative penal proceedings, the communicant was not granted access to information relating to the offence it had reported (such as whether and how the competent authorities had followed up); and in case of judicial criminal proceedings, the communicant was neither granted access to related information on the offence it had reported, nor standing as a third party or even as a victim, although the purpose of its activity was closely related to the offence and its legal interest seemed to be evident. Therefore, the communicant alleges that the Party concerned fails to comply with article 9, paragraph 3, of the Convention.

40. The communicant also alleges that due to the complete absence of legal remedies for NGOs in administrative penal and judicial criminal proceedings, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

41. During the discussion before the Committee on 26 September 2012, the communicant also stressed that the Ombudsman for the Environment (Environmental Ombudsman) in Austria cannot be seen as a remedy, but as an administrative authority, which does not always have standing in review procedures; and also that environmental liability laws in Austria do not address cases of hunting, nature protection or other mistreatment of a single animal creature, but only address cases of severe negative effects on a species. In illustration of its allegations, the communicant informed the Committee of circumstances where animals were mistreated (killing frog populations near a pond, using a cheetah in a fashion show, using a fox for training hunting dogs) or other violations (dumping wastewater from a poultry farm near a Natura 2000 area), but members of the public that had reported the incidents could not verify whether the criminal offence had actually been prosecuted, and were not able to follow up, in the event the complaints had been dropped.

42. The Party concerned submits that it is not in breach of any of the Convention's provisions with respect to the present case. During the discussion before the Committee, the Party concerned admitted possible flaws in the present system, but noted that these are being addressed in the process of following up on the previous recommendations of the Committee, in the framework of the administrative court system of the country, at the federal and provincial levels.

43. Apart from its objections with regard to the admissibility of the communication (see above), the main argument of the Party concerned is that the access to justice provisions under the Convention do not extend to proceedings under criminal law and do not include matters of animal protection in a sense that goes beyond the protection of animals in their natural habitats (in situ) or animal welfare in the stricter sense (such as protection against animal torture). In the view of the Party concerned, there is no provision under the Convention asking Parties to grant specific participatory — or even prosecutorial — rights

to NGOs in criminal or administrative penal proceedings. In those proceedings, NGOs are heard in court or by the public prosecutors as witnesses, experts or private accuser. The main purpose of Austrian criminal and penal procedures is to implement the entitlement of the State under public penal law.

44. In particular, the Party concerned draws attention to the language used by the Convention. Article 9, paragraph 3, states that members of the public may "challenge", not "penalize". Article 9, paragraph 4, refers to the procedures in the three previous paragraphs. Article 9, paragraph 1, concerns requests for information. With regard to this aspect the Environmental Information Acts (*Umweltinformationsgesetze*) at the federal and provincial levels reflect the obligations of this provision. Article 9, paragraph 2, concerns access to justice for permitting activities under article 6; however, neither article 6 nor any other provision of the Convention explicitly refers to criminal or administrative penal proceedings.

45. The Party concerned argues that some of the legislation referred to by the communicant, namely, the Animal Protection Act and the Wildlife Trade Act, is not covered by the Convention. It notes that the definition of "environmental information" in article 2, paragraph 3, of the Convention indicates that the the term "environment" includes the natural, cultural and built environment, and may subsume animal protection in broader terms, especially as species conservation, biological diversity and conservation of flora, fauna and habitats; but the term does not cover animal protection in the stricter sense, such as domestic animals, or the trade of endangered species. In this sense, the communicant's allegations (including the examples of using a cheetah in a fashion show or a fox to train hunting dogs) fall outside the scope of the Convention.

46. The Party concerned reiterates that access to justice under the Aarhus Convention does not extend to proceedings under criminal law, and takes the position that animal protection under the Convention includes only their protection in their natural habitats in Austria. It maintains that, apart from the possibilities offered under the EU Environmental Liability Directive, as transposed into national law, members of the public have the possibility to have access to justice by using civil law remedies and the institution of the Environmental Ombudsman. Nevertheless, the Party concerned admits that the existing situation is not satisfactory and considers that those changes it intends to make, as a follow-up to the Committee's recommendations in ACCC/C/2010/48, will extend the legal standing of NGOs so as to respond to the issues raised by the communication.

III. Consideration and evaluation by the Committee

47. Austria ratified the Aarhus Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.

48. The central allegation of the communication is the lack of possibility for members of the public, including NGOs, to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of the national law relating to the environment, under article 9, paragraph 3, of the Convention. The Committee decides not to consider alleged non-compliance with article 9, paragraph 4, of the Convention on the merits, because in the present case the allegations of the absence of effective remedies (art. 9, para. 4) are subsumed by the allegations of a complete absence of any remedies (art.9, para. 3). That is, if the Committee holds that the Party concerned fails to provide any remedy, as provided for under article 9, paragraph 3, this also implies a failure by the Party concerned to comply with article 9, paragraph 4.

49. With respect to the connection of the communication to communication ACCC/C/2010/48, in which standing was considered in the context of the remedies

available both under permitting participatory procedures (art. 9, para. 2) and administrative and civil remedies for contraventions of national law relating to the environment, in particular in sectoral and provincial laws, the Committee notes that the present communication goes beyond the scope of ACCC/C/2010/48, because it calls for consideration of the Committee of access to penal/criminal proceedings in environmental matters.

50. The first question to be addressed is whether the laws invoked by the communicant constitute "national law relating to the environment"; the second is whether members of the public, including NGOs, have any possibility to exercise their rights under the Convention in cases where the contravention of environmental legislation triggers the application of judicial criminal or administrative penal proceedings.

51. Before examining these aspects more thoroughly, the Committee recalls that "the criteria, if any, laid down in national law" in accordance with article 9, paragraph 3, should not be seen as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national laws relating to the environment (see findings on communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C/1/2006/4/Add.2, paras. 35–37) and ACCC/C/2006/18 (Denmark) (ECE/MP.PP/C/1/2008/5/Add.4, paras. 29–31)).

National law relating to the environment (art. 9, para. 3)

52. Article 9, paragraph 3, is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene laws relating to the environment, and with the means to have existing laws relating to the environment enforced and made effective (see also findings on ACCC/C/2005/11 (Belgium), para. 34). Importantly, the text of the Convention does not refer to "environmental laws", but to "laws relating to the environment". Article 9, paragraph 3, is not limited to "environmental laws", e.g., laws that explicitly include the term "environment" in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment.

53. The scope of "national laws" also extends to the applicable EU law in a member State. In this regard, acts and omissions that may contravene EU regulations or directives, but not national laws implementing those instruments, may as well be challenged under paragraph 3 (see findings on ACCC/C/2006/18 (Denmark), para. 27).

54. The broad understanding of "environment" under the Convention is drawn from the broad definition of "environmental information" under article 2, paragraph 3, which also extends to "biodiversity and its components, including genetically modified organisms". The fact that components of biodiversity have been removed from their habitat does not necessarily mean that they lose their property as biodiversity components.

55. Laws on the protection of wildlife species and/or trade in endangered species (including marketing in the domestic market, import and export) are also "laws relating to the environment", because they are not limited to the regulation of trade relations but include obligations on how the animals/species are to be treated and protected. Accordingly, these laws help protect or otherwise impact on the environment. In addition, to the extent the laws of the Parties relating to the environment apply to acts and omissions of a transboundary or extraterritorial character or effect, these acts and omissions are also subject to article 9, paragraph 3, of the Convention.

Access to administrative or judicial proceedings and effective remedies (art. 9, paras. 3 and 4)

56. In its findings on communication ACCC/C/2006/18 (Denmark) the Committee noted that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, as long as there were other means for challenging those acts and omissions. In the present case, the Committee therefore looks also at whether the system of the Party concerned provides for any other means for challenging acts and omissions by private persons and public authorities that contravene provisions of its national law relating to the environment.

57. The Party concerned specifically referred to the remedies available to the communicant under the environmental liability and environmental information laws. The Committee notes that the scope of applicability of these laws does not cover all aspects referred to in the present communication. For instance, under environmental liability laws action may be triggered by environmental organizations for alleged damage (as measurable adverse change) to protected species and natural habitats or alleged significant damage to water and land. As already mentioned in the previous section, the scope of the "environment" under the Convention is to be understood as going beyond these aspects of environmental effects. The Party concerned seems to be aware of the inconsistencies in its system and mentioned during the discussion the possibility of amendments to the environmental liability laws to address also the situations subject to the present communication.

58. The Austrian Environmental Liability Act, adopted by the Party concerned in the implementation of the EU Environmental Liability Directive, allows NGOs to file complaints and acquire legal standing in civil procedures only if there is a specific environmental damage. Even in such cases, NGOs have legal standing only in proceedings concerning precautionary measures and compensation for environmental damages that have already occurred.

59. Under the law of the Party concerned, at the national and/or provincial level, certain acts and/or omissions that may impact on the environment can be challenged through penal administrative or criminal judicial proceedings. Members of the public, including environmental NGOs, cannot participate in these proceedings, but at the same time, the communicant claims that they have no other means to challenge such acts or omissions of public authorities or private persons in contravention to national laws on environment, as is required under article 9, paragraph 3, of the Convention.

60. Moreover, members of the public, including NGOs, may not invoke their rights under the Austrian Environmental Liability Act in the context of penal/criminal procedures or as effective remedies to challenge acts and omissions contravening provisions of the laws of the Party concerned relating to the environment.

61. The Party concerned refers to the use of the institution of the Environmental Ombudsman. The Committee has already reviewed the function of the Ombudsman for the Environment under the law of the Party concerned (findings on communication ACCC/C/2010/48 (Austria), para. 74) and found that not only may its authority be limited, as it does not have standing in the procedures of many sectoral laws relating to the environment, but it has discretion whether or not to bring a case to court, despite the request of a member of the public, including an NGO. The Party concerned points to proposals for changes to the institution currently under discussion. It also mentions that Environmental Ombudsmen of some provinces have agreed to act when requested by members of the public, even if they are not obliged by law to do so. Given the limited role of the institution of the Ombudsman, the Committee does not consider the possibility of bringing complaints to the Ombudsman as providing a means for challenging acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment, as required by article 9, paragraph 3, of the Convention.

62. On the basis of the information received from the Party concerned on how it intends to address the Committee's recommendations on communication ACCC/C/2010/48, the Committee considers it too early to assess whether the discussed amendments to the Environmental Liability Act, the institution of the Environmental Ombudsman or to other laws will effectively address some or all the issues raised in the present communication. The Party concerned has proceeded with interministerial meetings, but no advance draft laws, for instance, have been tabled that could be considered by the Committee as per the Party's potential compliance with the Convention.

63. The Committee concludes that in certain cases members of the public, including environmental NGOs, have no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national law, including administrative penal law and criminal law, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection. Whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention. For these reasons, the Committee holds that the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention.

64. The Committee does not exclude the possibility that in addressing the recommendations in ACCC/C/2010/48 the Party concerned will also address the issues identified in the present communication. In this respect, the Committee reminds the Party concerned that in proceeding with any amendments it should take into account that access to justice under article 9, paragraphs 3 and 4, requires more than a right of members of the public to address an administrative authority or the prosecution about an illegal activity. Members of the public should also have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities when they consider that such acts or omissions amount to criminal acts or administrative offences. This may be pursued through avenues within or beyond penal/criminal law procedures.

IV. Conclusions and recommendations

A. Main findings with regard to non-compliance

65. The Committee finds that, because members of the public, including environmental NGOs, have in certain cases no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention (see para.63 above).

B. Recommendations

66. Pursuant to paragraphs 35 and 37 (b) of the annex to decision I/7, the Committee recommends that the Meeting of the Parties recommend to the Party concerned, that, when addressing the recommendations under ACCC/C/2010/48, it also ensure that members of the public, including NGOs, have access to adequate and effective administrative or judicial procedures and remedies in order to challenge acts and omissions of private persons and public authorities that contravene national laws, including administrative penal laws and criminal laws, relating to the environment.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-fourth meeting
Geneva, 25–28 March 2014
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/66 concerning compliance by Croatia

Adopted by the Compliance Committee on 27 September 2013

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I. Introduction

1. On 24 January 2012, the non-governmental organization (NGO) Association for Nature, Environment and Sustainable Development "Sunce" (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Croatia had failed to comply with its obligations under the Convention concerning public participation with regard to plans and programmes.1

2. Specifically, the communication alleges that the Party concerned failed to comply with article 7 of the Convention because of the adoption of waste management plans at the county and city level without inspection control and public participation, as required under the Croatian Environmental Protection Act (EPA) and further regulated by special laws.

3. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 8 May 2012. On the same date, a letter was sent to the communicant. Both were asked to address a number of questions from the Committee.

5. The communicant and the Party concerned responded to the Committee's questions on 4 October and 8 October 2012, respectively. The communicant submitted additional information on 22 November 2012.

6. At its thirty-eighth meeting (Geneva, 25–28 September 2012), the Committee agreed to discuss the content of the communication at its thirty-ninth meeting (Geneva, 11–14 December 2012).

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

8. The communicant and the Party concerned submitted their response on 10 and 15 February 2013, respectively.

9. The Committee prepared draft findings at its forty-first meeting (Geneva, 25–28 June 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 18 July 2013. Both were invited to provide comments by 15 August 2013.

10. The communicant and the Party concerned provided comments on 12 August and 2 September 2013, respectively.

11. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee finalized its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal

[1] Communication ACCC/C/2012/66 and documents related to it, including responses from the communicant and the Party concerned, are available on the Committee's website from http://www.unece.org/env/pp/compliance/compliancecommittee/66tablecroatia.html.

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

II. Summary of facts, evidence and issues[2]

A. Legal framework

12. According to the Croatian EPA, the public has the right to participate in plans and programmes (art. 16, para. 3). The EPA further requires that the public be informed of their rights to participate in procedures, including the right to present their opinion on proposals for plans and programmes related to the environment which are not subject to mandatory strategic assessment (arts. 140 and 142).

13. The Regulation on Information and Participation of the Public and Public Concerned in Environmental Matters provides the details for carrying out public participation procedures. For plans and programmes relating to the environment, but which are not subject to strategic environmental assessment (SEA), the competent authority has to publish the information about the proposal on its website (art. 3). The public affected by the implementation of the proposed plans and programmes have the rights to submit their views, objections and proposals (arts. 14 and 15).

14. In addition to the above two instruments, the Convention is implemented by the Regulation on Strategic Environmental Assessment of Plans and Programmes.

15. The Waste Act regulates the adoption of waste management plans at the national, county and municipality/town levels (see art. 7). The Waste Management Strategy, as part of the Sustainable Development Strategy, defines waste policy at the national level. The National Waste Management Plan is the technical document that implements the policy of the Strategy. Both the Waste Management Strategy and the National Waste Management Plan are adopted by parliament.

16. County waste management plans are adopted at the county level (including Zagreb), and town/municipality plans are adopted by the local Council. These plans must follow the Waste Management Strategy and the National Waste Management Plan, and their implementation is supervised by the competent authority. They regulate matters on the separation and collection of waste, management of landfills, waste-polluted locations and dump sites and remedial action. Reports on the implementation of the plans are also adopted by the town/municipal council and submitted to the Ministry of Environmental Protection, Physical Planning and Construction (Ministry of Environmental Protection) and the Croatian Environmental Protection Agency. The Agency prepares a synthesis report that is available to the public.

17. Town/municipality waste management plans “heavily lean”3 on town/municipality spatial plans, for which public consultation is obligatory, and may include consultation with private sector stakeholders.

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

[3] See response by the Party concerned of 8 October 2012, para. 16.

B. Facts

18. On 30 March 2011, on the occasion of the preparation of the second national implementation report under the Convention, the communicant sent a letter to the Ministry of Environmental Protection complaining about the lack of inspection control and public participation in the adoption of several waste management plans in the country (see annex to the communicant's response of 4 October 2012), specifically in Split-Dalmatia County.[4] According to the communicant, this was due to the incorrect interpretation of Croatian legislation. The plans in question were adopted after the Convention had entered into force for the Party concerned.

19. By letter of 27 April 2011 (annex 1 to the communication), the Ministry responded that strategies, plans and programmes are documents of sustainable development and environmental protection only when the EPA or sectoral legislation explicitly determines them as such; and that, unlike waste management strategies, waste management plans are not mentioned in either the EPA or sectoral legislation as sustainable development and environmental protection documents. Therefore the provisions for inspection control and public participation do not apply. Waste management plans, at county, municipality or town level, simply implement the Waste Management Strategy.

20. During the discussion before the Committee at its thirty-ninth meeting, both parties confirmed that a public participation procedure had taken place according to the Convention for the adoption of the Waste Management Strategy.

C. Domestic remedies and admissibility

21. The communicant states that the websites of the two major cities in Split-Dalmatia County, Split and Kastela, included information on the adoption of the plans, but that the public was not involved in the process. The communicant submitted letters of complaint to the City of Split, the City of Kastela and the Ministry of Environmental Protection. As a result of the communicant's action, the public was apparently involved in the adoption of the Split and Kastela waste management plans.

22. However, the communicant submits that, for the other plans, the public was not duly informed about their adoption or the process of adoption. As a result, the communicant missed the deadlines set by national law to challenge the plans before domestic courts.

D. Substantive issues

23. The communicant alleges that by adopting several waste management plans without carrying out inspection control and public participation procedures, the Party concerned failed to comply with article 7 of the Convention.

24. In the view of the communicant, the provisions for public participation included in the EPA, a framework law of general application, should apply to all special laws, including the Waste Act, as long as special laws do not explicitly exclude the application of the Environmental Protection Act's general provisions. Since the Waste Act does not specifically exclude the application of public participation procedures under the EPA, waste management plans should be adopted following public participation procedures. The fact that the EPA does not specifically refer to "waste management plans" is irrelevant, because

[4] The communicant refers to Hvar, Sinj, Stari, Grad, Vis, Rgorac, Marina, Otok, Postira, Sucuraj, Zagvozd, etc.

waste management plans concern the management, recovery and recycling of waste and thus constitute an essential element of sustainable development and resources management.

25. The communicant also stresses that the fact that public consultations for the adoption of the Split and Kastela waste management plans eventually took place, after the communicant had sent complaints to the local authorities and the Ministry, demonstrates that according to the law of the Party concerned, public participation should be provided for the adoption of town/municipality waste management plans, but the provisions of the law are not clear on this subject.

26. The Party concerned in general submits that there is no non-compliance with the Convention, and that the communicant's complaint is manifestly unfounded.

27. The Party concerned points out that by being labelled as "plans" waste management plans do not immediately fall within the scope of article 7 of the Convention. They operationalize and implement the policy contained in the Waste Management Strategy, as part of the Sustainable Development Strategy and the State and county waste management plans, the latter of which are subject to public participation in the context of strategic assessment. Therefore, there is no obligation for early public participation under article 6, paragraph 4, of the Convention.

28. The Party concerned further explains that the elements of waste management plans at the municipal/town level (i.e., the separation and collection of waste, the management of landfills, waste-polluted locations and dump sites and remedial action) are not as such referred to in article 6, paragraph 6, of the Convention. Thus, these plans are not programmes or policies and they do not include any information related to the description of sites, significant impacts on the environment and possible emissions or alternatives, or locations for new waste management facilities or sites for new landfills.

III. Consideration and evaluation by the Committee

29. Croatia ratified the Convention on 27 March 2007. The Convention entered into force for Croatia on 25 June 2007.

30. Waste management planning in Croatia is decided at three government levels (see art. 7 of the Waste Act, para. 15 above): at the national level (Waste Management Strategy and National Waste Management Plan); at the county (regional) level (county management plan); and at the local (town/municipality) level (municipality/city/town management plan). County plans should be in line with the framework described in the national strategy, and municipality plans should be in line with the provisions of the county plans. In addition, waste producers are also obliged to prepare waste management plans.

31. There is no issue of flawed public participation in the process of adopting the waste management planning documentation at the national level. During the discussion at the Committee's thirty-ninth session, the Party concerned and the communicant agreed that the law of the Party concerned requires the carrying out of public participation for the adoption of such a plan, and the communicant confirmed that when the public participation procedure was provided for adoption of the Waste Management Strategy, members of the public, including the communicant, were able to participate.

32. Both parties agree that there is an obligation of the authorities to carry out public participation for the preparation of county management plans. Apart from the case of Split-Dalmatia County, no other examples were provided to the Committee to demonstrate a persistent pattern in the authorities' practice demonstrating non-compliance with the public participation requirements prescribed by law.

33. For these reasons the Committee does not examine whether the law and practice of the Party concerned is in compliance with the Convention in the case of the preparation of the national Waste Management Strategy and the county management plans. The Committee thus focuses on the law and practice of the Party concerned with regard to the adoption of municipal waste management plans.

Waste management plans as plans relating to the environment (art. 7)

34. According to the communicant municipal waste management plans fall within article 7, but according to the Party concerned these plans are only technical documents implementing the decisions taken under the national and county management plans, which were prepared following public participation procedures. Yet, both parties agree that waste management plans are documents relating to the environment.

35. What constitutes a "plan" is not defined in the Convention. The fact that a document bears in its title the word "plan" does not necessarily mean that it is a plan; rather it is necessary to consider the substance of the document (see also findings on communication ACCC/C/2008/27 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.2, para. 41)). The Committee thus considers the contents of the municipal waste plans of the Party concerned, as well as the legal effects of these plans on the public, to determine whether they fall within the ambit of article 7 and the extent to which public participation procedures should apply under the Convention.

36. According to the Waste Act (art. 11), the municipality waste plan contains: (a) measures for separate collection of municipal waste (such as the locations for the containers for special waste or the contractual relationship between the company dealing with a special waste category at the national or regional level and the company handling waste at the local/municipality level); (b) measures for the management and supervision of municipal waste landfills (such as the timetable of opening and closing hours for landfills); (c) a list of waste-polluted locations and dump sites; and (d) a programme of action and financial provisions for the remediation for the sites mentioned in section (c).

37. The Committee notes that the municipality waste management plan may implement at the local level what was already decided in the national/regional waste management documentation. For instance, if the national waste management plans contain the general technical requirements for waste management facilities (Waste Act, art. 9, para. (2) 4), the county waste management plan provides for the construction planning of such facilities (Waste Act, art. 10, para. (1) 4) according to the technical requirements in the national plan, and the municipal waste management plan requires the local waste operator to transfer and store the waste to one of the facilities listed in the county plan (Waste Act, art. 11, para. (1) 1). Similarly, where the national plan sets the general requirements for the management of special waste categories (Waste Act, art. 9, para. (2) 2), the county plan defines measures for separation of waste in the county (Waste Act, art. 10, para. (1) 3), and the municipality lists the specific locations of the containers (Waste Act, art. 11, para. (1) 1).

38. Thus, the municipality waste management plan does not simply copy the decisions contained in the national/regional waste management plans and the spatial management plans (where there is provision for the landfill sites, for instance); rather, in order to implement the general framework of waste management set at the national/regional level, it makes specific provisions and includes details for waste management at the local level. This is further demonstrated by the contents of the plans of Ivanska and Cres,[5] which

[5] Submitted by the Party concerned on 15 February 2013.

provide for measures for the treatment of specific waste (medical waste, construction waste, etc.) or for the landfill.[6] Besides, there would be no reason for municipal waste management plans to exist if all the details had already been well established in the national and regional management plans, as well as in the spatial management plans.

39. While these municipality waste management plans implement the national and county waste management plan and the national strategy at the local level, they are not only theoretical orientations on waste management or only a repetition of the subjects treated in the national/county waste management documentation. It is apparent to the Committee that they contain considerations specific to the region concerned on the impact of waste management, on possible emissions, possible locations and facilities, which are without doubt of interest to the public and therefore should be subject to public participation according to article 7. Moreover, whether a document sets the framework for future development consent is not a determining factor of its nature as a plan under article 7 or not.

40. The fact that the waste management plans are not mentioned in the EPA and in sectoral laws as sustainable development and environment protection documents is not relevant; an insufficient coverage by the legislation of one of the subject matters of the Aarhus Convention cannot be invoked as an excuse to avoid its application to an activity which is obviously related to the protection of the environment.

41. For these reasons, the Committee finds that municipal waste management plans are plans within the purview of article 7 of the Convention.

Public participation in the preparation of waste management plans

42. In order to evaluate whether the Party concerned is in compliance with the Convention, the Committee examines both the regulatory framework and the established practice for the preparation of municipal waste management plans, which may already meet the minimum standards for public participation set by article 7.

43. As set out in article 7, the Party concerned has to make the appropriate practical and/or other provisions for the public to participate during the preparation of the plan and in accordance with three specific provisions of article 6, paragraphs 3, 4 and 8, of the Convention. This has to be done "within a transparent and fair framework, having provided the necessary information to the public", while specific reference is made to the objectives of the Convention.

44. In its article 16, paragraph 3, the Croatian EPA lays down the general right of the public to participate in procedures, inter alia, for the development and adoption of plans. For some plans, public participation procedures under SEA apply; for other plans, the procedures set out in EPA section IX apply, in particular EPA article 142, as well as article 14 of the Regulation on Information and Participation of the Public and the Public Concerned in Environmental Matters (Regulation on Information and Public Participation), which provides the details for carrying out public participation procedures. Since no SEA is required for waste management plans, the second set of provisions for public participation are relevant.

45. EPA article 142 provides for the right of the public to present its opinions, comments and proposals on drafts of plans and programmes related to the environment. The same article also sets out the obligation of the public authorities to ensure timely and efficient public participation in the process of drafting and amending plans within their

[6] The communicant also provided contents of the Split management plan on 11 February 2013.

competence. Article 140 requires proper dissemination of information in the early phase of the procedure, when all options are open, elaborates on the content of the public notice, sets a minimum deadline of 30 days and obliges the competent authority to review the results of public participation and inform the public of its decision.

46. The EPA also provides that the list of the plans requiring public participation, as well as the identification of the public which may participate, should be established by way of a regulation (art. 142, paras. 3 and 4).

47. The Regulation on Information and Public Participation (arts. 3, 4 and 14) adds elements for public participation in the preparation of plans, in particular with regard to the obligation of the competent authority to inform the public through its website and the content of the public notice. Like the EPA, the Regulation does not define the plans for which this procedure applies, and mentions that these would be determined by law. It identifies the public which may participate as "the public which may be affected by those plans […] during their implementation".

48. On the basis of the above, the Committee finds that the Party concerned has made regulatory arrangements for the public to participate during the preparation of plans relating to the environment. More specifically, the Committee understands that the requirements of article 6, paragraphs 3, 4 and 8, incorporated in article 7, of the Convention, are implemented through EPA articles 140 and 142, and the requirement of providing the necessary information to the public is implemented in particular through the Regulation on Information and Public Participation (arts. 3, 4 and 14).

49. However, the Committee notes that the EPA (art. 142, para. 3), as well as the Regulation on Information and Public Participation (art. 14, para. 3), stipulate that the list of plans relating to the environment which are not subjected to SEA, but for which public participation is required, will be determined by law/regulation. According to the information submitted to the Committee, there is yet no law/regulation in place as to this type of plans, and this creates uncertainty as to the application of the public participation procedures.

50. In addition, according to the English translation of the laws provided to the Committee, there is no consistency as to whether the public participates before the first draft of the plan or only once there is a draft available (see text of the EPA (art. 142, para. 2), and the Regulation on Information and Public Participation (art. 14, para. 1), referring to the "draft proposal of the plans", as compared with the general principle for public participation in the development of plans enshrined in the EPA (art. 16, para. 3)).

51. For these reasons, the Committee finds that the present arrangements under the law of the Party concerned are not sufficiently clear to ensure that the requirement of article 7 for a transparent framework is met. Thus, the Party concerned fails to comply with article 7.

52. To illustrate its allegations, the communicant referred to the examples of the preparation of the Split and Castela municipality waste management plans, in which in two cases public participation was carried out, further to the communicant's request. Apart from these two cases, the Committee was not provided with sufficient information to assess whether there is a consistent practice as to the conduct of public participation for the preparation of other municipality waste management plans. On the basis of the information provided, and given that the Split and Castela municipality waste management plans were isolated cases, since public participation was provided at the communicant's request, the Committee is not in a position to conclude whether there is a persistent practice by the authorities of the Party concerned not to make the appropriate practical and/or other provisions during the preparation of the municipality waste management plans. However, the fact that the framework is not clear and transparent (see above) suggests that there is uncertainty in practice on whether public participation should be provided. The Committee

also emphasizes that article 7 obliges public authorities to organize public participation procedures, as required by law; hence, it should not be for the public to remind the authorities of their right to participate.

Clear and transparent framework (art. 3, para. 1)

53. Based on the considerations above, the Committee finds that the legislation in force in the Party concerned fails to provide for a consistent and uniform application throughout the territory and is not clear as regards public participation in the preparation of municipality waste management plans, and therefore is not in compliance with article 3, paragraph 1, of the Convention.

IV. Conclusions and recommendations

54. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

55. The Committee finds that:

(a) The present arrangements under the law of the Party concerned are not sufficiently clear to ensure that the requirement of article 7 for a transparent framework is met. Thus, the Party concerned fails to comply with article 7 of the Convention (para. 51);

(b) The Committee finds that the legislation in force in the Party concerned fails to provide for a consistent and uniform application throughout the territory and is not clear as regards public participation in the preparation of municipality waste management plans, and therefore is not in compliance with article 3, paragraph 1, of the Convention (para. 53).

B. Recommendations

56. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties to the Convention, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends to the Party concerned that it ensure that a transparent framework is in place providing for appropriate practical and/or other provisions for the public to participate during the preparation of municipality waste management plans, by, inter alia, including municipality waste management plans in the list of plans relating to the environment which are not formally subjected to SEA, but for which public participation is required, so that article 7 of the Convention is clearly applicable to such plans.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-fourth meeting
Geneva, 25–28 March 2014
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 24 September 2013

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I. Introduction

1. On 12 March 2012, a member of the public, Ms. Christine Metcalfe on behalf of the Avich and Kilchrenan Community Council, submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the European Union (EU) and the United Kingdom of Great Britain and Northern Ireland had failed to comply with their obligations in relation to the renewable energy programmes and two related projects — for a wind farm and its access route — in the area of Argyll, Scotland.[1]

2. Specifically, the communication relates to the implementation of the renewable energy programme in Scotland and two specific projects in the Avich and Kilchrenan area of Argyll related to that programme, i.e., the Carriag Gheal wind farm and the linked access West Loch Awe Timber Haul Route. The communicant alleges that the authorities at the EU, United Kingdom and Scottish administrative levels failed to provide information to the public, as required by articles 4 and 5 of the Convention, regarding the implementation of the renewable energy programme, which involved also the implementation of a number of individual wind energy projects, such as the farm and the access route. The communication also alleges that due to the lack of transparency, effective public participation was impeded, contrary to articles 6 and 7 of the Convention. Finally, the communication alleges that there are no adequate review procedures for members of the public to challenge the failures of access to information and public participation as required by article 9, paragraphs 1 and 2, of the Convention, while the costs for engaging in such procedures are prohibitively high, contrary to article 9, paragraph 4, of the Convention.

3. The communication also raises concerns with regard to the adoption process of a recent European Commission communication on renewable energy policy (Renewable Energy: a major player in the European Energy market" (COM(2012) 271)) and compliance by the EU with the public participation provisions of the Convention.

4. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Parties concerned on 8 May 2012. On the same date, a letter was sent to the communicant. All were asked to address a number of questions from the Committee.

6. The communicant answered the Committee's questions by letter of 24 September 2012. Both of the Parties concerned responded to the communication on 8 October 2012. The communicant submitted additional information on 24 November 2012.

7. At its thirty-eighth meeting (Geneva, 25–28 September 2012), the Committee agreed to discuss the content of the communication at its thirty-ninth meeting (Geneva, 11–14 December 2012).

8. Additional information was submitted by the communicant on 24 November 2012.

9. The Committee discussed the communication at its thirty-ninth meeting, with the participation of representatives of the communicant and the Parties concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the

[1] Communication ACCC/C/2012/68 and documents related to it, including responses from the communicant and the Parties concerned, are available on the Committee's website from http://www.unece.org/env/pp/compliance/compliancecommittee/68tableeuuk.html.

discussion, the Committee posed a number of questions to both the communicant and the Parties concerned and invited them to respond in writing after the meeting.

10. The communicant submitted its response on 8 February and the Parties concerned on 11 February 2013. Information was also submitted by an observer on 3 March 2013.

11. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee decided to put additional questions to the parties.

12. The Party concerned (United Kingdom) submitted its response on 17 May and the communicant on 18 May 2013. Additional information was submitted by an observer on 13 June 2013, from the communicant on 15 and 23 June 2013 and from the Party concerned on 17 June 2013.

13. The Committee prepared draft findings at its forty-first meeting (Geneva, 25–28 June 2013), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Parties concerned and the communicant on 30 July 2013. All were invited to provide comments by 27 August 2013.

14. The EU and the United Kingdom both provided comments on 27 August 2013, and the United Kingdom provided additional comments on 6 September 2013. The communicant provided comments on 23 August and additional comments on 2 September 2013.

15. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee finalized its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-fourth meeting. It requested the secretariat to send the findings to the Parties concerned and the communicant.

II. Summary of facts, evidence and issues[2]

A. Legal framework

Legal framework of the EU

16. Concerning the legislative framework for the use of renewable energy sources of the EU and its member States, Directive 2009/28/EC on the promotion of the use of energy from renewable sources[3] obliges member States to increase their use of energy from renewable sources and contains a mandatory target of a 20 per cent share of overall energy consumption in the EU to come from renewable sources. EU member States have to develop National Renewable Energy Plans (NREAPs) (see findings on communication ACCC/C/2010/54 (EU) (ECE/MP.PP/C.1/2012/12, paras. 21–23)).

17. Regarding access to information, Directive 2003/4 on public access to information[4] aimed to bring EU legislation in line with the Convention (ibid., paras. 26–27).

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

[3] Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

[4] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, replacing and repealing Directive 90/313/EC on the freedom of access to information on the environment.

18. With respect to public participation, the EU has in place a regulatory framework relevant for the conduct of, among other things, environmental impact assessment (EIA) and strategic environmental assessment (SEA) in its member States (ibid., paras. 28–32).

19. Finally, Regulation No. 1367/2006 (the Aarhus Regulation)[5] addresses implementation of the Convention vis-à-vis all EU institutions and bodies, and lays down related requirements. The Aarhus Regulation extends the application of Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents to all EU institutions and bodies, requires those institutions and bodies to provide for public participation in the preparation, modification or review of "plans and programmes relating to the environment" and also enables environmental NGOs meeting the criteria it lays down to request an internal review of acts or omissions by EU institutions and bodies.

Legal framework of the United Kingdom

20. The Electricity Act 1989 (England, Wales and Scotland Law) sets out the framework for public electricity supply and the reorganization of the electrical industry. The Act, among other things, regulates licensing and the rights to enter land and carry out construction projects, as necessary for the building or maintenance of the network. With respect to environmental management in general, persons authorized to generate and/or supply electricity must have a regard for the conservation of the flora and fauna and any geological features of special interest present.

21. In Scotland, the construction, extension and operation of power stations over a certain capacity is subject to the consent of the Scottish Ministers (Electricity Act, sect. 36). The Energy Consents and Deployment Unit administers applications on behalf of the Ministers. The process for application to consent includes a consultation phase. An EIA procedure is carried out according to the Guidance On The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 and the Guidance for Electricity Works EIA Regulations 2008.

22. In considering applications under the Act, the Scottish Ministers are called upon to examine a wide range of issues, including any written representations from members of the public, consultation responses, legal and planning obligations and the compliance of the proposal with current Scottish Government policy. Consent is granted after consideration of the potential benefits and shortcomings of the proposed project.

23. The latest revisions to the procedure for consent under section 36, which came into effect after the projects at stake were consented to, aim to further ensure that all relevant stakeholders are able to participate fully in the decision-making process. The Energy Consents and Deployment Unit endeavours to make details of live projects available on its website in order to improve access by members of the public to all details of proposed projects. It encourages members of the public to submit representations electronically.

24. Ownership of the national forest estate in Scotland is held by the Ministers. The Forestry Commission Scotland (FCS)[6] serves as the forestry directorate of the Scottish Government. Activities carried out include maintenance and improvement of the natural

[5] Regulation (EC) No. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. The Regulation entered into force on 28 September 2006 and became effective on 17 July 2007.

[6] See http://www.forestry.gov.uk/scotland.

environment, the provision of recreation, timber harvesting and replanting of harvested areas.

25. For some types of forestry projects (e.g., afforestation, deforestation, forest roads and forestry quarries) which are likely to have a significant impact on the environment and are above certain thresholds set by law, a formal consent for the work to take place is required by FCS. An EIA procedure is then conducted according to the EIA (Forestry) (Scotland) Regulations 1999 to determine whether consent should be given for the work to go ahead. The FCS Conservancy Office discharges the Scottish Ministers' responsibilities under the Environmental Impact Regulations that apply in forestry projects.

26. The Forest Enterprise Scotland is an executive agency of FCS and operates at arm's length of the FCS. Its internal governance is separate from FCS, including a different Chief Executive and Management Board. The Enterprise is not involved in the evaluation or determination of the EIA report, but rather has the role of a private individual or organization that may bring projects for screening against EIA (forestry) regulations.

B. Facts

27. The communication raises concerns of non-compliance with respect to the processes for the adoption of the renewable energy strategy/policy documentation by the EU and the United Kingdom/Scotland. The communication focuses in particular on the renewable energy programme in Scotland and two projects related to this programme, i.e., the Carriag Gheal wind farm (the wind farm) and the West Loch Awe Timber Haul Route (the access route) which was designed to facilitate access to the wind farm site. The access route is close to a nesting site of Golden Eagles, a protected species. The communicant acts as a Community Councillor in the Avich and Kilchrenan area of Argyll, where the two projects have been undertaken.

The European Commission communication on its renewable energy strategy

28. Early 2012, the European Commission initiated consultations on its renewable energy strategy. The general principles and minimum standards of consultation were laid out in the communication, "Towards a reinforced culture of consultation and dialogue — General principles and minimum standards for consultation of interested parties by the Commission" (COM(2002) 704). On 6 June 2012, the European Commission adopted a communication entitled "Renewable Energy: a major player in the European Energy market" (COM(2012) 271), which presents the final decision of the Commission's renewable energy policy.

Renewable energy strategy in the United Kingdom/Scotland

29. The United Kingdom Renewable Energy Strategy was published by the Government in July 2009. Public consultations were carried out in 2008.[7] At the time of submission of the present communication, Scottish authorities were completing the scoping exercise for a new SEA for the renewable energy programme. As Community Councillor, the communicant is able to have questions raised, via a Member of the Scottish Parliament, in the Scottish Parliament.

30. The NREAP of the United Kingdom, adopted under Directive 2009/28/EC in June 2010, outlines the objectives and implementation mechanism in the renewable action plans

[7] http://webarchive.nationalarchives.gov.uk/20100509134746/http://www.decc.gov.uk/en/content/cms/consultations/cons_res/cons_res.aspx.

in the different parts of the United Kingdom, and the measures that the United Kingdom is taking to meet the renewables targets set by the Directive. The NREAP was based on the Renewable Energy Strategy.

The wind farm and access route projects

31. The applications for the wind farm and the access route were processed separately, and the carrying out of the EIA procedures for each project was also separate. For the access route, the EIA (forestry) (Scotland) Regulations 1999 applied and the competent authority was FCS.

32. The EIA report for the wind farm project referred to reductions in emissions and fuel savings. The Avich and Kilchrenan Community Council found that the information did not refer to properly established figures and that the EIA report overstated what actual savings would occur. It made a submission to the competent authority.

33. During the EIA procedure for the access route, public consultations were conducted. The documentation was available on the FCS website.

34. During the process, the communicant made requests for environmental information to FCS. The requests related in particular to the alternative routes included as part of the EIA documentation, including feasibility studies that had been carried out in 2001, in the context of an unsuccessful FCS bid to the European Regional Development Fund. Most of the documentation regarding the bid had been destroyed; however, some of the documentation was retrieved and shared with the communicant.

35. Nine responses were received, one from the communicant, and no outstanding objections from statutory agencies. The Scottish Natural Heritage, which advised both FCS and Scottish Ministers on matters relating to wildlife and habitats, and the Royal Society for the Protection of Birds did not object to the proposed route.

36. After the EIA reports were adopted there was a six-week deadline for submission of objections, but no objection was received.

Other requests for environmental information

37. Apart from the access to information requests in the context of consultations for the wind farm and the access route, the communicant also made requests for information relating to emissions savings data, which are summarized below.

38. On 24 January 2012, the communicant, as Community Councillor, requested information from the EU Commission with regard to the Good Practice WIND Project (GP WIND),[8] i.e., how the Commission ensured compliance with article 5 of the Aarhus Regulation (annex 1 to the communication). The complaint is currently part of an appeal to the EU Ombudsman.

39. In 2012, in relation to the Electricity Generating Policy Statement[9] and the 2020 Routemap for Renewable Energy in Scotland (Renewable Energy Routemap),[10] the communicant asked the Scottish authorities what measures they had implemented to ensure that the "qualitative assessments", alternative proposals to achieve them and the likely state of the environment without implementation of the plan, were up-to-date, accurate and comparable. The authorities replied on 4 April 2012 that they were not required to generate

[8] See http://www.project-gpwind.eu.

[9] See http://www.scotland.gov.uk/Topics/Business-Industry/Energy/EGPSMain.

[10] Scottish government (Edinburgh, 2011). Available from http://www.scotland.gov.uk/Publications/2011/08/04110353/0.

data where none existed and were obliged only to include the information that might reasonably be required for the SEAs (see annex 7 to the information supplied by the communicant on 24 September 2012).

40. In December 2011, the communicant contacted the United Kingdom Department for Environment, Food and Rural Affairs (DEFRA) about issues of alleged non-compliance with the Convention, especially with article 3, paragraph 1. DEFRA referred the matter to the Department of Energy and Climate Change (annex 2 to the communication). The answer was not to the satisfaction of the communicant.

C. Domestic remedies and admissibility

41. A complaint concerning the matter of this communication was lodged with the European Commission (CHAP(2010)02125) on the basis of a possible violation of the EIA and Habitats Directives.[11] The Commission responded on 29 February 2012 (annex 1 to the communicant's information of 24 September 2012). The reaction was not to the satisfaction of the communicant, who submitted a complaint to the EU Ombudsman. The case was closed on 21 June 2013.

42. The communicant submitted a complaint with the Information Commissioner (annex 3 to the communication), because in her view the SEA for the Electricity Generating Policy Statement and the Renewable Energy Routemap of the Scottish Government was not carried out according to the requirements of EU law (annex 8 to the communicant's information of 24 September 2012). The Commissioner replied that his remit was solely to establish whether the Environmental Information Regulations had been correctly applied.

43. The communicant submitted a complaint to the United Kingdom Ombudsman (annex 2 to the communication) concerning the failure of DEFRA, and subsequently the Department of Energy and Climate Change, to respond to requests for information on emissions savings. The United Kingdom Ombudsman responded that it could not consider complaints about the accuracy of information and referred the matter to the Information Commissioner.

44. The communicant, together with other stakeholders including the European Platform Against Windfarms (EPAW), submitted to the Commission a request for internal review of the communication, "Renewable Energy: a major player in the European Energy market", under article 10, paragraph 1, of the Aarhus Regulation, on a variety of grounds. The request was found to be not admissible on the grounds that the document in question was not an administrative act within the meaning of the Regulation.

45. On 18 March 2013, EPAW filed a complaint with the General Court for the annulment of the communication in question. The Court found the application admissible and the matter is pending.

46. The United Kingdom argues that, with the exception of her complaints to the Information Commissioner, the communicant has not otherwise sought to invoke remedies that would be available to her in the national courts if she was correct in her assertion that the United Kingdom was not in compliance with the Convention.

47. Similarly, the EU is of the view that the communicant has not exhausted all available remedies at the EU level.

[11] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended, and and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

D. Substantive issues

48. According to the communication, the Parties concerned failed to comply with the provisions of the Convention on access to information, public participation and access to justice in implementing the renewable energy programme in Scotland, as well as the related projects for the wind farm and the access route in the locality of the communicant. In the view of the communicant, the lack of public participation in the design of renewable energy policy in support of onshore wind energy generation and the development consent for the Carraig Gheal wind farm and the related access route are only examples of the uncontrolled expansion of wind energy farms in Scotland and throughout the EU space, following the United Kingdom and the EU goals to displace fuel generation, reduce greenhouse gas emissions and reach climate change strategic goals.

49. Both Parties concerned refute the communicant's allegations and comment on the lack of clarity as to the factual basis of the allegations and the precise nature of alleged non-compliance. The United Kingdom argues that the fact that the communicant opposes wind energy in general and the projects in particular does not entail that the United Kingdom failed to comply with the provisions of the Convention. In addition, the EU posits that, given the structure of the EU and its member States, and in particular the observations of the Committee in that respect (see findings on ACCC/C/2006/17 (European Community) (ECE/MP.PP/2008/5/Add.10, para. 44), that the communication rather concerns implementation of the Convention by the United Kingdom than by the EU.

Access to, collection and dissemination of information (arts. 4 and 5, paras. 1 (a) and 2)

50. The communicant's allegations of non-compliance with the provisions of the Convention regarding access to and collection and dissemination of environmental information relate both to the design of the renewable energy policy and the decision-making for the wind farm.

51. The communicant alleges that the Parties concerned failed to ensure that the available environmental information relating to the energy policy (such as the greenhouse gas emission and fossil fuel savings) was transparent, up to date, accurate and comparable. Therefore, the Parties concerned failed to comply with article 5, paragraphs 1 (a) and 2, of the Convention.

52. The communicant also alleges that the EU authorities never replied to her request for information as to whether measures were in place to comply with article 5 of the Aarhus Regulation (concerning the quality of environmental information); and that the Department of Energy and Climate Change had never replied to her request for information, initially submitted to DEFRA, concerning compliance with the Convention. Therefore, the Parties concerned failed to comply with article 4 of the Convention.

53. The communicant further alleges that FCS, by having an ongoing policy of destruction of documents, which may include documents that fall under the Freedom of Information regulation, was not in a position to supply requested information concerning alternative routes to the access route and that therefore the United Kingdom failed to comply with articles 4 and 5 of the Convention. Additionally, the communicant alleges that this failure severely impacted on effective public participation.

54. The Party concerned (United Kingdom) refutes the communicant's allegations. It contends that the Scottish Government and FCS have over the years responded to the substantial quantity of correspondence received from the communicant. The requested information was regularly provided in a manner that was transparent and effectively accessible. The Party had refrained from submitting all this evidence to the Committee, due

to the volume, but affirmed that it was willing to submit it upon request. It argues that the fact that the communicant does not accept that the information she believed should be available was not available is not an indication that the Party concerned (United Kingdom) failed to comply with articles 4 and 5 of the Convention.

55. The Party concerned (United Kingdom) also stresses that the public participation exercises for the policy and the projects demonstrate that the competent authorities in taking the decision were actually in possession of the relevant environmental information.

56. The Party concerned (United Kingdom) also contends that the FCS documents management policy did not prevent the communicant from studying any alternatives. The said policy is in accordance with the Freedom of Information legislation and Environmental Information Regulations. FCS engaged in lengthy correspondence and the relevant files were later found and supplied to her. At the advice of FCS, the communicant could have addressed the matter to the Information Commissioner's Office, but she never did so.

Public participation (Renewable Energy Strategy and NREAP) (arts. 6 and 7)

57. The communicant alleges that the programme at issue (i.e., the Renewable Energy Strategy) is subject to the Convention, as a programme and as a project listed in annex II of the EIA Directive, and is therefore subject to the public participation requirements of article 6 of the Convention. According to the communicant, at no stage in the development of the United Kingdom Renewable Energy Strategy and the NREAP was any effort made by the United Kingdom authorities to inform those living in rural Scotland, who would be the most affected by the Renewable Energy Strategy.

58. The communicant further alleges that the consultation prior to the adoption of the United Kingdom NREAP and the related documentation were not in accordance with the standards set by the Convention, because:

(a) The plan was approved in a "fast track" manner in spite of unresolved environmental issues, thus precluding open and effective public participation at an early stage, when all options were open. For instance, no measures were taken to address the disproportionate impact of the Strategy on rural communities, although the environmental assessments recognized it; the impacts of wind-powered generation associated with landscape, noise and biodiversity were not assessed; and the documents did not mention the possibilities for access to justice;

(b) The authorities failed to take due account of the outcome of public participation, as evidenced by the one-page only document of comments, which ignored a significant number of informed submissions critical of the authorities' assessment of renewable energy potential. According to the communicant, consultation on Scotland's SEA of the Renewable Energy Routemap and Electricity Generation Policy began only in 2012, i.e., after the adoption of the Renewable Energy Strategy and the NREAP. For these reasons, the communicant alleges that the United Kingdom failed to comply with article 7, in conjunction with article 6, paragraphs 4 and 8, of the Convention. According to the communicant, the SEAs for energy in the United Kingdom were initiated only after the NREAP had been adopted and options were no longer available.

59. With respect to article 7, the Party concerned (United Kingdom) contends that in adopting the NREAP it fully complied with the public participation requirements of the Convention. According to the United Kingdom, the NREAP does not set the framework for the determination of consent applications for renewable energy projects and an SEA is not required — unlike the National Policy Statement for renewable energy, for which an SEA is conducted. However, extensive consultations were carried out on the occasion of the following:

(a) The drafting of the NREAP, which used the content and analytical work contained in the Renewable Energy Strategy published by the Government in July 2009. The Strategy was developed following a consultation in June 2008 and impact assessments of proposals for renewable electricity, renewable heat and transport. Responses were received, while conferences and seminars were organized with individuals, businesses and other organizations to discuss the Strategy. A summary of responses was published on the Department for Business, Enterprise and Regulatory Reform's website, which showed that the majority of respondents agreed with the majority of the proposals set out in the consultation;

(b) In Scotland, the Scottish Government set out objectives in respect of renewable energy in its Renewables Action Plan, published in July 2009, and the Scottish Renewable Energy Routemap. Both were subjected to public consultation, including SEA. The latest public consultation on renewable targets (Electricity Generation Policy Statement and an SEA) was organized from March to June 2012. The consultation responses were being processed at the time of consideration of the communication.

60. The EU agrees with the United Kingdom position that the Scottish authorities had conducted extensive consultations on the plans, including SEA under applicable EU law.

61. Concerning the application of article 7 of the Convention to NREAPs, the EU notes that this was already the subject of communication ACCC/C/2010/54, and that the EU is reflecting on possible ways of improving the effective implementation of article 7 by member States when they prepare NREAPs.

Public participation and the European Commission energy communication (art. 7)

62. The communicant alleges that public participation in the context of the renewable energy strategy of the European Commission (COM(2012) 271) also failed to comply with article 7 of the Convention. According to the communicant, it was the outcome of a "professionally organized lobbying campaign", as demonstrated, for example, by the fact that there were 67 submissions from industry and only 28 from NGOs.

63. The Party concerned (EU) states that the Communication on "Renewable Energy: a major player in the European energy market" (COM(2012)271) is not a plan or programme within the purview of article 7 of the Convention, but a political document of a non-legally binding nature, announcing the view of one EU institution as expressed to the other institutions (in particular the Parliament and the Council as co-legislators). The EU, however, notes that because Commission "communications" have the nature of a preparatory step, they could fall under the last sentence of article 7 of the Convention. In this respect, the EU asserts that public consultations were conducted via a widely accessible website for a 12-week period, all in compliance with the Convention.

Clear, transparent and consistent framework (art. 3, para. 1)

64. In September 2012, the communicant also alleged that the EU failed to comply with article 3, paragraph 1, of the Convention, because the Aarhus Regulation and Commission Decision 2008/401/EC[12] do not implement the necessary provisions of the Convention. That the objectives of the Convention are ignored in practice, the communicant alleges, is demonstrated by the current consultations in relation to projects of common interest in energy infrastructure.[13]

[12] Commission Decision of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of the Aarhus Regulation.

[13] See http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm.

Public participation (wind farm and access route) (art. 6)

65. The communicant alleges that the wind farm and the access route are projects that fall under article 6, paragraph 1 (a), in conjunction with paragraph 20 of the annex to the Convention. The communicant, as Community Councillor, participated in the public participation organized in relation to the two projects at issue (the wind farm and the access road) and in her view those were not in accordance with article 6 of the Convention.

66. With respect to article 6 of the Convention, the United Kingdom contends that although the application for the wind farm was made to Scottish Ministers on 24 December 2004, i.e., before the entry into force of the Convention for the Party concerned (United Kingdom), the United Kingdom still complied with the requirements of article 6. Prior to consent, public consultation for the wind farm ran according to the Electricity Act 1989; and for the access route according to the EIA (Forestry) (Scotland) Regulations 1999.

67. According to the United Kingdom, during the public participation for the wind farm, individuals and organizations could make representations (for a timeline of the wind farm application see annex B to the response of the United Kingdom of 8 October 2012). The United Kingdom explains that a total of four consultations ran for the project, one for the original applications and three addenda (7 January–10 February 2005; 1–29 November 2005; 28 February–28 March 2006; and 18 October–23 November 2007). During the consultation proceedings, the Government received 440 representations, including three written objections from Avich and Kilchrenan Community Council (where the communicant is a Councillor) and one from the communicant herself. The Scottish Ministers considered all these objections and during the process they found that the benefits of the project outweighed any potential impacts.

68. With respect to the access route, the United Kingdom contends that an EIA procedure was duly organized, that the communicant was made aware of all project-related documentation available on the website of the authority, and that she could have objected to the EIA report six weeks after it was issued, but she had not done so. During the process, neither the Scottish Natural Heritage, which advised both FCS and Scottish Ministers on matters relating to wildlife and habitats, nor the Royal Society for the Protection of Birds objected. In the view of the Party concerned (United Kingdom) the fact that FCS had a shared project objective with the developer of the wind farm does not in itself result in failure to comply with article 6 of the Convention.

69. The EU stresses that the European Commission, after having made intensive investigations regarding the complaint received by the communicant alleging the failure of the EU to respect public participation requirements in the design and implementation of the route leading to the wind farm, found that there was no infringement of the relevant EU legislation, including the EIA and Birds[14] Directives (annexes to the response of the EU of 8 October 2012).

Access to justice (art. 9, paras. 1 and 2)

70. With regard to access to justice, the communicant alleges that although the Community Council was opposed to the projects, due to the costs involved, it was not possible to pursue judicial review of the project, in breach of article 9, paragraphs 1, 2 and 3, of the Convention.

[14] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (this is the codified version of Directive 79/409/EEC as amended).

71. With respect to article 9 of the Convention, the Party concerned (United Kingdom) notes that, since the Committee is considering the issue of prohibitive costs claimed by the communicant elsewhere, it refrains from commenting on the allegations.

III. Consideration and evaluation by the Committee

72. The EU signed the Aarhus Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005. The EU became a Party to the Convention on 17 May 2005.

73. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

74. The Committee first examines the admissibility of the communication and then will focus its consideration on the public participation with respect to the decision-making for the wind farm, the access road, the NREAP (United Kingdom) and relevant documents adopted in Scotland. The Committee will not consider any allegations on access to justice. While the communicant included allegations of non-compliance by the Party concerned (United Kingdom) with the Convention's requirement for non-prohibitively expensive judicial remedies, the communicant did not further elaborate on this matter in its subsequent written and oral submissions.

75. The Committee decides not to consider the allegations with respect to compliance by the EU for the preparation of its renewable energy strategy (COM(2012) 271) because these are currently before the General Court (Case T-168/13, *EPAW v. Commission*) (see para. 45).

76. The Committee also decides not to consider the allegation that the EU fails to comply with article 3, paragraph 1, of the Convention because this submission was made late in the proceedings and was not further substantiated by the communicant.

77. The Committee further decides not to consider whether the EU has in place a regulatory framework to ensure proper implementation of the Convention with respect to NREAPs, given that this was considered in its findings on communication ACCC/C/2010/54 concerning compliance by the EU.

78. The Committee finally decides not to consider the submissions by an observer concerning a different development in Scotland, because this would broaden considerably the subject matter of the communication, the Parties concerned did not have the opportunity to respond to the allegations raised and it appears that complaints have been filed at the domestic level.

Admissibility of the communication

79. The Committee notes that, according to decision I/7, annex, paragraph 13 (a), the Committee's function is, among other things, to consider submissions and communications. Submissions may be brought by one or more Parties about another Party's compliance or by a Party concerning its own compliance (decision I/7, annex, paras. 15 and 16); communications may be brought by members of the public concerning compliance by a Party (decision I/7, annex, para. 18).

80. The present complaint was submitted as a "communication", on behalf of the Avich and Kilchrenan Community Council, a body with statutory duties within the Party concerned (United Kingdom). The Party concerned (United Kingdom) submitted that "it may be helpful to consider the communicant to be Mrs. Metcalfe in person". In this respect,

the Committee considers whether the complaint at issue qualifies as a communication under paragraph 18 of the annex to decision I/7.

81. In order to define the nature of the complaint, the Committee examines the role of community councils in Scotland. Although community councils have statutory duties in terms of licensing and planning, they have no regulatory decision-making functions and are essentially voluntary bodies established within a statutory framework. They mainly act to further the interests of the community and take action in the interest of the community as appears to be expedient and practicable, including representing the view of the community regarding planning applications.[15] In addition, community councils rely on grants from local authorities and voluntary donations. Community Council members furthermore operate on a voluntary basis and do not receive payment for their services.

82. The Committee was also informed by the Party concerned (United Kingdom) that the representations from the Avich and Kilchrenan Community Council with regard to the projects at stake were recorded under the same section as representations from members of the public and non-governmental organizations (NGOs).

83. Based on the above, in particular the role of the council in representing the interests of the community in planning matters and the fact that council members provide their services on a voluntary basis and have no regulatory decision-making functions, the Committee concludes that community councils in Scotland qualify as "the public" within the definition of article 2, paragraph 4, of the Convention. It thus decides to consider the present complaint as a communication under paragraph 18 of the annex to decision I/7, as submitted by Ms. Metcalfe on behalf of the Avich and Kilchrenan Community Council.

Access to, collection and dissemination of information (arts. 4 and 5, paras. 1 (a) and 2)

84. The communicant alleges that the authorities of both Parties concerned did not actively disseminate information regarding quantifiable data on the merits of wind energy projects in general or the information they disseminated was inadequate; nor did they provide this information at the communicant's request. According to the communicant, lack of or inadequate provision of this information impeded effective public participation in the decision-making processes for the adoption of policies, programmes and plans at the EU, United Kingdom and Scottish levels.

85. Based on article 5 of the Convention, Parties have the obligation to possess and update environmental information which is relevant for their functions. This implies that public authorities competent for the development of plans, policies, strategies or projects in relation to wind energy should be in possession of all relevant available information. Empirical calculations of carbon dioxide (CO_2) reductions per policy, plan, programme or project did not seem to be readily available at the time. Instead, calculations were based on modelling and on percentage contributions to renewable energy only. The Committee notes that such calculations are contested.

86. As the Committee has already stated in previous findings (on communication ACCC/C/2010/54, para. 89), "the Committee is not in a position to ascertain whether the technical information disseminated by the Party concerned, or the communicant for that matter, is correct". In the present case, the communicant seems to advocate a method for the calculation of the merits of wind energy that is different from what the decision-making

[15] See letter of the Party concerned of 20 December 2012 and also the websites http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/CommunityCouncils and http://www.highland.gov.uk/livinghere/communitiesandorganisations/communitycouncils.

bodies accept. The Committee has neither the mandate nor the capacity to assess the environmental information in question as to its accuracy or adequacy.

87. Based on the above, the Committee is not in a position to conclude that the Parties concerned failed to comply with the provisions of articles 4 and 5 of the Convention.

88. The Committee, however, notes that different methods are currently available for calculating the CO_2 reductions generated by wind energy projects and that the outcomes of these methods vary considerably. The Committee considers that, based on article 5, paragraph 1 (a), of the Convention, each Party is to ensure that "public authorities possess and update environmental information which is relevant to their functions". For public authorities engaged in decision-making regarding wind energy, this includes data arising from the application of different methods for calculating the CO_2 reductions generated by wind energy projects, including data from actual measurements. The Committee in this respect also notes that a carbon calculator has recently been installed for the wind farm, as was agreed by the parties during the discussion at the Committee's thirty-ninth meeting.

Public participation in relation to the wind farm (art. 6)

89. The Committee notes that the decision-making for the wind farm was initiated in November 2004, that is, before the entry into force of the Convention for the Party concerned (United Kingdom). As pointed out by the Committee in its previous findings, in determining whether or not to consider certain domestic procedures initiated before the entry into force of the Convention for the Party concerned, it examines whether significant events of those processes had taken place since the Convention's entry into force (cf. findings on ACCC/C/2008/27 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.2, para. 34), and ACCC/C/2008/26 (Austria) (ECE/MP.PP/C.1/2009/6/Add.1, para. 49). In the present case, consultations ran in four phases, one for the original applications before the entry into force of the Convention and three for the addenda shortly after the entry into force of the Convention for the Party concerned (United Kingdom). The decision for the project was granted on 13 June 2008 (Scottish Ministers consent)[16] and therefore important events, including consultations, took place after the entry into force of the Convention for the Party concerned (United Kingdom).

90. The wind farm is a project under article 6, paragraph 1 (a), in conjunction with paragraph 20 of the annex to the Convention. The communicant's allegations relate to article 6, paragraphs 6 and 8, of the Convention.

91. With respect to article 6, paragraph 6, of the Convention the communicant submitted that no or inadequate information was provided with regard to the figures for the calculation of the reduction of CO_2 emissions from wind energy and that therefore effective public participation was impeded. The matter of technical data deriving from different methods for the calculation of the reduction of CO_2 emissions from wind energy projects was discussed in paragraphs 84 to 88 above. In line with what was concluded above, the Committee cannot conclude that the Party concerned (United Kingdom) failed to comply with article 6, paragraph 6, of the Convention.

92. On 8 and 11 February 2013, respectively, the communicant and the Party concerned (United Kingdom) provided detailed information on the comments submitted during the consultation for the wind farm project and how those were or were not taken into account.

[16] See http://www.scotland.gov.uk/Topics/Business-Industry/Energy/Infrastructure/Energy-Consents/Applications-Database/Carraig-Gheal-Index/Carraig-Gheal-Consent.

93. In this regard, the Committee confirms that the requirement of article 6, paragraph 8, of the Convention that public authorities take due account of the outcome of public participation does not amount to a right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always required. Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account (see findings on communication ACCC/C/2008/24 (Spain) (ECE/MP.PP/C.1/2009/8/Add.1, para. 98), and ECE/MP.PP/C.1/2009/4, para. 29).

94. Having considered the information submitted by the parties in this regard, the Committee finds that the Party concerned (United Kingdom) overall duly took into account the comments submitted by the communicant and did not fail to comply with article 6, paragraph 8, of the Convention.

Public participation in relation to the access road (art. 6)

95. The access road is a project under article 6, paragraph 1 (a), of the Convention, in conjunction with paragraph 20 of the annex to the Convention. As with respect to the wind farm, the decision-making process started in 2004, before the entry into force of the Convention for the United Kingdom. However, a number of significant events related to the issuing of the permit took place after the entry into force of the Convention. The communicant alleges that the Party concerned (United Kingdom) failed to comply with all the obligations arising from article 6 of the Convention.

96. On 17 and 18 May 2013, respectively, the Party concerned (United Kingdom) and the communicant submitted detailed information on the public consultation process.

97. The assessment of whether a Party concerned is in compliance with article 6 of the Convention depends on whether the steps taken to ensure public participation are commensurate with the size and possible environmental impact of the project. If, for instance, the project concerns the construction of a nuclear power plant, then there is clearly an obligation for the public notice to be advertised widely in national and local media. However, if a project is of local significance, such as the opening of a forest road, a public notice in local media may suffice for informing the public concerned (see also findings on communication ACCC/C/2006/16 (Lithuania) (ECE/MP.PP/C.1/2008/5/Add.6), para. 67).

98. In this case, the Committee finds that the public concerned, including the communicant, had ample opportunity in more than one instance to participate in the consultation process and to submit comments. In this respect the Committee notes the following aspects. First, the way the notice for the project was advertised in the local press fits the local significance of the project and meets the requirements of article 6, paragraph 2, of the Convention. Second, the time frames provided for public consultations (almost one month each time for the original and revised versions of the environmental statement) were reasonable and therefore in line with article 6, paragraph 3, of the Convention. Third, the public concerned was involved from the beginning of the process. The process was therefore in conformity with article 6, paragraph 4, of the Convention. Fourth, the comments submitted by the public were addressed, in particular the main point of concern regarding the protection of the Golden Eagle, entailing that the Party complied with the requirements of article 6, paragraph 6, of the Convention.

99. Based on the above, the Committee does not find the Party concerned (United Kingdom) failed to comply with the public participation provisions of article 6 of the Convention.

Public participation regarding plans and programmes — the United Kingdom NREAP (art. 7)

100. NREAPs are plans or programmes under article 7 of the Convention (see findings on communication ACCC/C/2010/54, para. 75) and as such are subject to public participation. The fact that the United Kingdom's Renewable Energy Strategy, which informed the NREAP, was subject to public participation does not affect this conclusion, given their different legal status and functions in the EU and United Kingdom legal framework, respectively.

101. The Committee concludes that because the United Kingdom's NREAP was not subjected to public participation, the Party concerned (United Kingdom) failed to comply with article 7 of the Convention, in this regard.

Public participation in the preparation of plans, programmes and policies in Scotland (art. 7)

102. The communicant alleges non-compliance with article 7 of the Convention with respect to renewable energy policy documents in Scotland, in particular in relation to the Scottish Renewables Action Plan, the Scottish Renewable Energy Routemap and the Electricity Generation Policy Statement. However, at the hearing the communicant agreed that these documents had been subject to public participation and no longer challenged the compliance of these procedures with the Convention.

103. The Committee notes that the 2009 Scottish Renewables Action Plan was subject to public consultation in the context of the conduct of SEA.[17] Likewise the Renewable Energy Routemap, published in 2011, and the draft Electricity Generation Policy Statement, published in 2010, were subject to SEA in March 2012, in the context of which public participation took place.[18]

104. Given the facts noted in paragraph 103 above and the position of the communicant at the hearing (see para. 102, the Committee concludes that the Party concerned (EU) did not fail to comply with article 7 of the Convention, in this respect.

IV. Conclusions and recommendations

105. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

106. The Committee finds that because the United Kingdom's NREAP was not subjected to public participation, the Party concerned (United Kingdom) failed to comply with article 7 of the Convention.

107. In view of its decision in paragraph 77, the Committee points the Party concerned (EU) to its findings and recommendations in communication ACCC/C/2010/54 (EU).

[17] See http://www.scotland.gov.uk/Topics/Business-Industry/Energy/Energy-sources/19185/Resources/20801/RAPCONS.

[18] See http://www.scotland.gov.uk/Publications/2012/03/2294/2.

B. Recommendations

108. The Committee, pursuant to paragraph 35 of the annex to decision 1/7 of the Meeting of the Parties, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned (United Kingdom) to in future submit plans and programmes similar in nature to NREAPs to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention.

United Nations ECE/MP.PP/C.1/2014/9

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-fifth meeting
Maastricht, the Netherlands, 29 June–2 July 2014
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/70 concerning compliance by the Czech Republic*

Adopted by the Compliance Committee on 20 December 2013

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* This document is a late submission owing to editorial and secretariat capacity constraints and the need to give priority to the processing of documents for the fifth session of the Meeting of the Parties (Maastricht, the Netherlands, 30 June and 1 July 2014).

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I. Introduction

1. On 9 May 2012, the Czech non-governmental organization (NGO), Environmental Law Service (Ekologiský právní servis) (the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of the Czech Republic to comply with its obligations under article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

2. Specifically, the communication alleges that the Party concerned prepared its application to the European Commission for free allocation of allowances, including its national investment plan, under the revised rules for the European Union (EU) Emissions Trading System (ETS), without proper public participation, as required under article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

3. At its thirty-seventh meeting (Geneva, 26–29 June 2012), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 16 August 2012. On the same date, a letter was sent to the communicant. Both were asked to address a number of questions by the Committee.

5. The communicant and the Party concerned responded to the Committee's questions on 29 October 2012 and 14 January 2013, respectively.

6. At its thirty-ninth meeting (Geneva, 11–14 December 2012), the Committee agreed to discuss the content of the communication at its fortieth meeting (Geneva, 25–28 March 2013).

7. On 8 March 2013, the communicant provided additional information to the Committee, including comments on the response of the Party concerned of 14 January 2013.

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

9. The communicant and the Party concerned submitted their responses on 2 and 5 May 2013, respectively.

10. The Committee completed its draft findings at its forty-second meeting (Geneva, 24–27 September 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 11 November 2013. Both were invited to provide comments by 9 December 2013.

11. The Party concerned and the communicant provided comments on 4 and 6 December 2013, respectively.

12. At its forty-third meeting (Geneva, 17–20 December 2013), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-fifth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

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

A. Legal framework

Emissions trading

European Union law

13. The EU ETS is the main market-based tool of the EU climate change policy aiming at reducing greenhouse gas emissions. The system is based on a cap-and-trade approach, i.e., a limit (cap) is put on overall emissions from high-emitting industrial sectors, while companies can buy and sell emission allowances as long as the overall limit remains unaffected.

14. The system was established through the ETS Directive[2] and originally included the possibility for companies to receive some of their allowances from Governments for free. The most recent revision of the system aims at phasing out the free allocation of allowances, starting in 2013, with the objective that all allowances are auctioned by 2020.

15. However, the shift from free allocation to complete auctioning varies from industry to industry and country to country. For instance, in the power generation sector, all allowances must be bought, but for some countries, including the Czech Republic, there is still a possibility to continue granting a limited number of free allowances to existing power plants until 2019. At the same time, these countries should invest in the modernization of the power sector at an investment value that is at least as high as the value of the free allowances (ETS Directive, article 10c, para. 1).

16. To make use of this derogation, a member State has to submit to the European Commission an application containing, among other things, a national plan with information about modernizing its energy sector (upgrading infrastructure and technologies, diversifying energy sources, etc.) (ETS Directive, article 10c, para. 5). The Commission then makes an assessment on whether the application should be admitted or rejected.

17. The Commission has issued a guidance document on the optional application of article 10c of Directive 2003/87/EC (2011/C 99/03) (Guidance Document). Among other things, the Guidance Document requires that "for the sake of transparency and to enable a well founded assessment of the application by the Commission, member States should publish an application before submitting it to the Commission to enable the Commission to consider information and views from other sources" (para. 60). In its annex VII the Guidance Document includes a template for the application pursuant to article 10c (para. 5), which also requires that "member States should summarize the process by which the application and the plan has been prepared and how the public has been informed and involved".

Czech law

18. The Party concerned transposed the ETS Directive through Act No. 695/2004 Coll. on Terms of Trading with Greenhouse Gas Emission Allowances and on Amendments to

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

[2] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC and Directive, as amended.

Certain Acts.[3] According to the Act, until 31 October 2009 the Ministry of Environment would invite electricity producers to submit documentation for the preparation of the application. Once finalized by the Ministry of Environment, the application would be submitted to the Government by 30 November 2010 and published in a manner that would allow remote access.

Strategic environmental assessment

European Union law

19. Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive) defines plans and programmes as "plans and programmes ... as well as any modifications to them ... which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and ... which are required by legislative, regulatory or administrative provisions" (art. 2). The Directive does not apply to plans and programmes the purpose of which is to serve national defence or civil emergency or financial or budget plans and programmes (art. 3, para. 8).

Czech law

20. Act No. 100/2001 Coll. (the EIA Act) of the Party concerned transposes the SEA Directive. According to the Act, plans and concepts[4] as defined in the Act should be subject to environmental impact assessment (EIA) when they may have a serious environmental impact (art. 1, para. 2). A concept is a strategy, policy plan or programme prepared by a public authority and subsequently approved by a public authority.

B. Facts

21. The Czech Republic was one of the member States eligible to submit an application to the European Commission to continue free allowances under article 10c of the ETS Directive and it decided to do so. The process started in 2009, when electricity producers holding emissions permits issued after 22 October 2009 were invited to submit documentation for the preparation of the application by the deadline of 30 June 2010. This documentation included information about the list of installations expected to be operating from 2013 to 2019 and a draft plan concerning the upgrading of installations and clean technologies (see Act 695/2004 Coll., sect. 10a).

22. The Ministry of Environment prepared its application (annex 1 to the communication) and published it in December 2010.

23. In the meantime, the European Commission published its Guidance Document on 31 March 2011 (see para. 17 above). The Ministry of Environment also invited electricity producers interested in the process to supplement their documentation, as required by the Guidance Document.

24. The application was finalized in August 2011 and posted on the website of the Ministry of Environment from 19 August to 26 August 2011. Due to an error, the national investment plan, one of the main documents accompanying the main application, was only

[3] Translation provided by the communicant.

[4] The documentation submitted to the Committee refers to the term "conception" instead of concept, see communication, page 6.

uploaded on the website for consultation on 25 August 2011. The communicant submitted comments on 26 August 2011. The application was approved by the Government on 21 September 2011 (see annex 3 to the communication) and submitted to the Commission before the end of September 2011, that is, within the set deadline.

25. As required under the Guidance Document, the application, under the heading "transparency and public consultation", states that the Ministry of Environment cooperated with the Ministry of Industry and Commerce, the Ministry of Finance and with representatives of the energy sector in the preparation of the national investment plan (annex 2 to the communication). The application further states that the plan will be released on the website of the Ministry of Environment for public consultations before its presentation to the Government, and that the Ministry will then take into account all comments received within the set deadline.[5]

26. The "methodical report" (annex II to the application),[6] states that the authorities of the Party concerned consider that the national investment plan is neither a concept nor a plan, but rather a financial and budget plan and programme, and thus no strategic environmental assessment (SEA) is necessary.

27. During the processing of the application by the European Commission, the communicant, on 5 December 2011 and 2 April 2012, submitted comments/shadow reports to the Commission on the application of the Party concerned and raised concerns about the lack of EIA and public participation. The communicant discussed its first report with the Commission's Directorate-General for Climate Action on 19 January 2012. In its decision approving the application from the perspective of State aid on 19 December 2012, the Commission addressed the comments submitted by the communicant on 2 April 2012.

28. Further to the Commission's assessment, the Party concerned submitted its revised application on 12 June 2012, and followed up with additional information on 21 June 2012.[7]

29. On 6 July 2012, the Commission approved the application and the national investment plan (decision C (2012) 4576). In addition, the Commission's Directorate-General for Competition concluded its assessment process on 19 December 2012.

C. Domestic remedies and admissibility

30. On 14 October 2011, the communicant submitted an appeal to the Prime Minister through the Office of the Government, challenging the approval of the Czech application and the national investment plan. On 21 November 2011, the Ministry of Environment, assigned in the meantime to deal with this request, replied that due to the legal nature of the Government's approval of the application, there was no possibility to appeal. In addition, the Ministry responded to the appeal as follows: no assessment was necessary because the documents at issue did not fall under the EIA Act; the publication of the documents on 19 August 2011 allowed for remote access; and the Plan was subject to additional amendments disclosed to the public at a later date, but still before the end of the consultation period.

31. On 20 January 2012, the communicant submitted a "measure against inactivity" to the Prime Minister (through the Office of the Government) for failure to issue a decision

[5] See section 6 of the application.

[6] Annex 1 to the communicant's reply to the Committee's questions of 29 October 2012. Annex 2 to the same reply, constitutes the updated (2012) version of the methodological report.

[7] Annex 3 to the communicant's reply to the Committee's questions of 29 October 2012.

upon its appeal of 14 October 2011. By letter of 28 February 2012, the Office replied that due to the legal nature of the Government's approval, no appeal was possible.

32. On 20 August 2012, the communicant brought an action before the courts for the ineffective "measure of inactivity" of the Prime Minister. On 21 December 2012, the Municipal Court of Prague dismissed the action as inadmissible, on the grounds that the decision being challenged was of a political and not an administrative nature.

33. On 15 August 2012, the communicant submitted a request for internal review of the Commission decision approving the application and the plan under the Aarhus Regulation.[8] The request concerned the actions of EU authorities and not the Party concerned. The request was rejected on formal grounds because, according to the Commission, the Commission decision on transitional free allowances did not fall under the definition of an "administrative act" under the Aarhus Regulation. The communicant has brought an action before the General Court, which is pending. According to the communicant, this should not be an obstacle for the Committee to review the present communication, because it relates to the actions of EU institutions and not to those of the Party concerned.

D. Substantive issues

34. The communicant alleges that in preparing its application to use the option of transitional free allocations for the modernization of electricity generation and its national plan under article 10c of the ETS Directive, the Party concerned failed to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

35. In particular, the communicant alleges that the application at issue and the national investment plan included in the application are plans or programmes under article 7 of the Convention. This is supported by the definition of a plan or programme under the SEA Directive and the definition of a concept under the EIA Act. The communicant does not agree with the approach in the methodical report that the plan at issue concerns finances or budgets, and thus falls outside the scope of the SEA legislation (see para. 26 above), because the application and the plan primarily concern the strategy of the Party concerned in matters of sustainable energy, clean technologies and the environment. Therefore, in the view of the communicant an assessment including public participation was necessary.

36. The communicant claims that, once submitted to the Commission, the application and the national investment plan are final, i.e., no other projects and/or investments may be added. The Commission may reject the application as a whole or in part, and its decision is binding for the member State.

37. The communicant alleges that one week for public comments (19 August–26 August 2011) was only a pro forma consultation and did not allow for effective public participation under article 6, paragraph 3, of the Convention. In this connection, the communicant also alleges that the notice on the public consultations was poor and that the national investment plan — in the view of the communicant, the most essential part of the application — was not included in the documentation to be reviewed by the public that wished to participate.

38. The communicant further alleges that, considering that the preparation of the application and the plan were initiated in 2009 and sufficient opportunities were given to the private sector to contribute, members of the public did not have the opportunity to

[8] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

participate early in the procedure, and thus the Party concerned failed to comply with article 6, paragraph 4, of the Convention.

39. The communicant also alleges that neither its comments nor any of the comments submitted by members of the public were duly taken into account, and that the Party concerned failed to comply with article 6, paragraph 8, of the Convention.

40. The communicant claims that if an assessment had been carried out as required under EU law and the law of Party concerned, in principle these shortcomings would have been avoided.

41. The communicant finally argues that even if the Commission makes the final decision, a member State has a certain level of responsibility; it is the member State that decides whether and how to make use of the option for free allowances under EU law and thus exercises great discretion on the modalities and the effects of the final decision, such as the number of free allowances to be allocated. The only possibility for members of the public to provide comments on basic questions such as whether or not to apply for this option, and to what extent, is during the national consultations stage, before Government approval, and before the decision reaches the next level of decision-making (i.e., at the Commission).

42. The Party concerned refutes the communicant's allegations. Its primary argument is that there is no requirement under EU or Czech law for the carrying out of public consultations, rather the only requirement is that the application and the plan be published before submission to the Commission.

43. The Party concerned argues that, although it was under no requirement to do so, it allowed for public consultation, and that this occurred before the formal requirement for publication. The documentation was available on the website for almost one month before it was submitted to the Commission, public comments were invited, and the comments received were taken into account. Indeed, a number of other ministries, industry operators and associations and NGOs, including the communicant, submitted comments of a technical nature and their comments were addressed.

44. The Party concerned further claims that the actual and final decision is taken by the Commission and not the member State. Accordingly, the decision approving the application and the plan is not an administrative decision subject to appeal. In addition, members of the public had the possibility to submit comments until the final decision was issued by the Commission. The final version of the application, as approved by the Commission in July 2012, was very different from the version submitted in September 2011.

III. Consideration and evaluation by the Committee

45. The Czech Republic deposited its instrument of accession on 6 July 2004. The Convention entered into force for the Czech Republic on 4 October 2004.

46. The Committee first looks at whether the application as a whole, including accompanying documentation, such as the national investment plan, falls within the scope of article 7 and then examines whether the requirements for public participation were met by the public concerned.

47. The Committee notes that the preparation of the application was a long process whereby the Party concerned was responsible for preparing the application for submission to the Commission and thereafter the Commission, together with the Party concerned, further elaborated the application until its final approval by the Commission. The Committee will focus only on the obligations arising for the Party concerned from the

Convention during the preparation of the application, and will not extend its review to EU compliance with the Convention (not being the Party concerned). However, the Committee notes the complexity of decision-making in a multi-level government structure, such as the one between the EU and its member States, including the Party concerned, and encourages further cooperation and coordination of actions with respect to the implementation of the Convention.

Application for transitional free allowances as a plan or programme (art. 7)

48. Whether the application at issue falls under article 7 of the Convention is determined by the following two criteria: whether the document is a plan or programme and whether it is related to the environment.

49. First, what constitutes a "plan" is not defined in the Convention. The fact that a document bears in its title the word "plan" does not necessarily mean that it is a plan under article 7 of the Convention; rather, it is necessary to consider the substance of the document (see findings on communications ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2), para. 29; ACCC/C/2005/12 (Albania) (ECE/MP.PP/C.1/2007/4/Add.1), para. 65; and ACCC/C/2008/27 (United Kingdom of Great Britain and Northern Ireland) (ECE/MP.PP/C.1/2010/6/Add.2), para. 41). For instance, in the present case, the document at issue was an "application" that included the "national investment plan". The Committee looks at the contents and the legal effects of the application as a whole, to determine whether it falls under article 7 of the Convention.

50. It is acknowledged that the application relates to the environment since it proposes measures in the energy sector that affect or are likely to affect the elements of the environment. This is further supported by the fact that paragraph 60 of the 2011 Guidance Document states that "any application submitted by a member State should be considered environmental information".

51. Among other things, the Czech application for the allocation of free emission allowances proposed measures for investment into equipment and for the modernization of infrastructure and clean technologies in the electricity sector for a period of seven years. To this end, the accompanying plan envisaged the implementation of 350 projects throughout the territory. Through the application, including the accompanying documentation, the Party concerned set out its investment direction in the sector and proposed specific projects for the accomplishment of the plan. On the basis of this, the Committee finds that the application, including the accompanying documentation, is a plan under article 7 of the Convention.

52. It is submitted by the Party concerned that once approved by the Government and submitted to the Commission, the application underwent considerable changes. The Committee notes that article 7 requires appropriate provisions to be made for the public to participate during the preparation of the plan. Whether the plan was further amended when it passed to the next level of government (i.e., the Commission) before its finalization and adoption does not alleviate the obligations arising for the Party concerned during the period that it carried the main responsibility for the preparation of the substantive elements of the application.

53. For these reasons, the Committee finds that the application, including its national investment plan, prepared by the Party concerned under the revised rules for the EU ETS, is a plan within the purview of article 7 of the Convention and therefore article 6, paragraphs 3, 4 and 8, apply to its preparation.

Time frames for public participation procedure (art. 6, para. 3)

54. The official consultation period for the application was from 19 to 26 August 2011. During the discussion with the Committee at its fortieth meeting, the Party concerned agreed that the one-week period was short, but submitted that overall there were plenty of opportunities for the public to participate.

55. During the discussion, the Party concerned also mentioned that the documentation relating to the application was available on the Ministry's website from 3 December 2010. While indeed the documentation was published on 3 December 2010, formally the general public had only seven days for getting acquainted with the draft and submitting comments. Despite the fact that some members of the public had been able to submit comments outside the scope of these seven days, the Committee finds that the Party concerned failed to ensure a reasonable time frame for public participation in the case of such a document, since the general public was not aware of the ongoing consultation on the application.

56. It was further submitted that although the application was available from 19 August 2011, due to an error the national investment plan was only published on the website on 25 August 2011, without providing for an extension of the deadline for submission of comments. This meant that the public concerned had one day to study the plan, digest the information and provide comments.

57. The Committee considers that providing the public with seven days to get acquainted with the draft documents and to submit comments, let alone allowing it one day for the same purpose, cannot be considered a reasonable time frame for the public to prepare and participate effectively in the preparation of a document of the magnitude of the national investment plan. Therefore, the Committee considers that, by not providing sufficient time for the public to get acquainted with the draft and submit comments, the Party failed to comply with article 7, in conjunction with article 6, paragraph 3, of the Convention.

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

58. Given that the process to prepare the application was initiated on 31 October 2009 and that formally the general public had only seven days to get acquainted with the draft and submit comments, starting on 19 August 2011, that is, almost two years after the start of the application's preparation, the Committee finds that the Party concerned failed to comply with article 7, in conjunction with article 6, paragraph 4, of the Convention, because no early public participation was ensured, when all options were open.

59. In this respect, it is noted that article 7 provides that "the public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention". This provision should not be used by public authorities in a way so as to restrict public participation, but rather as a way of making public participation more effective. In the present case, it is accepted that the input by private stakeholders engaged in electricity production was essential in that it provided specific technical details indispensable for the preparation of the application. The Committee considers that there was a considerable span of time for participation of private stakeholders compared to that granted to other members of the public, to the extent that the authority exercised its discretion in a way that ran counter to the objectives of the Convention; in particular "to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development" by involving, among others, NGOs promoting environmental protection. While the closer inclusion of the private stakeholders in the process may have been justified, there was still an obligation on the public authority to act in accordance with the objectives of the Convention and not to abuse this provision to

effectively bar or significantly reduce the effective public participation of other members of the public.

Due account of the public participation (art. 6, para. 8)

60. There is a clear obligation arising from article 7 on public authorities to seriously consider the outcome of public participation in the preparation of plans. However, the Convention does not specify how this should be done in practice.

61. It is recognized that the public authority preparing the plan is ultimately responsible for policymaking and has to consider a number of factors, including the comments of the public. This may lead to a final plan that may not always be accepted by the public. However, the authority should be able to demonstrate how the comments were considered and why it did not follow the views expressed by the public. As already stated, "the requirement of article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision" (see Committee's commentary on communication ACCC/C/2008/29 (Poland) in the report of its twenty-fourth meeting (Geneva, 30 June–3 July 2009) ECE/MP.PP/C.1/2009/4, para. 29). Yet, "while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received" (findings on communication ACCC/C/2008/24 (Spain) (ECE/MP.PP/C.1/2009/8/Add.1), para. 99).

62. The Committee notes that for decisions on specific activities, fulfilment of the requirement of article 6, paragraph 8, is to be proven through fulfilment of article 6, paragraph 9. In contrast, a requirement to make accessible the reasons and considerations on which the decision is based is not expressly provided for in article 7 of the Convention. Nevertheless, the Party concerned has the obligation to demonstrate that it has fulfilled its obligations under article 6, paragraph 8. The Committee notes that in the process of preparing a plan this obligation could be fulfilled by following the procedure set out in article 6, paragraph 9, or any other way the Party concerns chooses to demonstrate that it has taken "due account" of the outcome of the public participation.

63. In the present case, the Party concerned, in its application to the European Commission referred to in paragraph 22, mentions that "the Ministry of the Environment will thoroughly settle all duly submitted comments". The Party concerned was not able to show through its written and oral submissions how the outcome of public participation was duly taken into account. The Committee appreciates that the Party concerned had to operate under extremely tight deadlines to ensure that its application to the Commission was submitted within the set deadline and that free allowances were eventually awarded for the transitional period 2013–2019 according to the new EU regime on ETS. Nevertheless, the Committee considers that the application at issue certainly did not constitute an emergency situation and that there would have been a possibility for enhanced openness and transparency of the process from its start in October 2009, so that public participation would not have been jeopardized. For these reasons, the Committee finds that, by failing to show through its written and oral submissions how the outcome of public participation was duly taken into account, the Party concerned failed to comply with article 6, paragraph 8, of the Convention.

IV. Conclusions and recommendations

64. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

65. The Committee finds that:

(a) The application, including its national investment plan, prepared by the Party concerned under the revised rules for the EU ETS is a plan within the purview of article 7 of the Convention and therefore article 6, paragraphs 3, 4 and 8, apply to its preparation (para. 53).

(b) By not providing sufficient time for the public to get acquainted with the draft and submit comments, the Party concerned failed to comply with article 7, in conjunction with article 6, paragraph 3, of the Convention (para. 57).

(c) Given that the preparation process for the application was initiated on 31 October 2009 and that formally the general public had only seven days to get acquainted with the draft and submit comments, starting on 19 August 2011, that is, almost two years after the start of the application's preparation, the Committee finds that the Party concerned failed to comply with article 7, in conjunction with article 6, paragraph 4, of the Convention, because no early public participation was ensured, when all options were open (para. 58).

(d) By failing to show through its written and oral submissions how the outcome of public participation was duly taken into account, the Party concerned failed to comply with article 6, paragraph 8, of the Convention (para. 63).

66. Furthermore, the Committee, while noting the complexity of decision-making in a multi-level government structure such as the one between the EU and its member States, encourages the EU in designing a common framework for its member States to implement the Convention, to ensure the compatibility of that framework with the Convention and to fulfil its responsibility to monitor that its member States, including the Czech Republic, in implementing EU law, properly meet the obligations resting on them by virtue of the EU being a party to the Convention (see findings on communication ACCC/C/2010/54 (EU) (ECE/MP.PP/C.1/2012/12), para. 76).

B. Recommendations

67. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures request in paragraph 37 (b) thereof, recommends that the Party concerned, in future, submits plans and programmes similar in nature to the national investment plan to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention.

United Nations ECE/MP.PP/C.1/2015/3

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-eighth meeting
Geneva, 24–27 March 2015
Item 8 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/77 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 2 July 2014

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I. Introduction

1. On 21 August 2012, the non-governmental organization (NGO) Greenpeace Limited (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of the United Kingdom of Great Britain and Northern Ireland to comply with the Convention's provisions on access to justice.[1]

2. Specifically, the communicant submits its experience as an environmental NGO that sought judicial review of the designation by the Secretary of State for Energy and Climate Change of the National Policy Statement for Nuclear Power Generation in the United Kingdom (Nuclear National Policy Statement).[2] Its application for judicial review was refused and it was ordered to pay the Party concerned (the defendant) the amount of £11,813, which was later reduced to £8,000 after the communicant argued that the amount was excessive given that the case fell within the scope of the Aarhus Convention. Notwithstanding this reduction, the communicant alleges that the Party concerned fails to comply with article 9, paragraphs 4 and 5, of the Convention, because of the high costs ordered in the case of refusal of applications for judicial review in environmental cases.

3. At its thirty-eighth meeting (Geneva, 25–28 September 2012), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 30 October 2012.

5. The Party concerned responded to the allegations on 31 May 2013.

6. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee agreed to discuss the content of the communication at its forty-first meeting (Geneva, 25–28 June 2013).

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

8. The Party concerned and the communicant each submitted their response on 19 August 2013.

9. The Committee prepared draft findings at its forty-fourth meeting (Geneva, 25–28 March 2014). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 26 May 2014. Both were invited to provide comments by 26 June 2014.

10. Both the Party concerned and the communicant provided comments on 26 June 2014.

[1] The communication and related documentation from the communicant, the Party concerned and the secretariat, is available from http://www.unece.org/env/pp/compliance/compliancecommittee/77tableuk.html.

[2] United Kingdom, Department of Energy and Climate Change, *National Policy Statement for Nuclear Power Generation (EN-6)*, vols. I and II (London, The Stationery Office, 2011). Available from https://www.gov.uk/consents-and-planning-applications-for-national-energy-infrastructure-projects.

11. At its forty-fifth meeting (Maastricht, the Netherlands, 29 June–2 July 2014), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-eighth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[3]

A. Legal framework and relevant case-law

National policy statements

12. The United Kingdom Planning Act 2008 regulates, inter alia, matters relating to the authorization of projects for the development of nationally significant infrastructure. In sections 5–13, the Planning Act provides for national policy statements, which are issued by the Secretary of State and set out national policy in relation to one or more specified descriptions of development.

13. The national policy statement regime was introduced to avoid delay when development consent is subsequently sought for nationally significant infrastructure projects, because "in principle" issues such as the need for nuclear power would then already be settled by the national policy statement. This then enables consideration of individual applications for development consent to concentrate on local issues.

14. The Planning Act provides that challenges to national policy statements can only be brought by way of judicial review. Any challenge must be brought within six weeks following either the date of designation of the national policy statement or the publication of the national policy statement, whichever is the later.

15. The Planning Act also provides for the review of a national policy statement which has been designated if the following conditions all apply:

(a) There is a significant change in any of the circumstances upon which any of the policy set out in the statement was decided;

(b) The change was not anticipated at that time;

(c) If the change had been anticipated, any of the policy would have been materially different.

Pre-action protocol for judicial review

16. The Civil Procedure Rules 1998 introduce "pre-action protocols" in different areas. The purpose of these protocols is to promote cooperation between the parties in various types of disputes and to encourage parties to attempt to negotiate a settlement, by providing information to each other, prior to making a legal claim.

17. One pre-action protocol addresses judicial review. Before submitting an application for judicial review, a claimant should comply with the procedure laid out in the protocol, namely, the claimant should send a letter to the defendant before taking action, identifying the decision/act/omission challenged and setting out a summary of the facts and the reasons for challenging them. The defendant has to respond to the claim within 14 days, also

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

indicating which parts of the claim, if any, it concedes. The pre-action protocol should normally be complied with, but is not a mandatory part of bringing a claim for judicial review, though if a party does not follow the protocol, it may be penalized in costs.

Permission for judicial review in England and Wales and costs

18. The Party concerned explains, in its response to the communication dated 31 May 2013, that in England and Wales, permission to apply for judicial review must be granted by a High Court Judge. The "White Book", the guide to civil procedure in England and Wales, summarizes the test for granting permissions as follows:

> The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that permission is required is designed to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending although misconceived" (*R. v Inland Revenue Commissioners Ex p. National Federation of Self-employed and Small Businesses Ltd* [1982] A.C. 617 at p. 642 per Lord Diplock). Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence (*R. v Legal Aid Board Ex p. Hughes* (1992) 5 Admin. L. Rep. 623; *R. v Secretary of State for the Home Department Ex p. Rukshanda Begum and Angur Begum* [1990] C.O.D. 107 and *Sharma v Brown-Antoine* [2007] 1 W.L.R. 780 at para.14(4)) ....

19. In case of refusal of the application, under Civil Procedure Rule 54.12, paragraph 3, the claimant can renew its application for permission, which will then be considered at an oral hearing rather than through written submissions.

Costs

20. With respect to costs in unsuccessful applications for permission to judicial review, the defendant should normally be able to recover the costs of filing an Acknowledgement of Service from the unsuccessful claimant (*R. (Leach) v. Commissioner for Local Administration*).[4]

21. The court, however, should not order an unsuccessful claimant to pay the costs of a defendant attending an oral hearing and successfully resisting an application for permission except in exceptional circumstances. Such circumstances may be indicated by the presence of one or more of the following factors: (a) the hopelessness of the claim; (b) the persistence by the claimant in the claim after having been alerted to facts or the law demonstrating its hopelessness; (c) the extent to which the court considers that the claimant has sought to abuse the process of judicial review for collateral purposes; (d) whether, as a result of full argument and the deployment of documentary evidence, the claimant has, in effect, had the advantage of an early substantive hearing of the claim (*R. (Mount Cook Land Ltd) v. Westminster City Council*) (*Mount Cook* case)).[5]

[4] [2001] EWHC (Admin) 455.

[5] [2004] 2 P. & C.R. 405.

22. What is reasonable in terms of the level of costs incurred in filing an Acknowledgment of Service and Summary Defence was examined by the Court of Appeal in *R. (Ewing) v. Office of the Deputy Prime Minister*:

> The considerations which may apply in responding to the application for permission will vary enormously from case to case. For example, where the subject-matter is in essence a commercial dispute between rival developers, different considerations may apply. In the ordinary case, however, the court must be particularly careful to ensure that the costs falling on the judicial review claimant are not disproportionately inflated by the involvement of the other parties at the permission stage.[6]

23. The Court of Appeal in *Ewing* noted:

> Finally, I would repeat the request made by this court in *Mount Cook* that an opportunity should be found as soon as possible to introduce a specific rule or practice direction governing the procedure for applications for costs at the permission stage, and the principles to be applied. It would be helpful if at the same time there could be clarification of what is required by way of "summary of grounds", and if thought might also be given to whether it is necessary to impose the same requirement on all parties for a summary of grounds at the acknowledgement stage. It may be thought sufficient to impose such a requirement on the Defendant, leaving other parties free to submit comments if they wish to so.[7]

24. The claimant can appeal the cost order awarded before the Court of Appeal.

25. In *Morgan v. Hinton Organics (Wessex Ltd),*[8] cited with approval in *R. (on the application of Garner) v. Elmbridge Borough Council*,[9] the Court of Appeal held:[10]

> This court has not encouraged the development of separate principles for "environmental" cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The Corner House statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied "flexibly". Further development or refinement is a matter for legislation or the Rules Committee.

New rules on costs introduced in the Civil Procedure Rules

26. In the light of decision IV/9i of the Meeting of the Parties (see ECE/MP.PP/2011/2/Add.1), the Party concerned introduced changes to its Civil Procedure Rules with respect to the award of costs in claims within the scope of the Aarhus Convention. Rules 45.41–45.44 of the Civil Procedure Rules (England and Wales) provide for costs protection in "Aarhus Convention claims". Practice Direction 45 provides for a protective costs order of "£5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person; ... in all other cases, £10,000".[11] The liability of the defendant for a successful claimant's costs is capped at £35,000.The

[6] [2005] EWCA (Civ) 1583, [2006] 1 W.L.R. 1260, para. 42.
[7] Ibid, para. 46.
[8] [2009] EWCA (Civ) 107, [2009] 2 P. & C.R. 30.
[9] [2010] EWCA (Civ) 1006.
[10] *Morgan*, para. 47.
[11] Practice Direction 45, para. 5.1 (available from http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs). The changes to the Practice Direction relating to Aarhus Convention claims came into force on 1 April 2013.

sum of recoverable costs for both the claimant and the defendant cannot be challenged. The amended rules entered into effect for England and Wales on 1 April 2013 (Scotland and Northern Ireland have rules which came into effect separately).

B. Facts

27. On 19 July 2011, the Party concerned exercised its power to designate under section 5 of the Planning Act 2008, the Nuclear National Policy Statement. The National Policy Statement (NPS), together with the Overarching National Policy Statement for Energy, provides the primary basis for decisions taken by the Infrastructure Planning Commission (IPC) on applications it receives for nuclear power stations.[12] The NPS, together with the Overarching National Policy Statement for Energy, is also the primary decision-making document for the IPC when considering development consent applications for the construction of new nuclear power stations on sites in England and Wales that are listed in the NPS.[13] The NPS provides the binding decision-making framework[14] for the assessment of applications for the development of new nuclear power stations on some or all of the sites listed in Part 4 of the document by the end of 2025.[15]

28. The "designation" of the NPS was preceded by a process of consultations with the public and statutory consultees. The NPS was also subjected to an appraisal of sustainability according to the European Union (EU) Strategic Environmental Assessment Directive.[16] Public consultations on the draft NPS closed in January 2011.

29. The Fukushima accident occurred in March 2011, before the designation of the nuclear NPS but after public consultation on the draft had closed. The accident prompted the Party concerned to solicit a review of its civilian nuclear plants from the Chief Nuclear Inspector. The Chief Inspector published an Interim Report in May 2011.[17] The Interim Report apparently did not lead to significant changes to the NPS. Footnote 33 on page 13 of the of the nuclear NPS remarks that the Interim Report focused on issues relevant to the nuclear licensing and regulatory regimes and that were therefore primarily within the regulators' remit.

30. Given that the Fukushima accident occurred before the designation of the NPS (although after consultation on the draft had closed), a review of the NPS was not legally required under the Planning Act 2008, because any "significant change in circumstances" resulting from the Fukushima accident took place before the NPS was designated. It was therefore not possible to seek a review of the NPS through administrative channels without exceeding the statutory time limit for judicial review other than by a pre-action protocol letter.

31. On 16 August 2011, the communicant sent a judicial review pre-action protocol letter to the Party concerned. The Party concerned received the letter on 18 August 2011. In its pre-action protocol letter, the communicant stated that "the action that the Secretary of State is requested to take is to quash the Nuclear National Policy Statement, if necessary by

[12] Nuclear National Policy Statement, vol. I, para. 1.2.1.
[13] Ibid, para. 1.5.1.
[14] Planning Act 2008, sect. 104, para. 3.
[15] Nuclear National Policy Statement, vol. I, para. 1.5.1.
[16] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.
[17] Available at www.hse.gov.uk/nuclear/fukushima/interim-report.pdf. The final report was published in September 2011 and is available at http://www.hse.gov.uk/nuclear/fukushima/final-report.pdf.

submitting to a court of competent jurisdiction".[18] The letter attached a draft statement of facts and grounds for judicial review numbering 84 paragraphs (29 pages). The Party concerned considered the draft application to be much longer than the summary of the facts and the reasons for the challenge required by the Pre-Action Protocol for Judicial Review. While under the Pre-Action Protocol the defendant normally replies within 14 days, the communicant requested a response by 22 August 2011 because according to section 13 of the Planning Act 2008, the deadline for the communicant to challenge the NPS was 26 August 2011. In its letter, the communicant stated that the reason for sending its pre-action protocol letter almost a month after the decision had been taken was due to the fact that the time for challenging the decision was during the vacation season.

32. The communicant sought to challenge the decision to designate the NPS on two grounds:

(a) Failure to take into account material considerations and/or failing to review the NPS prior to its designation in relation to flood risk, off-site electrical supplies and on-site emergency controls;

(b) Failure to consult on the issue raised by the Fukushima accident and the interim report.

33. On 22 August 2011, the Party concerned sent a holding reply that the deadline set by the communicant was not sufficient for the Party concerned to respond to the points raised and, moreover, was contrary to the Pre-Action Protocol, and that a response would be sent in due course. In its letter, the Party concerned also enclosed several documents essentially addressing both allegations brought by the communicant.

34. On 24 August 2011, the communicant replied to the Party concerned that the Party concerned had not addressed the grounds of its challenge and had given no indication when a response would be provided. The communicant recalled the deadline of 26 August 2011 for any challenges to be brought against the NPS. It also reserved the right to amend its grounds in the light of any substantive response and its position as to costs.

35. On 26 August 2011, the last possible date to do so, the communicant submitted a claim for judicial review of the designation of the NPS. In the meantime, no response had been received from the Party concerned.

36. The proceedings were accompanied by considerable publicity and representatives of the communicant issued press statements.

37. On 20 September 2011, the Party concerned filed its acknowledgement of service.

38. Thereafter, the communicant and the Party concerned exchanged correspondence, but this was not included in the costs claimed.

39. On 5 December 2011, the Court refused permission to apply for judicial review and the parties were informed of this on 12 December 2011. The communicant's application was refused on all grounds of challenge and the communicant was ordered to pay £11,813 to the defendant (the Party concerned) for costs in preparing the acknowledgement of service. The communicant was given 14 days to file written submissions disputing the award either in principle or in relation to the amount. The Party concerned was ordered to file any response within seven days thereafter.

40. On 22 December 2011, the communicant disputed the costs awarded on the grounds that the amount was excessive and the case fell within the scope of the Aarhus Convention.

[18] See annex 1 to the communication.

41. Specifically, the communicant argued that the majority of the claimed costs were Counsel's fees. Taking into account that the case at issue did not progress beyond the application stage, the engagement of two Queen's Counsel (i.e., senior barristers), in addition to an experienced junior barrister, and the submission of a document by the Party concerned of 46 pages/119 paragraphs, instead of a short summary that the Court of Appeal had in mind, were excessive and had a bearing on the costs incurred by the Party concerned and ordered against the communicant. In addition, the communicant argued that the claim, being at the permission stage, did not require consideration of any issues of a technical or scientific nature.

42. In addition, the communicant argued that this was not commercial litigation, that the communicant was an environmental NGO depending financially on private donations and that the claim related to the operation and associated practical consequences of the planning regime for new nuclear power stations and the assessment of nuclear safety, which were matters of the highest public interest, as subsequently also acknowledged by the High Court (Justice Ouseley).

43. Finally, the communicant argued that the fact that the Party concerned did not respond in time to its pre-action letter might have had a bearing on its costs now ordered against the communicant.

44. On those grounds, the communicant requested that an award of costs for an Acknowledgement of Service set at a maximum of £1,500 would be appropriate.

45. On 19 March 2012, the communicant was informed by the Court that its request for a reduction of the costs awarded against it to £1,500 had been refused, and that on 5 March 2012 an order was granted that the communicant pay the sum of £8,000 (instead of £11,813) to the Party concerned. The order stated that "the Aarhus Convention is itself irrelevant; it has only been incorporated into UK law to the extent that an EC Directive is involved; the Directives were not involved, other than as an element of background".

C. Domestic remedies and admissibility

46. On 22 December 2011, the communicant disputed the costs awarded by way of written submission to the High Court of Justice, Queen's Bench Division Administrative Court. On 19 March 2012, the communicant was informed that a cost order of the amount of £8,000 had been granted — instead of the original £11,813 — to be paid by the communicant to the Party concerned (see para. 45 above).

47. The communicant did not seek further remedies.

48. The communicant submits that if it had sought a renewal of its application for permission under Civil Procedure Rule 54.12, paragraph 3, the action would have likely incurred significant costs, in addition to the costs already incurred.

49. Moreover, had it proceeded with the matter before the Court of Appeal to appeal the refusal of the judicial review applications, costs would have been exorbitant.

50. The Party concerned claims that the communicant failed to exhaust domestic remedies and recalls paragraph 21 of the annex to decision I/7 of the Meeting of the Parties.

51. The Party concerned stresses that appealing the costs order would not have been an unreasonably prolonged process nor would it have failed to provide an effective or sufficient means of redress.

52. The Party concerned notes that it is not that uncommon for a judicial review case to be refused on the papers only for the claimant to successfully renew and obtain permission at an oral hearing, while a Court awards costs in an oral renewal in exceptional

circumstances only (see para. 21 above). The fact that the communicant chose not to take this step suggest that it did not have any faith in its grounds of challenge.

D. Substantive issues

53. The communicant alleges that exposing claimants to almost £12,000 for the Acknowledgement of Service merely at the permission stage is not compatible with the obligation of the Party concerned to ensure that access to judicial review in matters relating to the environment is not prohibitively expensive. It further alleges that in circumstances such as those presented in the present communication the exposure of claimants to such costs would serve as a serious deterrent to NGOs and individuals wishing to seek judicial review in environmental matters.

54. For these reasons, the communicant alleges that the Party concerned fails to comply with article 9, paragraphs 4 and 5, of the Convention.

55. In support of its allegations, the communicant refers to a number of decisions by courts of the Party concerned[19] as well as those by the Court of Justice of the European Union (CJEU) .[20] The communicant also refers to then-ongoing infringement proceedings brought by the European Commission to the CJEU against the Party concerned for failure to ensure that claimants can challenge decisions affecting the environment in a way that is fair, equitable, timely and not prohibitively expensive as required under the Aarhus Convention.[21]

56. The communicant finally refers to previous findings of the Committee on communications ACCC/C/2008/23 (ECE/MP.PP/C.1/2010/6/Add.1), ACCC/C/2008/27 (ECE/MP.PP/C.1/2010/6/Add.2) and ACCC/C/2008/33 (ECE/MP.PP/C.1/2010/6/Add.3), in which the Committee found the Party concerned in each case to be in breach of article 9 of the Convention with respect to costs.

57. The Party concerned refutes the communicant's allegations. It submits that the award of costs in the case at issue was reasonable and not prohibitively expensive and in accordance with article 3, paragraph 8, of the Convention. Therefore, the Party concerned did not fail to comply with article 9, paragraphs 4 and 5, of the Convention.

58. In its response, the Party concerned refers to its letter of 28 February 2013 to the Committee, providing an update on the Party concerned's compliance with decision IV/9i, which also addressed article 9, paragraphs 4 and 5. It also refers to the judgment of the CJEU in C-260/11 *Edwards v. Environment Agency*,[22] which considered the correct approach to be taken to the not prohibitively expensive requirement contained in article 9, paragraph 4, of the Convention and transposed into certain EU directives.

59. The Party concerned submits that the NPS was subject to public consultations in full compliance with the requirements of article 7 of the Convention, and notes that the

[19] The cases cited by the communicant in support of its communication included *Ewing*; *Garner*; *Morgan*; *R. (Edwards) v. Environment Agency* (No. 2) [2011] 1 W.L.R. 79 (at the time the communication was submitted to the Committee, the preliminary reference to the CJEU was pending).

[20] Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 2011 E.C.R. I-1255.

[21] The judgement was subsequently issued on 13 February 2014, see Case C-530/11, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, 2014 O.J. C. 93.

[22] 2013 EUR-Lex CELEX 62011CJ0260 (11 April 2013).

communicant did not submit any complaints during the consultation procedure, which implies that it concurred with the procedure.

60. With regard to the merits of the claim itself, first the Party concerned asserts that the threshold for getting permission to apply for judicial review is a relatively low one, but the communicant blatantly failed to show that the case was "arguable" and had a "realistic prospect of success".

61. Second, the Party concerned submits that the claim was densely, at times confusingly, drafted and required considerable work by its advocates to clarify the grounds of challenge. The work had to be carried out under pressure and on an issue of strategic importance for the energy policy. The Party concerned claims that it is disingenuous on the part of the communicant to use the strategic importance of the issue to bring a claim that had no prospect of success and was actually against the public interest, as it led to unnecessary expense, ultimately borne by the taxpayer. In this respect, the Party concerned also refers to the Advocate General's Opinion in the *Edwards* case stating that, in the context of assessing what is prohibitively expensive, "the prospects of success may also be relevant with regard to the extent of the public interest. A clearly hopeless action is not in the interest of the public, even if it has an interest in the subject-matter of the action in principle".[23] Third, the Party concerned argues that its response to the communicant's pre-action letter was a genuine attempt to resolve the issues, and to reassure the communicant that the points it raised, quite properly in its role as a campaigning NGO, had been satisfactorily addressed. Still, in the view of the Party concerned, the communicant irresponsibly pursued an unsuccessful claim.

62. Fourth, the Party concerned considers the challenge premature and misconceived, because the communicant misunderstood the nature of the designation decision and the correct point in the process to issue, as well as the correct public body to receive, a challenge. The NPS sets the framework for future policy on applications for the construction of power stations and any such future decision would be amenable to judicial review.

63. With regard to its non-response to the pre-action protocol letter, the Party concerned argues that the decision to designate the NPS had been widely publicized and had been subject to full public consultations, and there was no reason for the communicant to claim that owing to the timing of the decision (during vacation season) it was not able to submit its letter earlier and allow for more time to the Party to respond. It was also noted by the High Court (Justice Ouseley) that the deadline set by the communicant had been half the time which would have been allowed in an ordinary case.

64. With regard to the characterization of the claim, the Party concerned calls attention to the unusually complex challenge submitted, counting 37 pages plus 1,611 pages of attachments, while judicial review is brought on a point of law. To deal with the complexity of the case, the Party concerned claims that it rightly engaged two Queen's Counsel and a junior in order to eliminate the challenge at the first stage, and the grounds of defence were proportionate to the complexity of the case. The Party concerned notes that it has negotiated special rates for its regular and first Treasury Counsel and fees were far below those ordinary in commercial cases. The Party concerned equally recalls that the communicant engaged two experienced counsel for the case. In this respect the Party concerned also recalls paragraph 42 of the Court of Appeal in *Ewing* (see para. 22 above).

[23] Opinion of Advocate General Kokott delivered on 18 October 2012 in Case C-260/11, *Edwards*, EUR-Lex CELEX 62011CC0260, para. 47.

65. With regard to the approach to assessing costs, the Party concerned submits that the High Court took the correct approach to assessing costs in this case. The communicant could have applied for an interim protective costs order (PCO) limiting its liability for costs at the permission stage until its application for permission and a full PCO was determined. In this respect, the Party concerned refers to the CJEU judgement in *Edwards* and submits that the case law of the CJEU is a useful source of guidance on the interpretation of the test of what is "prohibitively expensive". The CJEU in *Edwards* held that an assessment of the question of what is prohibitively expensive cannot

> be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs … the costs of proceedings must not appear … to be objectively unreasonable. … The court may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages.[24]

The Party concerned contends that the merits of the case at issue were weak, and there was no strong interest in pursuing the claim, and that these were all matters that the Judge had regard to in making the decision he did on costs.

66. The Party concerned submits that the communicant was well aware of the poor merits of its case and, for that reason, chose not to further attempt to renew permission to apply for judicial review orally.

67. The Party concerned adds that the communicant's income for 2010 was £8,931,000, and that although a wholly subjective approach to what reasonable costs are for a claimant is not suggested in *Garner* or *Edwards*, it is open to the court assessing the costs to take into account the situation of the parties concerned, as well as the complexity of the relevant law and procedure and the potentially frivolous nature of the claim.

68. In addition, the Party concerned referred to the judgement in *R. (Davey) v. Aylesbury Vale District Council*,[25] which held that "the basic rule ... that costs follow the event in public law cases, as in others" exists "because, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of money diverted from the funds available to fulfil its primary public functions". In the light of the fiscal crisis, the Party concerned has suffered significant budget cuts. Under these circumstances, the Party concerned claims that the costs awarded were reasonable.

III. Consideration and evaluation by the Committee

69. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

70. The Committee limits its considerations to the following topics:

(a) Whether the cost order of £8,000 awarded against the communicant in this case makes the procedure prohibitively expensive under article 9, paragraph 4, of the Convention;

[24] Paras. 40–42.

[25] [2007] EWCA (Civ) 1166; [2008] l W.L.R. 878; [2008] 2 All E.R.

(b) The potential impact of the new rules on costs introduced in the Civil Procedure Rules (England and Wales) in a situation similar to the one considered in this case;

(c) The relevance of the Convention for the judiciary of the Party concerned.

71. The communication did not make any allegations with respect to the provisions of the Convention on public participation, so the Committee will not look into those issues.

The cost order

72. In determining whether the cost of judicial proceedings is prohibitively expensive the costs borne by the party concerned as a whole must be assessed. Moreover, such an assessment should involve both objective and subjective elements. In addition, the Committee has previously noted with respect to costs that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.[26]

73. The Committee considers that the particular context in which the application for permission to apply for judicial review was submitted in the present case is relevant for determining whether the costs ordered were prohibitively expensive in the sense of article 9, paragraph 4, of the Convention. The following elements are important in understanding the context:

(a) The designation of the unmodified NPS, in the wake of the Fukushima accident and after the publication of the Interim Report by the Chief Inspector for Nuclear Installations;

(b) The Interim Report contains recommendations that clearly relate to the safety of nuclear installations and to the public interest in the protection of the environment;

(c) The communicant was seeking to defend the public interest in the protection of the environment in challenging the NPS, and the only available option for doing so was the submission of an application for permission to apply for judicial review, public participation on the NPS having been finalized prior to the Fukushima accident;

(d) During the course of the application for judicial review the communicant furthermore incurred the costs of its own lawyers while bringing a case that was in the public interest.

74. In the light of the above, the Committee finds that the amount of £8,000 that the communicant was ordered to pay the defendant makes the procedures prohibitively expensive, even if the court, in revising the original amount (£11,813) took into account the fact that the communicant was acting in the public interest.

75. In coming to the above conclusion the Committee took into account the fact that the communicant did not apply for a PCO nor exhaust all domestic remedies, namely to appeal the costs award or to seek the renewal of its application for permission to apply for judicial review. With respect to the communicant's failure to apply for a PCO, the Committee recalls from its findings on ACCC/C/2008/33 that the Sullivan Report estimated the cost of seeking a PCO to be in the order of £2,500–£7,500 plus value added tax,[27] with no certainty that after incurring such expense that a PCO would actually be granted.[28] With respect to the communicant's decision not to appeal the costs award or to seek the renewal of its application for permission to apply for judicial review, the Committee considers that, after

[26] ECE/MP.PP/C.1/2010/6/Add.3, para. 135.
[27] Ibid, para. 105, citing the Sullivan Report, appendix 3, paras. 11–14.
[28] ECE/MP.PP/C.1/2010/6/Add.3, paras. 129–131.

being ordered to pay £8,000 (initially £11,813) for merely the permission stage, the communicant's decision not to pursue further domestic remedies for fear of facing even higher costs was entirely understandable. The Committee thus finds that neither the communicant's failure to apply for a PCO nor to appeal the costs award or to seek renewal of its application for permission preclude the Committee's finding that the amount of £8,000 made the procedure prohibitively expensive in the circumstances of this case.

76. The Committee also points out that the present communication needs to be distinguished from its findings on communication ACCC/C/2008/23. In the latter case the communicant had agreed that the costs awarded against it were not prohibitively expensive.[29]

77. In the light of the above considerations, the Committee finds the Party concerned to be in non-compliance with article 9, paragraph 4, of the Convention due to the cost order awarded against the communicant which rendered the procedure prohibitively expensive.

The relevance of the Convention for the judiciary of the Party concerned

78. As quoted in paragraph 45 above, the High Court maintained that the Convention was irrelevant in the proceedings before it.

79. The Committee takes this opportunity to point out that the Party concerned, being a Party to the Convention, is bound by the Convention under international law and that the nature of its national legal system or lack of incorporation of the Convention in national law are not arguments that it can successfully avail itself of as justification for improper implementation of the Convention.

IV. Conclusions and recommendations

80. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

81. The Committee finds the Party concerned has failed to comply with article 9, paragraph 4, of the Convention since the cost order awarded against the communicant in this case made the procedure prohibitively expensive.

B. Recommendations

82. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, and taking into account the cause and degree of non-compliance, recommends that the Meeting of the Parties, pursuance to paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned ensure that its new Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention.

[29] ECE/MP.PP/C.1/2010/6/Add.1, para. 41.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Fifty-first meeting
Geneva, 15–18 December 2015
Item 9 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/69 concerning compliance by Romania*

Adopted by the Compliance Committee on 26 June 2015

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* This document is a late submission owing to the Committee's meeting schedule: the deadline for submission of the present document (6 October 2015) fell before the end of the Committee's fiftieth meeting (Geneva, 6–9 October 2015).

I. Introduction

1. On 16 March 2012, Greenpeace CEE[1] Romania, the Center for Legal Resources (Centrul de Resurse Juridice) and the European network of environmental law organizations, Justice and Environment (collectively, the communicants) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Romania to comply with its obligations under article 4, paragraphs 1 and 2, article 6, paragraph 6, and article 9, paragraph 4, of the Convention.[2]

2. Specifically, the communication alleges that the documentation for the environmental impact assessment (EIA) carried out for the Rosia Montana mining project was not complete, because certain documents relating to archaeological monuments were not included and the public concerned was not able to examine them, and for this reason the Party concerned was not in compliance with article 6, paragraph 6, of the Convention. Moreover, when the communicants requested access to that information and also to the exploration/exploitation licences and other mining-related information, they were denied access and, therefore, according to the communication, the Party concerned failed to comply with article 4, paragraphs 1 and 2, of the Convention. In addition, the communication alleges that judicial procedures take a long time to reach a conclusion and that the Party concerned is thus not in compliance with article 9, paragraph 4, of the Convention.

3. The communication concerns the same project that was the subject of communication ACCC/C/2005/15 (see ECE/MP.PP/2008/5/Add.7) in which the Committee had considered allegations of non-compliance by the Party concerned with respect to disclosure of EIA documentation. In that case, the Committee did not find the Party to be in non-compliance because, prior to the adoption of its findings, the situation was remedied at the national level and the law exempting EIA studies from disclosure was amended.

4. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 8 May 2012. On the same date, a letter was sent to the communicants. Both were asked to address a number of questions from the Committee.

6. The Party concerned responded to the allegations and to the Committee's questions on 5 October 2012; the communicants responded on 8 October 2012.

7. In its response of 5 October, the Party concerned requested the Committee to consider the communication inadmissible as lacking "relevance to the subject matter of the Convention".[3] The Party concerned contends that the communication lacks "relevance to the subject matter of the Convention" as: (a) the EIA procedure was still ongoing and therefore there was no decision about the project yet; (b) all information, and in particular

[1] Central and Eastern Europe.

[2] The communication and other related documentation from the communicants, the Party concerned and the Committee, are available on a dedicated web page for the communication (http://www.unece.org/env/pp/compliance/compliancecommittee/69tableromania.html) on the Committee's website.

[3] This criterion was listed as a possible criterion for inadmissibility in the Committee's determination of admissibility dated 30 March 2012.

environmental information, was available to the public; and (c) the exploration/exploitation licences were not required for the environmental decision-making process.

8. At its thirty-ninth meeting (Geneva, 11–14 December 2012), the Committee agreed to invite the communicants to respond to the Party's objection with respect to the admissibility of the communication and preliminarily scheduled to discuss the content of the communication at its fortieth meeting (Geneva, 25–28 March 2013). The communicants provided comments on 5 February 2013. The Committee using its electronic decision-making procedure confirmed its preliminary decision about the discussion of the communication.

9. The Committee discussed the communication at its fortieth meeting with the participation of representatives of the communicants and the Party concerned. At the same meeting, it confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to the Party concerned, and invited it to respond in writing after the meeting, with the communicants thereafter to have the opportunity to provide their comments on the response of the Party concerned.

10. The Party concerned and the communicants submitted their responses on 22 May 2013 and 5 July 2013, respectively.

11. The Committee prepared draft findings at its fortieth to forty-seventh meetings inclusive, completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicants on 23 February 2015. Both were invited to provide comments by 23 March 2015.

12. The Party concerned requested an extension to provide its comments, which it did on 15 April 2015. It provided an update on 13 May 2015 and further information on 15 June 2015. The communicants also provided comments on 15 June 2015.

13. In the light of the request from the Party concerned for an extension to provide its comments on the draft findings, the Committee had agreed at its forty-eighth meeting (Geneva, 24–27 March 2015) to adopt its findings using its electronic decision-making procedure once the extended deadline for the Party concerned to provide its comments on the draft findings had expired. The Compliance Committee accordingly adopted its findings using its electronic decision-making procedure on 26 June 2015, taking account of the comments received from both the Party concerned and the communicants, and agreed that the findings should be published as a formal pre-session document to its fifty-first meeting. It requested the secretariat to send the findings to the Party concerned and the communicants.

II. Summary of facts, evidence and issues[4]

A. Legal framework

14. The legal framework on access to information in Romania consists of: Law 544/2001 on free access to information of public interest; Government Decision 878/2005 on public access to environmental information; Law 182/2002 on protection of

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

classified information; and Decision 585/2002 concerning national standards for classified information. Public participation is regulated by Government Decision 445/2009.[5]

15. Law 544/2001 provides for exemptions to public access to information requirements (art. 12, paras. 1 and 2):

> (1) The following information shall be exempt from the free access citizens provided in article 1, and article 11, respectively:
>
> …
>
> (b) Information on the deliberations of the authorities, as well as those that concern the economic and political interests of Romania, if they belong to the category of classified information, according to the law;
>
> …
>
> (2) The responsibility for enforcing the measures to protect the information pertaining to the categories provided in para. 1 lies with the persons and public authorities who hold such information, as well as with the public institutions empowered by law to ensure the security of information.[6]

16. Government Decision 585/2002 provides that "in accordance with the law, the information is classified secret of State or secret of service, depending on the importance which it holds for the national security and to the consequences which might occur in case of unauthorized disclosure or dissemination" (art. 4); and that the information may be unclassified if (a) the classification period has ended, (b) information disclosure cannot prejudice any longer the national security, national defence, public order or interest of public and private entities which hold the information, and (c) the information was classified by a person who was not legally authorized to do so (art. 20).[5]

17. Law 182/2002 provides that "secret of service information is established by the manager of the legal entity on the basis of the methodology provided by Governmental decision" (art. 31); and that "it is forbidden to classify as secret of service information which by its nature or content aims to ensure the information of citizens on personal or public interest aspects, for abetting or hiding the elusion of law or for obstructing justice" (art. 31).[5]

18. Pursuant to Government Decision 445/2009 on EIA, the documentation required to initiate an EIA procedure includes a notification outlining the project, the urbanism certificate and the attached plans. If the competent authority considers that an EIA is necessary, the developer is requested to submit a technical presentation and an EIA report by a certified expert (art. 8). The EIA report must include a "description of environmental aspects likely to be significantly affected by the proposed project, including in particular, population, fauna, flora, soil, water, air, climate factors, material assets, including architectural and archaeological heritage, landscape and interrelation between the above factors" (art. 11, para. 1).[5]

19. The EIA report is subject to public debate and comments may be submitted orally or in writing to the competent authority or the developer. The law provides for early and effective public participation (art. 16, para. 1). The public notice is posted on the websites of the competent authority, the environmental authority and the developer and in national and local newspapers. Comments should be taken into account during the procedure. Once

[5] More information on these laws and regulations is set out in the Committee's findings on communication ACCC/C/2010/51 (Romania) (ECE/MP.PP/C.1/2014/12), paras. 20–25.

[6] See written response of the Party concerned to the communication, received 5 October 2012.

taken, the text of the decision, including the reasoning, must be posted on the competent authority's website.[7] Public participation is also required for the revision or update of decisions (art. 21, para. 1).

B. Facts

20. Rosia Montana is a commune composed of 16 villages in the Rosia River Valley in Alba County, western Transylvania. The area has been known for its mineral resources since Roman times. A State-run gold mine in the area closed in 2006 before Romania acceded to the European Union. The area is still considered to host the largest undeveloped gold deposit in Europe. A Canadian resource company has since sought a permit to develop a new gold and silver mine. The archaeological heritage of the area is rich, with many monuments dating back to Roman times.

21. Further to the application by the developer, the screening exercise indicated that an EIA procedure was required. The EIA procedure for the project started in late 2004. On 15 May 2006, the developer submitted the EIA report to the environmental authority. Public consultations were organized, including 14 public debates in different locations in the Party concerned and two debates in Hungary.

22. In 2005 the communicants requested access to the Rosia Montana mining licences but were refused, and were unsuccessful in their appeal to the courts.[8]

23. The EIA procedure was expected to be concluded by 2007. However, the process was suspended in 2007, owing to the project's urbanism certificate having been suspended by the court, and it was resumed after a new urbanism certificate was issued in April 2010.

24. Since legislation had in the meantime been amended to meet European Union standards, a revised EIA report was prepared, which was again subjected to a public participation procedure. The report included, among other matters, consideration of the Roman remains. In 2010, the EIA study was completed and the report was submitted to the public for comments. Public consultations on the documentation submitted by the developer took place in March, April and May 2011. The developer sent its answers to the public's comments in August 2011. The EIA process for the Rosia Montana mine was still ongoing at the time of submission of the present communication and no final EIA decision had been taken when the present findings were adopted.

25. In 2010, a List of National Monuments was approved by Order No. 2361/2010 of the Romanian Government. Class "A" of the list comprised six national monuments on the territory of Rosia Montana, including the Roman gold mining galleries of Carnic Mountain. In 2011, the Ministry of Culture and National Heritage (Ministry of Culture) issued an archaeological discharge certificate for the mining galleries of Carnic Mountain. The archaeological discharge certificate was motivated by the conclusions of a study concerning the archaeological vestiges from Rosia Montana. As a consequence of the issuance of the archaeological discharge certificate, part of the galleries of Carnic Mountain lost their archaeological protection status. The procedure for the issuance of the certificate was conducted without public participation.

26. In 2010, the communicants requested access to the archaeological study and the documentation submitted by the developer to the National Archaeological Commission

[7] Ibid., p. 7.

[8] Bucharest Court of Appeal, Section VIII for Contentious Administrative and Tax Matters, 7 November 2005, Civil decision No. 1587, File No. 1589/2005 (see annex IV to the communication).

from the Ministry of Culture. The Ministry of Culture refused access to the information. No reasons for the refusal were provided. The communicants appealed the refusal of access to the archaeological study and supporting documentation to the Bucharest Court. In its submissions to the Court, the Ministry of Culture claimed that "the archaeological research reports represent scientific creations subject to copyright".[9] The Bucharest Court only accepted part of the communicants' claims.[8] In October 2012 the Bucharest Court of Appeal held in favour of the Ministry of Culture and rejected the communicants' appeal in its entirety.[10]

27. In July 2011, the communicants requested copies of the archaeological discharge certificate and the archaeological study from the Alba County Department of the Ministry of Culture. The authority responded by providing the communicants with a copy of the archaeological discharge certificate. With respect to the documentation substantiating the issuance of the archaeological discharge certificate (including the archaeological study), the Alba County Department stated that "such documentation contains a very large amount of information and we do not have the technical and human resources that are necessary in order to prepare an integrated copy thereof".[11] The communicants were informed that they could examine the documentation at the office of the Department and that they could even make copies of it, at their own expense.[11]

28. In April 2010, the communicants requested the following information from the National Agency for Mineral Resources: (a) what licences for the exploration/exploitation of non-ferrous ore were the subject of ongoing activity in Romania; (b) what was the quantity of non-ferrous ore licensed for exploration/exploitation for each mining licence; (c) what was the current status of exploitation at Baia Mare (where an ecological accident occurred in 2000), what environmental remediation measures had been taken for the contaminated area and what was the stage of implementation of those measures; and (d) copies of the original exploration/exploitation licences. The Agency did not answer the communicants' request and the communicants appealed the refusal of access to information to the Bucharest Court. By decision No. 914/2011 dated 7 March 2011 the Bucharest Court held that the National Agency for Mineral Resources was obliged to release the aforementioned information.[12] The Agency appealed and the case was sent to the Bucharest Court of Appeal.

29. On 13 February 2014 the Bucharest Court of Appeal issued its decision, partially upholding the Agency's appeal.[13] It overruled the Bucharest Court's order to communicate the information regarding the quantity of non-ferrous ore licensed on the ground, holding that that information had already been provided to the communicants, and thus that the original ruling was without purpose. It further held that the order to provide copies of the licences was unfounded, on the ground that the requested information related to the Party's economic interests, and was thus included in the category of classified information according to the law.

[9] Bucharest Court, Ninth Department for Administrative and Fiscal Contentious Matters, 9 December 2011, Civil Judgement No. 4222, File No. 59715/3/2010 (see annex I to the communication).

[10] Bucharest Court of Appeal, Section VIII, Fiscal and Administrative Legal Department, 4 October 2012, Civil Judgement No. 3421, File No. 59715/3/2010 (see communication web page, decision received 7 June 2013).

[11] Answers to the Committee's questions by the Party concerned, received 22 May 2013, p. 8.

[12] Bucharest Court, Section IX for Contentious Administrative and Tax Matters, 7 March 2011, Civil Judgement No. 914, File No. 23774/3/CA/2010 (see annex VI to the communication).

[13] Bucharest Court of Appeal, Section VIII, Administrative and Fiscal Court, 13 February 2014, Civil Judgement No. 972, File No. 23774/3/2010 (see communication web page, judgement received from the Party concerned, 15 June 2015).

30. Notwithstanding the Court of Appeal's ruling, the communicants contended that, as at the date of the adoption of the present findings, it had not received the requested information mentioned in paragraph 28 above.[14]

C. Substantive issues

Article 2, paragraph 3 and article 4 — access to environmental information

Access to the archaeological study

31. The communicants allege that, by refusing access to the archaeological study and the accompanying documentation submitted by the developer for the purposes of the archaeological discharge certificate procedure, the Party concerned failed to comply with article 4 of the Convention. The communicants submit that the state of cultural sites, inasmuch as they are or may be affected by the state of the elements of the environment, is explicitly included in the definition of "environmental information" in article 2, paragraph 3, of the Convention.

32. The Party concerned contends that the refusal to provide a copy of the archaeological study was legally correct, since the requested information is not encompassed by the term "environmental information" — however broadly that term is understood. Moreover, the authority in possession of the requested information, namely the Alba County Department of Culture and National Heritage under the Ministry of Culture, was not able to make a copy of such a large volume of documentation (more than 1,060 pages) due to a lack of technical and financial resources. The communicants were, however, informed that they could inspect and make copies of the requested information at the premises of the Alba County Department.

Mining licences and other mining-related information

33. The communicants also allege that the mining-related information requested in 2010 (see para. 28 above) is environmental information under article 2, paragraph 3 (b) and (c), of the Convention, and through its ongoing refusal to provide access to the requested information, the Party concerned is in breach of article 4, paragraphs 1 and 2.

34. Furthermore, the communicants note that the exploration/exploitation licences were withheld as classified secrets of service. The communicants stress that these licences are administrative acts awarding rights to private entities to extract mineral resources and are environmental information within article 2, paragraph 3, of the Convention. According to the communicant, the fact that mining activities may have an adverse impact on the environment means that this information should be publicly available. Therefore the Party concerned should have released the information. By its refusal to do so, the Party concerned acted in breach of article 4 of the Convention.

35. With respect to the requested mining licences, the Party concerned claims that they are not covered by the definition of "environmental information". Rather, the mining licences are classified as "secret of service". Licences in the mining field are contracts with operators and provide obligations and rights for the parties; as such they are classified under national law (Law 544/2001, in conjunction with Government Decisions 182/2002, 585/2002 and 878/2005) and fall under article 4, paragraph 4 (d), of the Convention.

[14] E-mail from communicant, 15 June 2015.

36. The Party concerned made no comment on the alleged failure to provide the requested information about the status of Baia Mare and the remedial measures taken.

Article 6 — public participation in relation to the archaeological discharge certificate procedure

37. The communicants allege non-compliance with article 6 of the Convention on the ground that the archaeological discharge certificate was issued without a public participation procedure.

38. The Party concerned refutes the communicants' allegation. It argues that the archaeological discharge certificate is an administrative act and claims that no public participation is required by law to issue one. Moreover, there is no obligation for the public authorities to disclose the reasons for the discharge, which are usually of a scientific nature.

Article 6, paragraph 6 — EIA documentation incomplete

39. The communicants allege that the EIA documentation for the Rosia Montana mine submitted for public comment was not complete because the following documents were missing:

(a) *The archaeological study concerning the Roman remains*. The communicants allege that the study should have been included in the EIA documentation. Further, the communicants submit that a site verification protocol issued in 2011 incorrectly represented some archaeological monuments while some other monuments studied by the archaeologist were entirely omitted from the EIA documentation;

(b) *The exploration/exploitation licences*, which according to the communicants have been unlawfully withheld as classified secrets of service. The communicants stress that these licences are environmental information (see para. 33 above) and should have been included in the EIA documentation;

(c) *Information about the next phases of the project in the surrounding areas*, such as the Bucium Project.

40. The communicants allege that, because the above-mentioned documents were missing from the EIA documentation, the Party concerned failed to comply with article 6, paragraph 6, of the Convention.

41. The Party concerned refutes the allegation of non-compliance with article 6, paragraph 6. It submits that "the EIA legislation does not require the developer to submit any other studies, except the EIA report, nor licences for exploitation/exploration. These licences cannot impose any limitation to the EIA assessment whose conclusions are mandatory when stipulated in the environmental agreement".[15]

Article 9, paragraph 4 — timeliness of access to justice regarding access to information

42. The communicants allege that court procedures concerning access to information in the Party concerned are not timely, and that the Party concerned thus fails to comply with article 9, paragraph 4, of the Convention. In this regard, the communicants cite the following timeline: (a) their court application for access to the archaeological study was submitted on 5 October 2010; (b) the case was registered with the Bucharest Court on 9 December 2010; (c) the Court issued its decision on 9 December 2011 and ordered the

[15] Party's response to the communication, p. 7.

Ministry of Culture to make available the archaeological documentation requested by the communicants;[9] (d) the Ministry of Culture appealed, and by a decision of 4 October 2012 (written decision received by the communicants in May 2013), the Court of Appeal upheld the Ministry of Culture's appeal denying access to the requested documentation on the ground that the documentation was not held by the Ministry of Culture, but rather by the National Archaeology Commission, which is not a public institution subordinate to the Ministry of Culture but instead an autonomous specialized scientific organism without legal personality in a consultative role to the Ministry of Culture;[10] and (e) if the outcome of the court procedure had been successful for the applicant, the requested information would have been released two years after the initial application and therefore would be useless.

43. The communicants also provide other examples to demonstrate that court proceedings concerning access to environmental information may take several years before a decision is issued.[16]

44. The Party concerned refutes the communicants' allegations of non-compliance with article 9, paragraph 4, and claims they are not substantiated. It points out that, according to a recent study,[17] the majority of cases registered are resolved within six months. It also stresses that, once final, a court decision is enforced, and there is full transparency of all decisions through journals and electronic databases. The Party concerned cites established jurisprudence of the European Court of Human Rights to the effect that the reasonableness of the length of the proceedings is to be seen in the context of the circumstances of a case.[18] The Party submits that two years for one degree of jurisdiction is not excessive in length. Finally, the Party concerned submits that the following legal tools were available to the communicants to speed up the court proceedings, but the communicants did not use them:

(a) A demand to change the date of the audiences before the national tribunals;

(b) A demand to accelerate the proceedings by directly invoking the European Convention provisions;

(c) A demand for application of a fine for judges that intentionally delay the proceedings;

(d) An action for compensation for intentional delay of the proceedings.[19]

D. Domestic remedies

45. When their 2010 request for access to the archaeological study was refused, the communicants challenged the refusal in the Bucharest Court, which found in favour of the communicants at first instance. By its decision of 4 October 2012, the Bucharest Court of Appeal subsequently reversed that decision in favour of the Ministry of Culture (see para. 26 above).

46. The communicants also challenged the refusal of the National Agency for Mineral Resources to disclose the exploration/exploitation licences in the courts. In March 2011, the communicants succeeded at first instance but the Agency appealed. The Bucharest Court of Appeal issued its ruling on 13 February 2014, partially overturning the order of the court of first instance (see para. 29 above).

[16] Additional information from the communicants, received 4 February 2013.

[17] Romania, Superior Court of Magistracy, "Report on the State of Justice, 2011", available (in Romanian) from http://www.csm1909.ro/csm/linkuri/10_04_2012__48486_ro.pdf.

[18] Buchholz v. Germany, judgement of 6 May 1981.

[19] Party concerned's response to communication, page 16.

III. Consideration and evaluation by the Committee

47. Romania ratified the Aarhus Convention on 11 July 2000. The Convention entered into force for Romania on 30 October 2001.

Environmental information — article 2, paragraph 3

Archaeological study and archaeological discharge certificate

48. The Party concerned states that it does not consider that the archaeological discharge certificate and the documentation substantiating it, including the archaeological study, represent "environmental information" for the purpose of article 2, paragraph 3, of the Convention. It also asserts that the mining licences and other mining-related information requested by the communicants in 2010 are not environmental information within the definition of article 2, paragraph 3.

49. The Committee recalls that the definition of "environmental information" in article 2, paragraph 3 (c), includes, inter alia, any information in any material form on "cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph [3] (b)" of article 2. The archaeological study contains information on the state of "cultural sites and built structures" (i.e., the Roman ruins), which "may be affected by activities or measures, including administrative measures" (i.e., the "activity" of mining, or the "administrative measure" of the archaeological discharge certificate) "affecting or likely to affect the elements of the environment" (i.e., soil, land, landscape and natural sites). In the light of the preceding analysis, the Committee considers the definition of environmental information is clearly wide enough to include the archaeological study. Therefore, access to information could not be refused on the ground that the study was not environmental information.

50. The Committee considers for the same reasons that the archaeological discharge certificate is also within the scope of environmental information under article 2, paragraph 3 (c), of the Convention.

Mining licences and other mining-related information

51. With respect to the mining licences and the other mining-related information requested by the communicants, the Committee notes that article 2, paragraph 3 (a), of the Convention stipulates that the state of elements of the environment includes soil, landscape and natural sites. Exploration/exploitation of non-ferrous ore is an activity affecting or likely to affect the state of these elements of the environment, within the definition of article 2, paragraph 3 (b). Similarly, a mining licence is an administrative measure affecting or likely to affect the state of elements of the environment. While not at this point of the findings precluding that one of the exceptions in article 4, paragraph 4, may exempt certain aspects of the mining licences and the mining-related information from disclosure, the Committee finds that the licences and other mining-related information requested, including the "quantities of non-ferrous ore" that were entitled to be extracted under those licences, are clearly "environmental information" within the scope of article 2, paragraph 3, of the Convention. Thus, it was not open for the Party concerned to refuse access to this information on the ground that it was not "environmental information".

52. The Committee wishes to emphasize that once a piece of information that has been requested is found to be "environmental information" within the scope of article 2, paragraph 3, of the Convention there is a presumption that it should be released. A process is triggered by the request whereby there are a series of duties to be performed by the

authorities (see art. 4, paras. 1–7). The Committee will examine some of these duties in more detail below.

Article 4

Access to the archaeological study

53. The Party concerned states that, in order to comply with article 4 of the Convention, it was enough to ensure that the public was able to view the archaeological study at the premises of the Alba County Department of the Ministry of Culture free of charge. Moreover, the communicants were informed that they could make copies of the requested documentation, at their own expense. The Party submits that such conduct cannot be regarded as an unjustified refusal to provide access to information.

54. According to the documentation before the Committee, the reason put forward by the Alba County Department of the Ministry of Culture for not providing a copy of the requested information was that it did not have the capacity to deal with the request. It also indicated that it had received other similar requests. In its answers to the Committee's questions received 22 May 2013, the Party concerned stated:

> In accordance with Art.4 (1) (b) of the Convention, public authorities may refuse to grant access to environmental information in case "is more reasonable for the respective authority to provide the respective information in another form, in which case the reasons shall be given for making it available in that form".[20] In the case at hand, the public authorities informed the communicant about the objective reasons for which it could not provide a full copy of the documentation (i.e. large amount of information — over 1060 pages) but allowed the communicant to copy such documentation on the communicant's expense, without imposing any tariff in this respect.

55. The Committee considers that, according to article 4, paragraph 1, of the Convention it is not sufficient to respond to a request for information from the public under article 4 by simply providing access to examine the information free of charge. Article 4, paragraph 1, expressly requires the applicant to be provided with copies of the actual documentation. With respect to the Party concerned's reference to article 4, paragraph 1 (b), the Committee clarifies that article 4, paragraph 1 (b), does not entitle a Party to refuse to provide copies of the requested information, but rather refers to the form the copies of the requested documentation is provided in: for example, paper form, electronic form, or on a CD Rom. Providing free access to examine the requested documentation does not amount to providing a copy of the requested information. Thus, in the present case, the Party cannot rely on article 4, paragraph 1 (b), because the information was not provided to the communicants in any other form nor was it already publicly available in another form.

56. The Committee notes that the public authority would have been entitled under article 4, paragraph 8, of the Convention to make a reasonable charge for providing copies of the requested information so long as a schedule of charges was provided in advance. The authority in question did not do so. It is not clear from the information before the Committee whether an electronic version of the requested information existed. If it did, it would have been reasonable to have made the requested information available to the communicants in that form. However, even if an electronic version did not initially exist, given the authority's statement that it had received other requests for the same information,

[20] Note that the answer is reproduced as received, and that the citation of the Convention does not reproduce the provision exactly.

an efficient approach may have been for the authority to have the requested pages scanned, and then it would have been able to meet both the requests of the communicants and other similar requests without much additional effort. However, this did not happen, nor was any other means used to provide the communicants with a copy of the requested information.

57. In its communication, the communicants also state that they were denied access to the archaeological study on the ground that the study was the intellectual property of the archaeologist who carried out the study. The Ministry of Culture successfully invoked this legal exception to the rule of access to information before the Bucharest Court of Appeal.[10]

58. The Committee considers it important to clarify that, with regard to intellectual property rights and disclosure, the archaeological study in this case should be treated similarly to EIA studies. In this regard, the Committee recalls its findings on communication ACCC/C/2005/15 (Romania) (ECE/MP.PP/2008/5/Add.7):

> 28. EIA studies are prepared for the purposes of the public file in administrative procedure. Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law.
>
> 29. The Committee wishes to stress that in jurisdictions where copyright laws may be applied to EIA studies that are prepared for the purposes of the public file in the administrative procedure and available to authorities when making decisions, it by no means justifies a general exclusion of such studies from public disclosure. This is in particular so in situations where such studies form part of "information relevant to the decision-making" which, according to article 6, paragraph 6, of the Convention, should be made available to the public at the time of the public participation procedure.
>
> 30. ... Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule.

59. The Committee considers likewise that the Party concerned in this case could not refuse access to the archaeological study on the ground of article 4, paragraph 4 (e), of the Convention (intellectual property rights). Therefore the Committee finds that the Party concerned failed to comply with article 4, paragraphs 1 and 2, of the Convention in two respects — by its failure to provide the communicants with a physical or electronic copy (see paras. 53–56 above) and for denying access on the grounds of intellectual property rights (see paras. 57–58 above).

Mining licences and mining-related information

60. In the light of its analysis of the scope and meaning of "environmental information" as defined in article 2, paragraph 3 (b) (see para. 51 above), the Committee considers that the communicants were entitled to copies of the requested mining licences. With respect to the mining-related information requested in 2010, save for the information exempted under article 4, paragraph 4, of the Convention (and bearing in mind that any grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by

disclosure and whether the information requested relates to emissions into the environment), the Committee considers that the Party concerned should have provided the communicants with access to the requested information. This includes copies of the actual documentation, with any information exempted from disclosure redacted.

61. The Party concerned claims that the mining licences and mining-related information fall under the exception in article 4, paragraph 4 (d), namely, that its release would adversely affect confidential commercial and industrial information.[21] Elsewhere,[22] the Committee has expounded its views on how the Party concerned should implement article 4, paragraph 4 (d).

62. The Committee notes that the Party concerned justified its refusal of access to the mining-related information for the first time after the Bucharest Court issued its decision and an appeal against the decision was filed.[23] In the Committee's view, this way of proceeding does not facilitate the implementation of the Convention. Failing to provide reasons for the refusal to provide the requested information in their response to the request significantly limits transparency and accountability in the way the Party concerned implements the Convention and is thus not in keeping with the spirit of the Convention. The Committee observes that, had the National Agency for Mineral Resources provided the reasons for its refusal of access to the requested information, the discussion with respect to the correct implementation of article 4, paragraph 4 (d), could have happened in the context of the proceedings before the Bucharest Court.

63. In the present case, the Committee is not in a position to examine whether any parts of the licences could be exempted from disclosure under article 4, paragraph 4 (d) (see para. 35 above). However, even if article 4, paragraph 4 (d), (or any other ground of refusal set out in article 4, paragraphs 3 and 4) could be applied in this case and aspects of the Rosia Montana or other mining licences could validly be exempted from disclosure, those parts might be redacted and the rest of the requested information disclosed. The Party concerned has provided no evidence to justify the failure to disclose the remainder of the licences, including copies of the actual licences themselves and annexes. Moreover, the analysis of what was to be exempted and what disclosed should have been on a document-by-document basis. The Committee notes that such an analysis is also missing in the decision of the Bucharest Court of Appeal dated 13 February 2014.[13] The Committee stresses that the classification of an entire type of environmental information as exempt from disclosure runs contrary to the letter and spirit of the Convention.

64. Thus, the Committee finds that, owing to its failure to provide the requested mining-related information or to redact those parts validly within the scope of the exceptions in article 4, paragraph 4, and to disclose the remainder, the Party concerned is in non-compliance with article 4, paragraphs 1 and 2, of the Convention.

65. The Committee takes note of the cooperative tone of the letter from the Ministry of Environment and Climate Change to the communicants dated 17 May 2013. However, the Committee also notes that the letter of 17 May 2013 refers the communicants back to the National Agency for Mineral Resources to ask for the majority of the information it had requested. The Committee further notes that the communicants were involved in court proceedings with the Agency for exactly this information from October 2010 until February

[21] Party concerned's response to the communication, received 5 October 2012, p. 13.

[22] See findings on communication ACCC/C/2010/51 (Romania) (ECE/MP.PP/C.1/2014/12), paras. 90–95.

[23] Appeal No. 985 brought by the National Agency for Mineral Resources before the Bucharest Court of Appeal, 30 March 2011, File No. 2377/3/CA/2010 (see annex III to the communication).

2014 (see paras. 28 and 29 above). At the time of the adoption of these findings, there is no indication that the Agency's position has changed.

Article 4, paragraph 6 — separation and disclosure of the part of information that is not exempted

66. The Committee asked the Party concerned whether its legislation transposed the requirement in article 4, paragraph 6, of the Convention: that, if information exempted from disclosure under the Convention can be separated out without prejudice to the confidentiality of the information exempted, public authorities should make available the remainder of the requested information. In response the Party concerned informed the Committee that its legislation (Governmental Decision No. 878/2005, art. 15, para. 1) provides that "The environmental information held by or for the public authorities, which has been requested, is partially supplied when its separation from the information falling under the provisions of Article 11 para. (1) d) and e) or of Article 12 para. (1), is possible".

67. In a previous communication, the Committee has received indications that article 4, paragraph 6, may not be regularly observed in practice by the public authorities of the Party concerned.[24] Such indications are again present in the present communication where in none of the instances of requests for access to environmental information the authorities took the necessary steps to ensure that the non-confidential portion of the information was made available.

68. The Committee finds that the Party concerned has a legal basis for the correct implementation of article 4, paragraph 6, namely article 15, paragraph 1, of Governmental Decision No. 878/2005. Nevertheless the Committee considers there is enough evidence before it to conclude that, in practice, article 4, paragraph 6, of the Convention is not regularly observed by the authorities of the Party concerned. Thus the Committee finds that, by failing to ensure that the non-confidential portion of the information is made available, the Party concerned fails to comply with article 4, paragraph 6, of the Convention.

69. In addition, the Committee notes that the authorities' obligation under article 4, paragraph 6, of the Convention is not mentioned in the flyers published by the Ministry of Environment in 2007 and 2009, nor the guidance published in paper and electronic form by the National Environmental Protection Agency, each explaining the public's rights to have access to environmental information, and how they may do so. In the Committee's view the public should be informed about the whole range of rights provided by the Convention.

Article 4, paragraph 7 — statement of reasons for a refusal of a request for information

70. Neither the communicants nor the Party concerned have raised the issue of whether Romanian authorities provide reasons for refusals of requests for environmental information. It is undisputed that at least one of the refusals for access to information — the 2010 request for access to mining-related information (see para. 28 above) — was a tacit one and no reasons were provided. Neither were reasons provided for the express refusal of the request for access to the Archaeological Study in 2010 (see para. 26 above).

71. Article 4, paragraph 7, of the Convention contains explicit requirements, inter alia, that refusals must be in writing if the information request was in writing or the applicant so requests and also that the reasons for a refusal must be stated.

[24] See ECE/MP.PP/C.1/2014/12, para. 98.

72. The Committee notes that providing a statement of reasons under article 4, paragraph 7, not only helps the administration and the public to understand the Convention, but also provides higher administrative authorities and the court with a better basis to assess whether the officials have correctly implemented the law. Under the Romanian legal system where declassification of information takes additional time, a statement of reasons for a refusal of a request for information can also reduce the duration of a procedure.

73. In at least two other cases which were brought before the Committee, Romanian authorities left the requests for access to environmental information unanswered without stating the reasons for refusal.[25]

74. For the above-mentioned reasons, the Committee finds that, by failing to provide reasons for the refusal of the request for the mining related information in 2010 (see para. 28), the Party concerned failed to comply with article 4, paragraph 7, of the Convention.

Article 6, paragraph 6 — incompleteness of the EIA documentation

75. The communicants claim that the Party concerned has failed to comply with article 6, paragraph 6, of the Convention in respect of the requested archaeological study and other information (see para. 39 above).

76. According to the Party concerned,[26] the communicants were entitled to have access for examination, free of charge, to the archaeological study. The Party concerned did not comment on the fact that the communicants had access to the archaeological study only long after the period of public consultations on the EIA report.

77. The Committee was not provided with evidence as to the moment when the archaeological study was finished. Thus it is not clear whether the archaeological study could have been included in the EIA documentation for the purposes of the public consultations.

78. In addition, the Committee notes that a final EIA decision for the Rosia Montana mine has not been taken yet. It would thus still be possible for the Romanian environmental authority, or, if necessary, the Romanian courts, to consider the communicants' allegation of failure to comply with article 6, paragraph 6, and if there was such a failure, to address it. For this reason the Committee is not in a position to come to any conclusion regarding the alleged unlawfulness of the EIA procedure with respect to the above-mentioned facts. The Committee thus does not find the Party concerned to be in non-compliance with article 6, paragraph 6, of the Convention.

Article 6, paragraphs 3 and 7 — issuance of the archaeological discharge certificate

79. The communicants submit that the decision to grant the archaeological discharge certificate should be seen as part of the wider decision-making procedure to permit the mine. A decision-making procedure involving multiple decisions of a "permitting" nature is sometimes called a "tiered decision-making" procedure. The Committee recalls its findings in communication ACCC/C/2006/17 (European Community), in which it found that article 6 does not necessarily require "that the full range of public participation requirements set out in paragraphs 2 to 10 of the article be applied for each and every decision on whether to permit an activity of a type covered by paragraph 1 … Some such

[25] ECE/MP.PP/C.1/2014/12, paras. 30 and 38.

[26] See answers by the Party concerned to the Committee's questions, received 22 May 2013.

decisions might be of minor or peripheral importance … therefore not meriting a full-scale public participation procedure."[27]

80. According to the Party concerned, "the archaeological discharge certificate is issued following completion of archaeological research procedure (6 years for Carnic). The discharge certificate defines (i) areas that are important from archaeological perspective and have to be protected in situ and (ii) areas in which other activities can be carried out."[28]

81. The Party concerned indicates that a large amount of the EIA documentation (namely eight of its volumes) deals with the archaeological patrimony of the proposed Rosia Montana site. The Committee considers that this clearly leads to a conclusion that the archaeological site and its legal status are not of minor or peripheral importance. In the Committee's view the issuance of the archaeological discharge certificate was a fundamental step in the decision-making process which resulted in a significant change of the subject matter of the EIA. In the present case there is a clear relation between the two procedures — the EIA and the procedure for issuing the archaeological discharge certificate. Thus, in this case the two decisions were part of a "tiered decision-making procedure".

82. Moreover, the Committee considers that the assertion of the Party concerned that there was no rationale to involve the public in the issuance of the discharge certificate as "the general public could not override the judgement of experts on such matters as to whether a particular item's archaeological value was properly assessed or not"[28] fails to take into account the fact that the public includes persons with different expertise, knowledge, opinions or experience. It is thus contrary to the objectives of the Convention.

83. The importance of the procedure for issuing the archaeological discharge certificate was such that the Party concerned should have provided sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making (art. 6, para. 3) and an opportunity for the public to submit comments, information, analysis or opinions (art. 6, para. 7). For the above-mentioned reasons the Committee finds that, by not providing for any public participation in the procedure for issuing the archaeological discharge certificate, the Party concerned failed to comply with article 6, paragraphs 3 and 7, of the Convention.

Article 9, paragraph 4 — timeliness of court procedures for access to information

84. Article 9, paragraph 1, of the Convention requires Parties to ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused in part or in full, inadequately answered, etc., has access to a review procedure before a court of law or another independent and impartial body established by law. Article 9, paragraph 4, requires that the procedures referred to in article 9, paragraphs 1, 2 and 3, be, inter alia, timely.

85. The communicants have put before the Committee eight court proceedings regarding requests for access to information to which they have been party.[29] At the time the list of cases was provided to the Committee, after over two years of proceedings one of the cases had been concluded. The other cases were all ongoing, several for more than two years and one for well over three years. Included in this list were the communicants' court proceedings with the National Agency for Mineral Resources regarding access to various

[27] ECE/MP.PP/2008/5/Add.10, para. 41.

[28] See answers by the Party concerned to the Committee's questions, received 22 May 2013.

[29] Additional information in relation to the Party's response from the communicants, received on 4 February 2013, pp. 7–10.

mining-related information.[12] In that case, the communicants had filed the original proceedings in October 2010, and the decision of the Court of Appeal was ultimately issued on 13 February 2014 — i.e., almost three-and-a-half years after the communicants' original proceedings were filed.

86. The Party concerned refutes the allegation that its court procedures are not timely, and states that in the light of jurisprudence of the European Court of Human Rights, court proceedings with a duration of two years per degree of jurisdiction is not excessive in length. In addition the Party concerned points to a national 2011 Report on the State of Justice[17] by the Superior Council of Magistracy, which concluded that the majority of cases registered in the courts of law of the Party concerned were solved in less than six months per jurisdiction level. Finally, the Party concerned draws attention to the opportunities a litigant has for accelerating a court procedure which, according to the Party concerned, the communicants have not used.

87. In the view of the Committee, the jurisprudence of the European Court of Human Rights deals with cases of greater variety than access to environmental information cases. For that reason the Committee does not find the European Court of Human Rights jurisprudence to be directly applicable when considering allegations under article 9, paragraph 4, in relation to article 9, paragraph 1, of the Convention. However, some of the criteria used by the European Court of Human Rights, such as the complexity of the factual or legal issues raised by the case or the issue at stake for the applicant, are relevant here also. In the light of the first of these criteria, the Committee considers that an access to environmental information case would generally be neither factually nor legally complex. The Committee notes that the National Agency for Mineral Resources did not lodge a defence to the first instance court proceedings regarding access to mining-related information[12] — i.e., the factual and legal complexity of the case apparently did not motivate the defendant to make a submission before the court. As for the second criterion, in both of the communicants' court proceedings subject to the present communication the requested information could have helped the applicants to more effectively participate in the repeat procedure for EIA of the Rosia Montana mining project. Therefore, the issues at stake required timely final decisions.

88. As for the reference by the Party concerned to the 2011 Report on the State of Justice, the Committee finds that six months as an average duration for court procedure per jurisdiction in the Party concerned is considerably shorter that the duration of each of the eight access to environmental information court procedures to which the communicants refer. The Committee notes that in at least one instance the information requested was relevant to an ongoing environmental decision-making procedure subject to the Convention. Since the court procedure did not provide access to the requested information within a time frame that would enable that information to be used in the ongoing environmental decision-making procedure, the Committee finds that the court procedure for access to the requested information was neither timely nor provided an effective remedy as required under article 9, paragraph 4, of the Convention.

89. With respect to any legal tools available to the applicants in domestic court proceedings to speed up the process, the Committee observes that these tools should be not only available to applicants, but also to defendants. Defendants thus bear equal responsibility to use such procedural tools to prevent delays in the court proceedings. Article 9, paragraph 1, of the Convention clearly recognizes the particular need for the speedy resolution of review procedures concerning information requests in comparison to other types of review procedures, and the fact that overloaded court systems may struggle to be able to meet these needs. In the circumstances where a Party provides for the review of information requests by a court of law, article 9, paragraph 1, requires the Party to ensure that such a person also has access to an expeditious procedure established by law that is

free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. The Committee has not received any information from the parties to indicate whether or not such an alternative expeditious procedure exists in the Party concerned, and if it does, why the communicants did not use it.

90. Thus, in the light of the duration of the communicants' eight cited court procedures concerning access to environmental information, and bearing in mind that the Party concerned did not provide any examples of access to environmental information court procedures that were completed in a considerably shorter time, the Committee finds that the Party concerned has failed to ensure that the review procedures for information requests referred to in article 9, paragraph 1, are timely and provide an effective remedy, as required by article 9, paragraph 4, of the Convention.

IV. Conclusions and recommendations

91. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

92. The Committee finds that:

(a) The Party concerned failed to comply with article 4, paragraphs 1 and 2, of the Convention in two respects: by its failure to provide the communicants with a physical or electronic copy of the requested archaeological study and for denying access on the grounds of intellectual property rights (para. 59);

(b) Owing to its failure to provide the requested mining-related information or to redact those parts validly within the scope of the exceptions in article 4, paragraph 4, and to disclose the remainder, the Party concerned is in non-compliance with article 4, paragraphs 1 and 2, of the Convention (para. 64);

(c) By failing to ensure that the non-confidential portion of the information is made available, the Party concerned fails to comply with article 4, paragraph 6, of the Convention (para. 68);

(d) By failing to provide reasons for the refusal of the request for the mining-related information in 2010, the Party concerned failed to comply with article 4, paragraph 7 of the Convention (para. 74);

(e) By not providing for any public participation in the procedure for issuing the archaeological discharge certificate, the Party concerned failed to comply with article 6, paragraphs 3 and 7, of the Convention (para. 83);

(f) The Party concerned has failed to ensure that the review procedures for information requests referred to in article 9, paragraph 1, are timely and provide an effective remedy, as required by article 9, paragraph 4 (para. 90).

B. Recommendations

93. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures request in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned:

(a) Take the necessary legislative, regulatory or administrative measures and practical arrangements, as appropriate, to ensure the correct implementation of the Convention with respect to:

(i) Article 2, paragraph 3: the definition of "environmental information";

(ii) Article 4, paragraph 4: the grounds for refusal and the requirement to interpret those grounds in a restrictive way, taking into account the public interest served by disclosure;

(iii) Article 4, paragraph 6: the requirement to separate confidential from non-confidential information whenever possible and to make available the latter;

(iv) Article 4, paragraph 7: the requirement to provide reasoned statements for refusing a request for access to information;

(b) Review its legal framework in order to identify cases where decisions to permit activities within the scope of article 6 of the Convention are conducted without effective participation of the public (art. 6, paras. 3 and 7), and to take the necessary legislative and regulatory measures to ensure that such situations are adequately remedied;

(c) Review its legal framework and undertake the necessary legislative, regulatory and administrative measures to ensure that the court procedures for access to environmental information are timely and provide adequate and effective remedies;

(d) Provide adequate practical arrangements or measures to ensure that the activities listed in subparagraphs (a), (b) and (c) above are carried out with broad participation of the public authorities and the public concerned.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Fifty-second meeting
Geneva, 8–11 March 2016
Item 9 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/76 concerning compliance by Bulgaria*

Adopted by the Compliance Committee on 9 October 2015

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* This document is a late submission owing to the Committee's meeting schedule: the deadline for submission of the present document (28 December 2015) fell very soon after the Committee's fifty-first meeting (Geneva, 15-18 December 2015) and consultations were required with various parties prior to the document's submission.

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I. Introduction

1. On 25 July 2012, the Bulgarian non-governmental organization (NGO) Balkani Wildlife Society (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging a systemic failure of Bulgaria to comply with article 9, paragraph 4, of the Convention.[1]

2. Specifically, the communication alleges that the Party concerned fails to comply with article 9, paragraph 4, of the Convention, because it fails to meet the Convention's requirements regarding injunctive relief with respect to challenges to environmental permits issued under three European Union directives: the Environmental Impact Assessment (EIA) Directive;[2] the Strategic Environmental Assessment (SEA) Directive;[3] and the Habitats Directive.[4]

3. At its thirty-eighth meeting (Geneva, 25–28 September 2012), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 30 October 2012.

5. The Party concerned responded to the allegations on 22 May 2013.

6. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee agreed to discuss the content of the communication at its forty-first meeting (Geneva, 25–28 June 2013).

7. The Committee discussed the communication at its forty-first meeting, with the participation of representatives of the communicant. The Committee confirmed the admissibility of the communication and expressed its concern that the Party concerned had chosen not to participate in the discussion of the communication. At the same meeting, the Committee agreed on a set of questions to be sent to the parties.

8. The communicant and the Party concerned submitted their responses on 21 and 22 August 2013, respectively.

9. The Committee completed its draft findings at its forty-ninth meeting (Geneva, 30 June–3 July 2015), save for some minor editing points which it agreed to finalize through its electronic decision-making procedure after the meeting. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 4 September 2015. Both were invited to provide comments by 2 October 2015

[1] The communication and related documentation from the communicant, the Party concerned and the secretariat is available on a dedicated web page on the Committee's website (http://www.unece.org/env/pp/compliance/compliancecommittee/76tablebulgaria.html).

[2] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended. (See Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)).

[3] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

10. Both the Party concerned and the communicant provided comments on 2 October 2015.

11. At its fiftieth meeting (Geneva, 6–9 October 2015), the Committee proceeded to finalize its findings in closed session, taking into account the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document for its fifty-second meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[5]

A. Legal framework

12. According to the Bulgarian Environmental Protection and Biodiversity Act, all projects and plans falling within the scope of the EIA Directive, the SEA Directive and article 6, paragraph 3, of the Habitats Directive require an authorization from the Party's environmental authorities (the Ministry of Environment and Water and its regional branches). Such authorizations are known respectively as EIA decisions, SEA decisions and decisions on Assessment of Compatibility with the Special Protected Zones of Natura 2000.[6] For simplicity, all three decisions will henceforth be referred to in these findings as "EIA/SEA decisions".

13. EIA/SEA decisions constitute individual administrative acts and may be subject to administrative and judicial review.[7] According to the Administrative Procedure Code, administrative acts may not be executed prior to the expiration of the time limit for contesting them or where an appeal or a protest has been lodged, until resolution of that dispute by the relevant authority (Administrative Procedure Code, art. 90, para. 1).[8]

14. Under the Administrative Procedure Code (APC),[9] any appeal or protest lodged in an administrative[10] or a judicial[11] procedure has immediate and automatic suspensive effect. Authorities and courts may, however, discharge the suspensive effect of an appeal by issuing an order ("разпореждане за предварителното му изпълнение") granting immediate enforceability to an administrative act. This order is known as an order for preliminary enforcement.[12]

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

[6] Response to the communication from the Party concerned, 28 March 2013, p. 1. In communication ACCC/C/11/58 submitted by the same communicant, the authorizations related to an EIA procedure are called "EIA decisions" while those related to an SEA procedure are called "SEA statements".

[7] Communication, p. 2. In communication ACCC/C/11/58 submitted by the same communicant, the communication alleged that the legal nature of the "SEA statements" and the possibility to judicially review them was doubtful. In its findings on communication ACCC/C/11/58, the Committee found that indeed "Bulgarian law does not make fully clear whether judicial reviews of SEA statements as such are admissible" (ECE/MP.PP/C.1/2013/4, para. 59).

[8] Communication, p. 2 (footnote 3).

[9] For any direct references or citations, see Administrative Procedure Code (English version) from the Party concerned, 1 March 2016.

[10] Article 90, para. 1, of the Administrative Procedure Code.

[11] Article 166, para. 1, of the Administrative Procedure Code.

[12] Response to the communication from the Party concerned, 28 March 2013, p. 1.

15. An order for preliminary enforcement may be issued with respect to various types of administrative acts including, inter alia, EIA/SEA decisions as well as decisions ordering cessation of an illegal activity.

16. According to article 60, paragraph 1, of the Administrative Procedure Code, an order for preliminary enforcement may be issued as long as one of the following conditions is met, namely that the preliminary enforcement is required:

(1) to ensure life or health of individuals,

(2) to protect particular State or public interests,

(3) to prevent a risk of the frustration or material impediment of the enforcement of the act, or,

(4) where delay in enforcement may lead to a significant or irreparable detriment, or,

(5) at the request of some of the parties in protection of a particularly important interest thereof (in the latter case, the administrative authority shall require a relevant guarantee).[13]

17. An order for preliminary enforcement of any administrative act may be challenged within three days after its publication regardless of whether the administrative act itself has been contested (APC, art. 60, para. 4). The court examines the legality of the order according to article 60, paragraph 1, of the Code and, if it finds that the conditions set out in that provision are not met, it may repeal the order, resulting in the suspension of the underlying administrative act. Once the three-day period ends, the right of appeal against the order for preliminary enforcement lapses (ibid.), but not the right of appeal against the administrative act.

18. In contrast to an appeal of an EIA/SEA decision, which has suspensive effect, an appeal against an order for preliminary enforcement does not have suspensive effect unless the court decides otherwise (APC, art. 60, para. 5). The applicant may request suspension of the execution of the activity as part of its appeal against the order for preliminary enforcement.

19. An appeal of an order for preliminary enforcement is considered immediately in camera, and transcripts of the appeal are not served on the parties (ibid.).[14]

20. An applicant can also request a higher administrative body to stop the execution of an order for preliminary enforcement, if not necessitated by the public interest or if it would cause irreparable damage to the person concerned (APC, art. 90, para. 3).

21. Article 6 of the Administrative Procedure Code requires administrative authorities to exercise their powers reasonably, in good faith and fairly (para. 1). An administrative act and the enforcement thereof may not affect any rights and legitimate interests to a greater extent than the minimum necessary for which the act is issued (para. 2). Where an administrative act affects any rights of individuals or organizations, the measures that are more favourable to the said individuals or organizations shall be applied as long as the purpose of the law can be achieved. The administrative bodies “shall restrain themselves from acts and actions, which may cause damages obviously incommensurated to the

[13] Communication, p. 3.
[14] Communication, p. 3, footnote 5.

pursued aim" (para. 5). Article 6 is commonly referred to as the "proportionality principle".[15]

22. Article 7, paragraph 2, of the Administrative Procedure Code requires that all the facts and arguments, significant for the case, be subject to assessment.

23. Article 172a, paragraph 2, of the Code requires that, in its judgement, the court must present its reasoning, stating the positions upheld by the parties, the facts in the main proceedings and the legal conclusions of the court.

24. Pursuant to articles 180 and 181 of the Law on Obligations and Contracts, a guarantee that may need to be issued further to an order for preliminary enforcement under article 60, paragraph 1, of the Administrative Procedure Code may take the form of cash, bonds or mortgage.[16]

25. As an alternative to appealing the order for preliminary enforcement, at any stage of an appeal of an EIA/SEA decision, the applicant may request the Court to issue an injunction to stop the execution of the EIA/SEA decision if there is a risk of irreparable damage to the applicant (APC, art. 166, para. 2). However, this option may only be used if the order for preliminary enforcement has not itself been challenged.

B. Substantive issues

26. The communicant alleges that the Party concerned in general does not provide for effective and equitable injunctive relief with respect to orders for preliminary enforcement, and therefore fails to comply with article 9, paragraph 4, of the Convention. The communicant submits that the courts tend to refuse to consider environmental concerns when an order for preliminary enforcement is challenged and look at the conditions under article 60 of the Administrative Procedure Code rather narrowly and without properly balancing the interests involved, resulting in review procedures being ineffective. It also claims that financial guarantees imposed in such cases do not provide sufficient protection for the environment. It further claims that the courts are biased in resolving such disputes and tend to follow the views of the authorities. It states that, though there is room for authorities and courts to interpret the existing legislation in a way that the protection of the environment is recognized as a particularly important State or public interest, a legislative amendment would be needed to provide clear guidance in this respect. The communicant's allegations are set out in more detail in later paragraphs.

27. The Party concerned refutes the communicant's allegations. It claims that it is in general in full compliance with article 9, paragraph 4, of the Convention because its legislation provides for adequate and effective remedies with respect to challenging orders for preliminary enforcement. It points out that members of the public have the possibility to seek review of EIA/SEA decisions (APC, art. 90, para. 1, and art. 166, para. 1); to seek review of the order for preliminary enforcement separately from the EIA/SEA decision (APC, art. 60, para. 4); and also to request suspension of the preliminary enforcement at any time prior to the entry into force of the decision in case of potential irreparable damage (APC, art. 166, para. 2). It contends that both the authorities and the courts properly apply the applicable legal provisions.

[15] Response to the communication from the Party concerned, 28 March 2013, p. 4.

[16] Response to the communication from the Party concerned, 28 March 2013, p. 2.

1. Recent practice regarding orders for preliminary enforcement

(a) Role of the public authorities

28. The communicant alleges that environmental authorities usually grant an order for preliminary enforcement either without giving any reasoning at all or with a blanket reference to article 60 of the Administrative Procedure Code or "the protection of a particularly important interest of the developer", and without undertaking a proper balancing of the interests in the light of the precautionary principle. Moreover, the communicant contends that the authorities routinely grant an order for preliminary enforcement making only a formal reference to the conditions in article 60 of the Administrative Procedure Code, without providing any reasons to show that the actual situation satisfies these conditions. It states that there is no obligation on the competent authority to perform an objective test in this respect.

29. The Party concerned submits that, when considering whether to issue orders for preliminary enforcement of EIA/SEA decisions, the competent authorities take into account the results of the independent procedures leading to those decisions, including the public participation procedure. It submits that quite often in such cases the public have not raised any objections to the proposed activity, in particular environmental concerns, during the public participation procedure and that in many cases the reasons for challenging the EIA/SEA decision were related to its alleged illegality and not to environmental concerns.

(b) Role of the courts and other review bodies

30. The communicant alleges that, in the period 2010–2012, NGOs appealed a number of EIA/SEA decisions issued by the Ministry of Environment and Water and the Regional Inspectorates for Environment and Waters under the Ministry and, where granted, the accompanying orders for preliminary enforcement. The communicant contends that in the majority of cases the courts systematically held that suspension of the order for preliminary enforcement was not necessary pending the review of the challenged EIA/SEA decision.

31. The communicant provided summaries of a number of cases to illustrate the courts' recent practice. Five of these cases are summarized below, as these particular five cases were also cited by the Party concerned.[17]

(i) Ski lifts in Pirin National Park (decisions No. 31-PR/2010 and No. 33-PR/2010 of the Ministry of Environment and Water)

32. In 2010, NGOs brought legal action against two EIA decisions and their related orders for preliminary enforcement concerning the replacement and upgrading of ski lifts in Pirin National Park, a project that would, inter alia, result in the logging of trees in the national park. The NGOs argued that the EIA decisions' evaluations of the environmental impacts were flawed and that the orders for preliminary enforcement were neither supported by facts nor relevant guarantees, and did not take into account the precautionary principle.

33. The project was the subject of five court cases before the Supreme Administrative Court. In the proceedings to appeal the order for preliminary enforcement, the Court rejected the NGO submissions and evidence that a number of trees had already been logged and that the ongoing construction had led to irreversible environmental damage. In its reasoning, the Court referred to the conclusion in the EIA decisions that no significant

[17] Communication, pp. 6–12.

environmental impacts were expected, even though the EIA decisions themselves were at that time under challenge for substantive flaws.

34. The second instance court ultimately found the EIA decisions to be illegal but, meanwhile, due to the orders for preliminary enforcement, the trees had been logged.

(ii) Ada Tepe Goldmine on Mount Ada Tepe in the Eastern Rhodopes (Iztochni-Rodopi) (EIA decision No. 18-8,1/2011 of the Ministry of Environment and Water)

35. In 2011, NGOs brought legal action against the EIA decision and the related orders for preliminary enforcement concerning the exploitation of a goldmine on Mount Ada Tepe in the Eastern Rhodopes (Iztochni-Rodopi). The NGOs argued that the EIA decision's evaluation of the environmental impacts was flawed and that the order for preliminary enforcement was neither based on a proper evaluation of the interests at stake nor took into account the precautionary principle. Rather, the Ministry had issued its order for preliminary enforcement on the basis of the protection of the developer's interests, the State interest (regional development) and to prevent significant delays for the investment. It had not taken into account environmental impacts.

36. The case was reviewed at two instances. At first instance, the court held that the order for preliminary enforcement was valid and in compliance with article 60 of the Administrative Procedure Code, and environmental concerns should not be examined during the review of the order for preliminary enforcement but rather during the review of the EIA decision. The court's ruling was upheld by the Court of Cassation. The applicants requested the court to submit a request for a preliminary ruling before the Court of Justice of the European Union, but their request was dismissed.

(iii) Storage depot for nuclear waste (EIA decision No. 21-9/2011 of the Ministry of Environment and Water)

37. In 2011, NGOs brought legal action against the EIA decision and the related order for preliminary enforcement concerning the planned construction of a nuclear waste depot. The NGOs alleged that the EIA decision had been based on an incomplete EIA report with regard to environmental and health risks. The Minister had issued the order for preliminary enforcement on the grounds that the proper and timely implementation of national legislation and policy on nuclear waste was of public interest in order to protect human health.

38. The case was reviewed at two instances. At both instances, the courts confirmed that the order for preliminary enforcement was in conformity with article 60 of the Administrative Procedure Code and the protection of the public interest. They held that environmental concerns should not be examined when reviewing the order for preliminary enforcement, but rather during the review of the EIA decision, and in any event, the environmental aspects were not significant given the conclusions of the EIA decision.

(iv) Highway through "Bulgarka" Nature Park (EIA decision No. 4-2/2012 of the Ministry of Environment and Water)

39. In 2012, NGOs brought legal action against the EIA decision and the related order for preliminary enforcement concerning the construction of a highway through a national park, financed, among others, by the European Union, on the grounds that the EIA decision had been based on an EIA report that was incomplete as regarded the assessment of the environmental impacts. In addition, the NGOs claimed that the order for preliminary enforcement had failed to properly balance the interests at stake and to take into account the precautionary principle.

40. The court confirmed that the order had been issued in compliance with article 60 of the Administrative Procedure Code because the construction of the highway was of high public interest and that, given the EIA report's conclusions, the applicants' environmental concerns were not justified.

(v) Wind turbine parks (EIA decisions VA-4/2011, VA-7/2012, VA-8/2012 and VA-13/2012 of the Varna Regional Inspectorates for Environment and Waters)

41. In 2012, NGOs brought legal action against the EIA decisions and orders for preliminary enforcement concerning the construction of wind turbine parks on Via Pontica, the second largest bird migration route in Europe. The NGOs claimed that the EIA decisions were based on an incomplete EIA report regarding the assessment of the environmental impacts and that the orders for preliminary enforcement had failed to properly balance the interests at stake and to take into account the precautionary principle.

42. At the first instance, the Court followed a slightly different approach to the courts in the cases mentioned above, because it found that the orders should actually be based on the protection of the particular interest of the developer rather than the grounds which had been invoked by the authority to justify it. The Court still did not consider any environmental concerns raised. At the second instance, the case was closed because the EIA decision had been repealed by the Ministry in the meantime; according to the communicant, because of severe violations of environmental law.

43. The communicant submits that, in contrast to the approach taken by the courts when reviewing orders for preliminary enforcement of EIA/SEA decisions, when considering whether to uphold preliminary enforcement of decisions suspending activities the courts correctly take into account the protection of the environment. The communicant refers to cases where the public authorities had issued decisions obligating the cessation of certain illegal environmentally harmful activities, such as construction in a protected area and orders for preliminary enforcement of these suspension orders under article 60 of the Administrative Procedure.[18] When the developers challenged the order for preliminary enforcement, the courts found that the private interests of the developers were subordinate to the public interest in the protection of the environment.[19]

44. The Party concerned submits that issuing an order for preliminary enforcement is "not established uniform practice and is allowed rather exceptionally".[20] According to the Party concerned, in the period 2009–2013 a total of 93 EIA decisions were issued and only 11 of them included an order for preliminary enforcement. Similarly, in the period of 2011–2013 a total of 53 SEA decisions were issued and only 3 of them included an order for preliminary enforcement.[21]

45. The communicant alleges that neither the law nor judicial practice require authorities to examine whether upholding the order for preliminary enforcement (and thus allowing the activity to be implemented pending the appeal of the EIA/SEA decision) might have an irreversible impact on the environment. According to the communicant, there is a striking difference in this respect between the practice regarding orders for preliminary enforcement of EIA/SEA decisions and orders which ban rather than permit an activity. In the latter, article 60 of the Administrative Procedure Code is interpreted correctly to cover environmental issues as overriding reasons of public interest.

[18] For example, cases 8792/2009, 1396/2010, 241/2010, 12009/2008 and 11796/2006 of the Supreme Administrative Court. See communication, p. 13.

[19] Communication, p. 13.

[20] Information provided after the hearing by the Party concerned, 22 August 2013, p. 7.

[21] Ibid.

46. The communicant contends that the courts interpret article 60 of the Administrative Procedure Code as allowing them to review an order for preliminary enforcement only to check that the reasons given for the order correspond with the grounds listed in article 60, paragraph 1, of the Code; no examination of the actual facts is made and the courts, accordingly, usually find that the criteria of article 60 are met and uphold the order.

47. Finally, the communicant alleges that even if environmental considerations are taken into account, the courts usually rely on the findings of the EIA/SEA decisions despite those decisions themselves being challenged as inaccurate or insufficient. The communicant alleges that, when considering a dispute regarding preliminary enforcement, the courts as a rule follow the position and reasoning of the authorities. This applies both in cases where operators challenge decisions obligating them to stop illegal activities and in cases where NGOs challenge the preliminary execution of EIA/SEA decisions.

48. The Party concerned refutes the communicant's argument that the courts' appraisal is limited to the formal grounds of article 60, paragraph 1, of the Administrative Procedure Code without a thorough appraisal of the facts. It contends that, when considering applications for interim measures, the courts properly carry out their task of balancing the interests involved in the given case and carefully applying the proportionality principle; they assess whether the public interest, including protection of the environment, is at stake in an objective and impartial manner and in compliance with the right of the public concerned to participate in the decision-making process. The Party concerned provided several examples of balancing the interests from case law to substantiate its claim.[22]

49. With respect to the courts' reliance on the findings of the EIA/SEA decision, according to the Party concerned, in general the need for preliminary enforcement should be examined solely on the basis of the findings of those decisions because "it is not possible, in any other way and using different criteria, to perform an independent and objective appraisal/examination of whether to admit pre-enforcement, taking into account potential irreversible effects on the environment, because this would mean the competent authority to take a subjective and unlawful decision".[23] Furthermore, the Party concerned contends that it would be unreasonable if environmental authorities would, when taking EIA/SEA decisions and granting orders for preliminary enforcement not comply with "an act of superior authority (e.g. the Council of Ministers), which, based on the policy in a particular sector/area has determined that the project/investment proposal is of national importance".[24]

50. The Party concerned disagrees with the communicant's allegation that, in granting orders for preliminary enforcement, the authorities are motivated by the developers' interests and that the courts endorse the authorities' reasoning without taking into account the potential irreversible damage to the environment. As evidence to the contrary, it points, among others, to a recent decision of the Supreme Administrative Court that found that the competent authority, the Regional Inspectorate of Environment and Water of Varna, had wrongly issued an order for preliminary enforcement protecting in particular the considerable interests of the developer without providing for a necessary guarantee.[25] It claims that, in general, environmental concerns are taken into account both by the authorities and by courts in accordance with the requirements of applicable environmental laws.

[22] Information provided after the hearing by the Party concerned, 22 August 2013, p. 4 ff.
[23] Response to the communication from the Party concerned, 28 March 2013, p. 7.
[24] Ibid.
[25] Ibid., p. 2.

51. Furthermore, the Party concerned underlines that even if the EIA/SEA decision is issued without taking into account all possible negative environmental effects and/or the conditions contained in that decision are insufficient to ensure full protection of the environment, the order for preliminary enforcement cannot lead to irreversible damage to the environment, since the Party's multistage development consent procedure requires a construction permit to be granted before the activity can proceed.

2. Financial guarantees

52. The communicant alleges that the requirement for a financial guarantee in a case where a private interest is claimed to justify preliminary execution of the activity is determined usually at a very low level not commensurate with the value of the project (for example €6,000 in the case of a project worth €200 million) and without any consideration as to the potential environmental damage or costs of recultivation.

53. The Party concerned refutes the communicant's allegation and provides examples of cases where the financial guarantee was fixed at a significantly higher level (e.g., 150,000 Bulgarian leva (approximately €77,000)).[26]

C. Domestic remedies

54. The communicant submits that all domestic remedies have been exhausted for the proceedings described in paragraphs 32–42 above and that no general remedy exists at the domestic level to challenge the Party concerned's failure to comply with the Convention, as this is of an ongoing systemic nature.

III. Consideration and evaluation by the Committee

55. Bulgaria deposited its instrument of ratification on 17 December 2003. The Convention entered into force for Bulgaria on 16 March 2004.

56. The communication concerns the approach taken by the Party concerned to applying the requirement in article 9, paragraph 4, of the Convention to ensure adequate and effective remedies, including injunctive relief as appropriate, to review procedures regarding orders for the preliminary enforcement of EIA/SEA decisions.

57. As a preliminary point, the Committee notes that it has not been disputed by the parties to this communication that review procedures regarding EIA/SEA decisions are subject to the requirements of article 9, paragraph 4, of the Convention. Bearing this in mind, the Committee does not consider it necessary to examine this point further.

58. In order to determine whether the Party concerned meets the standard required by article 9, paragraph 4, of the Convention, the Committee first examines the legal framework regarding orders for preliminary enforcement of EIA/SEA decisions, in particular in the light of the information provided by the Party concerned in the context of this communication. The Committee then evaluates how the legal framework is being applied in practice. In this regard, while both the communicant and the Party concerned helpfully provided a number of examples from case law, the Committee focuses on the five cases summarized in the original communication (see paras. 32–42 above), since it is only with

[26] See for instance, decisions Nos. 255/13.09.2012 and 22/01.02.2013 cited in the information provided after the hearing by the Party concerned, 22 August 2013, p. 5.

respect to these five cases that the Committee has received sufficient evidence, in English, from both the communicant and the Party concerned.

A. Applicable legal framework

59. The Committee commends articles 90, paragraph 1, and 166, paragraph 1, of the Administrative Procedure Code, under which administrative acts may not be enforced prior to the expiry of the time limits to contest them or, where an appeal or a protest has been lodged, until resolution of that dispute by the relevant authority. These provisions, which in themselves operate as a form of automatic temporary injunction and which, according to the communicant, do not require the appellant in the substantive proceeding to first give a bond as security nor open the applicant to risk of damages against it if its substantive appeal is subsequently unsuccessful, may provide a useful legislative model and inspiration for other Parties.

60. The Committee has examined the Party concerned's submission that article 166, paragraph 2, of the Administrative Procedure Code provides an alternative to appealing the order for preliminary enforcement as it permits the applicant, at any stage of an appeal of an EIA/SEA decision, to request the Court to issue an injunction to stop the execution of the EIA/SEA decision if there is a risk of irreparable damage to the applicant. The Committee understands that a risk of irreparable damage to the environment would not be sufficient to satisfy the requirement for the applicant to demonstrate that the applicant is itself at risk of irreparable damage. The Committee therefore finds that the Party concerned cannot rely on article 166, paragraph 2, of the Administrative Procedure Code as an alternative means to meet its requirements to provide for adequate and effective remedies under article 9, paragraph 4, of the Convention.

61. Regarding orders for preliminary enforcement, the Committee considers that the mere existence of the order for preliminary enforcement as a measure to limit the automatic suspensive effect of an appeal cannot per se be considered as reducing the effectiveness of the remedies under article 9 of the Convention. Rather, it is necessary to examine the legal basis and practice under which an order for preliminary enforcement will be granted.

62. The Committee notes that it is not disputed between the parties that review procedures regarding EIA/SEA decisions are subject to the requirements of article 9, paragraph 4, of the Convention (see para. 570 above). As an order for preliminary enforcement of an EIA/SEA decision is a measure for injunctive relief regarding a decision subject to article 9, paragraph 4, it is likewise subject to the requirements set out in article 9, paragraph 4, of the Convention to be, inter alia, fair and equitable. In this regard, the Committee commends article 6, paragraph 1, of the Administrative Procedure Code, which requires administrative authorities to exercise their powers reasonably, in good faith and fairly.

63. The Committee considers that the requirement in article 1 of the Convention for Parties to guarantee the rights of information, participation and justice "in order to contribute to the right of every person to live in an environment adequate to his or her health and well-being", makes it clear that the protection of the environment is to be treated as an important public interest.

64. With respect to article 60, paragraph 1, of the Administrative Procedure Code, the Committee notes that it is common ground between the Party concerned and the communicant that, when deciding whether to grant/uphold orders for preliminary enforcement under that provision, public authorities and the courts, in accordance with the proportionality principle set out in article 6 of the Administrative Procedure Code, should carry out a balancing exercise to ensure that the decision is fair and taking into account all

interests, including the public interest in the protection of the environment. Where the Party concerned and communicant differ, however, is whether this happens in practice.

B. Orders for preliminary enforcement in practice

65. When considering the approach of the Party concerned to applying orders for preliminary enforcement regarding EIA/SEA decisions in practice, the Committee examines below the different roles played by the public authorities competent to issue EIA/SEA decisions and orders for preliminary enforcement and the courts and other review bodies competent to adjudicate on challenges to such decisions and orders.

1. Role of the public authorities

66. With respect to the role of public authorities, the Committee finds the view of the Party concerned that when issuing EIA/SEA decisions the competent authorities should not "question" a project/investment proposal that was designated by a superior authority as being of national importance (see para. 49 above) to be out of step with the Convention. If the role of authorities when issuing EIA/SEA decisions was to merely rubber-stamp the policy decisions taken at a higher level, it would effectively deprive the environmental decision-making of any significance and make public participation in such procedures meaningless. Likewise, making a designation of national importance by a superior authority a decisive factor in deciding to grant an order for preliminary enforcement would neglect the need for a balancing of interests, which should be the key factor in any determination on whether to grant interim relief.

67. The Committee notes the Party concerned's submission that often no concerns regarding the environmental effects of the proposed activity have been raised by the public during the public participation procedure leading up to the EIA/SEA decision. The Committee understands that this might explain why, when deciding whether to grant the order for preliminary enforcement in those cases, the public authorities determined that other interests were more pressing. If there is no evidence before them to the contrary, public authorities could not be expected to act otherwise. Bearing this in mind, the Committee is not convinced that the current practice of the Bulgarian public authorities with respect to the grant of orders for preliminary enforcement fails to comply with the requirements of article 9, paragraph 4, of the Convention, and therefore the Committee does not conclude that the Party concerned is in non-compliance with the Convention on this specific point.

68. The Committee takes this opportunity to make a more general observation regarding the relationship of the right to participate and the right of access to justice under the Convention, while stressing that what follows is not in any way directed at the communicant of the present communication. The Convention does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure, and introducing such a general requirement for standing would not be in line with the Convention. On the other hand, the Convention recognizes that public participation in decision-making procedures is a fundamental tool for enhancing the quality of environmental decision-making.[27] By ensuring that the public has the opportunity to express its concerns and by requiring public authorities to take due account of those concerns, the Convention helps to ensure that environmental considerations are integrated into governmental decision-making. Therefore, the Committee considers that if NGOs were to develop a practice to deliberately opt not to participate during public

[27] See, e.g., preambular para. 9.

participation procedures, though having the opportunity to do so, but instead to limit themselves to using administrative or judicial review procedures to challenge the decision once taken, that could undermine the objectives of the Convention.

2. Role of the courts and other review bodies

69. The Committee confirms that, as submitted by the communicant, the requirement in article 9, paragraph 4, of the Convention that injunctive relief and other remedies be "effective" includes, inter alia, an implicit requirement that those remedies should prevent irreversible damage to the environment.

70. In this respect, it is important to note that the Party concerned is bound to guarantee access to justice in accordance with the objective set out in article 1 of the Convention, that is, in order to contribute to the right of every person to live in an environment adequate to his or her health and well-being. Therefore, the protection of the environment must, in the language of article 60, paragraph 1, of the Administrative Procedure Code, be treated as a "particularly important public interest" for the purposes of that provision.

71. Furthermore, the Committee considers that, in contrast to its findings regarding the grant of such orders by public authorities (see para. 67 above), in an appeal of an order for preliminary enforcement under articles 60, paragraph 4, of the Administrative Procedure Code, it should be irrelevant whether the public raised any concerns during the earlier public participation procedure. Likewise, the grounds upon which the EIA/SEA decision is challenged in the main proceeding should be irrelevant also. Rather, if a risk of damage to the environment is put forward as a ground for appealing the order for preliminary enforcement, then — in accordance with the requirement in article 9, paragraph 4, of the Convention to ensure adequate and effective remedies to prevent environmental damage — the protection of the environment must be a major factor to be taken into account by the court in deciding the appeal.

72. Given that the EIA/SEA decision is itself challenged in the main proceeding, this will require that the reviewing body, when considering the appeal against an order for preliminary enforcement, undertakes its own assessment as to whether there is any risk of damage to the environment should the activity proceed while the challenge to the EIA/SEA decision is still pending. This assessment must be carried out on the basis of all the facts and arguments before it, and taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm.

73. As an aside, the Committee does not find convincing the Party concerned's submission that, even though an order for preliminary enforcement is upheld by the court, the project may not yet commence for some time, and hence no environmental damage will occur. While, due to various practical circumstances, that may be correct in some cases, as is evident from the cases examined in these findings, it is not necessarily so. For example, the two ski-lift projects (ruling no. 15789/2010 regarding decision No. 31-PR/2010 of the Ministry of Environment and Water)[28] resulted in irreversible environmental damage before the decision authorizing the ski lifts was finally found to be illegal (paras. 32–34 above). As that case demonstrates, environmental damage can indeed occur as a result of granting preliminary enforcement of a challenged EIA/SEA decision that is subsequently overturned as a result of that challenge. The key point is that there is nothing that legally prevents the developer from proceeding to apply for and obtain a construction permit as soon as the

[28] See communication, annex 6 (in Bulgarian); for English translation see the letter from the communicant dated 21 August 2013 answering questions after the hearing at the Committee's forty-first meeting, attachment A, annex 6.

order for preliminary enforcement is upheld and before the appeal regarding the validity of the EIA/SEA decision is concluded.

74. Bearing in mind the above considerations, the Committee notes that only in one of the five cases it has examined, namely the ruling in cassation case 14251/2010 regarding decision No. 33-PR/2010 of the Ministry of Environment and Water, did the court appear, when balancing the interests, to make its own assessment of the risk of environmental damage on the basis of all the facts and arguments before it. In the other four cases, the courts, when reviewing the decisions of the competent authorities regarding the preliminary enforcement of challenged EIA/SEA decisions, did not attempt to make their own assessment of the potential effects on the environment, but instead relied solely on the conclusions of the competent authority on that point, i.e., the exact conclusions being challenged in the main proceeding. In one case, the ruling in cassation case No. 8885/2012,[29] the courts did not consider environmental concerns at all. Subsequently, the substantive review by the Ministry revealed significant flaws in assessing the environmental impact of the activity and consequently repealed the EIA decision (in that case, decision No. 181/2012[30] of the Ministry of Environment and Water repealing the decision VA-7/2012 of Regional Inspectorates for Environment and Waters). The courts in the other three cases clearly refused to take into account any environmental concerns put forward by the applicant, indicating that they would be addressed when adjudicating the case on its merits.

75. That the above is an accurate summary appears further confirmed by the Party concerned's statement that in each of the five cases the courts rejected the appeals against preliminary enforcement "on the grounds of prevailing public and State interest in the implementation of the investment proposals, given the fact that the possible occurrence of any harms for the environment has not been proved".[31]

76. In the view of the Committee, the above facts reveal the existence of a certain trend, condoned by the Party concerned: when considering an appeal of an order for preliminary enforcement of a challenged EIA/SEA decision, instead of reviewing the extent to which the criteria in article 60, paragraph 1, of the Administrative Procedure Code are met in the light of the proportionality principle (APC, art. 6) and the requirement to assess all the facts and arguments significant for the case (APC, art. 7), the courts rely heavily on the conclusions contained in the EIA/SEA decision, despite the fact that the legality of that decision is being challenged in the main proceeding. The Committee considers that the courts' approach is not in accordance with the requirement in article 9, paragraph 4, of the Convention to provide adequate and effective remedies.

77. More precisely, with respect to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, the Committee finds that a practice in which the review bodies rely on the conclusions of the contested EIA/SEA decision, rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

[29] See the letter from the communicant dated 21 August 2013 answering questions after the hearing at the Committee's forty-first meeting, attachment A, annex 32.

[30] See ibid, annex 33.

[31] Information provided after the hearing by the Party concerned, 22 August 2013, p. 4.

78. The Committee notes that, in addition to an appeal under article 60, paragraph 4, of the Administrative Procedure Code, an applicant may, pursuant to article 90, paragraph 3, of the Code, request a higher administrative body to stop the execution of a preliminary order for enforcement if not necessitated by the public interest or if execution would cause irreparable damage to the person concerned. Having not examined in detail the practice of higher administrative bodies regarding requests under article 90, paragraph 3, the Committee does not make any findings on this point. However, the Committee stresses that the requirement in article 9, paragraph 4, of the Convention to provide adequate and effective remedies is equally applicable to requests under article 90, paragraph 3, grounded on a risk of environmental damage. Thus, the Committee's reasoning in paragraph 77 is also applicable to such requests.

3. Financial guarantees

79. While the Convention does not preclude the use of financial guarantees per se in judicial procedures covered by the Convention (and indeed guarantees may in appropriate cases play a useful role in helping to protect the environment), they may in practice be applied in a manner counter to article 9, paragraph 4, of the Convention. This could be the case when a financial guarantee imposed as a condition for upholding an order for preliminary enforcement is not set at a level that would be a disincentive to the taking of action that may cause environmental damage or, alternatively, that would provide an adequate remedy for any harm caused.

80. The case law before the Committee appears to show that courts tend to uphold orders for preliminary enforcement if a financial guarantee is imposed, without first considering whether the amount of the guarantee would be adequate to redress any environmental and other harm suffered should the work go ahead, and the appellant then succeeds in the substantive proceeding. If the courts indeed do so, the Party concerned would fail to comply with article 9, paragraph 4, of the Convention. However, on the basis of the limited information in front of it, the Committee does not conclude that it has been established that the Party concerned is in non-compliance with the Convention on this specific point.

IV. Conclusions and recommendations

81. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

82. The Committee finds that, with respect to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, a practice in which the courts rely on the conclusions of the contested EIA/SEA decision rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

B. Recommendations

83. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned review the approach of its courts to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, and undertake practical and/or legislative measures to ensure that:

(a) Instead of relying on the conclusions of the contested EIA/SEA decision, the courts in such appeals make their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm;

(b) The courts in their decisions on such appeals set out their reasoning to clearly show how they have balanced the interests, including the assessment they have undertaken of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm;

(c) Training and guidance is provided for judges and public officials in relation to how to carry out the above-mentioned balancing of interests in environmental cases, including on how to properly reflect that balancing in their reasoning.

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Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Fifty-fifth meeting
Geneva, 6–9 December 2016
Item 9 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*

Adopted by the Compliance Committee on 17 June 2015

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I. Introduction

A. Communication ACCC/C/2013/85

1. On 18 September 2012 the Environmental Law Foundation submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the United Kingdom of Great Britain and Northern Ireland failed to comply with its obligations under the Convention. Specifically, it alleges that section 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012, in force since April 2013, would result in prohibitively expensive costs in private nuisance proceedings and would increase financial and other barriers to access to justice in breach of article 9, paragraphs 3, 4 and 5, of the Convention.[1]

2. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision 1/7 of the Meeting of the Parties to the Convention.

3. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 22 July 2013.

B. Communication ACCC/C/2013/86

4. On 28 February 2013, a member of the public, Alyson Austin, submitted a communication to the Compliance Committee alleging that the United Kingdom failed to comply with its obligations under the Convention. Specifically, the communication alleges that the Party concerned failed to comply with article 9, paragraphs 3 and 4, of the Convention by not ensuring that the costs of access to justice in private nuisance cases, including her own, are fair, equitable, timely and not prohibitively expensive.

5. At its forty-first meeting, the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7.

6. At the meeting, the Committee considered that, further to its discussion with the Party concerned during that meeting, the Party concerned interpreted the Committee's recommendations as applying only to procedures for judicial review but not to private nuisance proceedings. According to the Party concerned, private nuisance proceedings were not specifically considered in the previous findings of the Committee, endorsed by decision IV/9i of the Meeting of the Parties. The Committee noted that paragraph 3 (a) of decision IV/9i concerned costs for all court procedures covered by article 9, and thus stressed that it did not agree in general with the position of the Party concerned, but that, in the light of the Party's position, the Committee would consider the present communication under its ordinary, and not its summary, proceedings procedure. The Committee also provisionally decided that it would possibly consider the communication jointly with communication ACCC/C/2013/85.

7. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 22 July 2013 for its response.

[1] Communications, including related documentation from communicants, the Party concerned and the secretariat, are available from http://www.unece.org/env/pp/cc/com.html by clicking on the appropriate reference.

C. Joint consideration of the two communications

8. The Party concerned provided its joint response to communications ACCC/C/2013/85 and ACCC/C/2013/86 on 20 December 2013.

9. On 14 January 2014, the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 provided a joint note commenting on the response.

10. The Committee held a hearing to discuss the substance of the communications at its forty-fourth meeting (Geneva, 25–28 March 2014), with the participation of the communicants and the Party concerned. The Committee confirmed that it would proceed to discuss the communications jointly and confirmed the admissibility of communication ACCC/C/2013/85. It also confirmed that communication ACCC/C/2013/86 was admissible to the extent that it raised systemic issues also within the scope of ACCC/C/2013/85, but that it would not consider the allegations concerning the case then pending before the national courts.

11. At its forty-fifth meeting (Maastricht, the Netherlands, 29 June–2 July 2014), the Committee decided to put additional questions to the communicants and to the Party concerned. The communicants and the Party concerned provided their responses to those questions on 5 September 2014.

12. The Committee completed its draft findings at its forty-seventh meeting (Geneva, 16–19 December 2014), save for some minor points which it agreed through its electronic decision-making procedure after the meeting. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded for comments to the Party concerned and the communicants on 23 February 2015 with an invitation to provide comments by 23 March 2015. The communicant of communication ACCC/C/2013/86 and the Party concerned provided comments on 9 March and 23 March 2015, respectively. No comments were received from the communicant of communication ACCC/C/2013/85.

13. At its forty-eighth meeting (Geneva, 24–27 March 2015), the Committee prepared revised draft findings taking into account the comments received from the parties. In accordance with paragraph 34 of the annex to decision I/7, the revised draft findings were then forwarded for comments to the parties on 10 April 2015 with an invitation to provide comments by 5 May 2015.

14. The Party concerned and the communicant of communication ACCC/C/2013/86 provided comments on the revised draft findings on 5 May 2015. The ACCC/C/2013/85 communicant did not provide comments. Taking into account the comments received, the Committee adopted its findings through its electronic decision-making on 17 June 2015 and requested the secretariat to send the adopted findings to the Party concerned and the communicants.

II. Summary of facts, evidence and issues[2]

A. Legal framework

Private nuisance

15. In *Coventry v. Lawrence, No 1*, the Supreme Court of the United Kingdom has defined private nuisance as: "an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land".[3]

Costs

16. The general framework regarding costs in the legal system of the Party concerned was examined in the Committee's findings on communication ACCC/C/2008/33[4] and its report to the Meeting of the Parties on the implementation of decision IV/9i.[5] In summary, the general rule is "costs follow the event".

17. In England and Wales, Practice Direction 45 to the Civil Procedure Rules, in force since 1 April 2013, provides for costs protection in "Aarhus Convention claims" of "£5,000 where the claimant is claiming only as an individual and … in all other cases, £10,000".[6] A defendant's liability for a successful claimant's costs is capped at £35,000. Rule 45.41 defines an "Aarhus Convention claim" as "a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

18. Section 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 (LASPOA) amends the Courts and Legal Services Act 1990 by inserting a new subsection 58C. Subsection (1) of section 58C provides:

> A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).

19. Section 46 LASPOA also repealed section 29 of the Access to Justice Act 1999, which had previously enabled the successful party to recover the premium of an "after the event" (ATE) insurance policy — a policy insuring against the risk of incurring a liability for costs, in particular the opposing party's costs. Section 46 entered into force on 1 April 2013.

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

[3] [2014] UKSC 13, para. 3.

[4] See ECE/MP.PP/C.1/2010/6/Add.3, paras. 34–71.

[5] See ECE/MP.PP/2014/23, paras. 41–58.

[6] See http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs.

B. Facts

Communication ACCC/C/2013/85

20. Since the allegations in communication ACCC/C/2013/85 concern the legal framework only, those allegations are presented in section C, "Substantive issues", below.

Communication ACCC/C/2013/86

21. Since 2008, the communicant of communication ACCC/C/2013/86 has, acting by herself and with others, raised concerns of continuing and excessive noise and dust deposition emanating from opencast coal mining operations located within 500 metres from her home. The communicant has sought to resolve the nuisance through correspondence and attempted negotiation with the operator, Miller Argent (South Wales) Ltd. She has also raised concerns with the environmental regulator, Merthyr Tydfil County Borough Council, which she alleges has not to date taken action against the operator.

22. In June 2010, the communicant and 491 other residents applied to the High Court for a pre-action group litigation order to manage a large number of claimants in one claim. In November 2010, the High Court dismissed the application due to uncertainty as to the claimants' funding provisions.[7] The claimants sought to appeal the dismissal. In December 2010, the operator sought payment of £257,104 for its legal costs for the pre-action application. In July 2011, the Court of Appeal dismissed the claimant's appeal against the dismissal when, on the day of the appeal, the operator undertook that it would only claim costs on a pro rata basis to a total of £553 per claimant and that it would not pursue any claimant for those costs unless they recommenced legal proceedings.[8]

23. After the July 2011 appeal, the communicant sought to resolve the problems individually with the operator through negotiation. This failed, and in November 2012 the communicant issued a further pre-action application to the High Court, seeking costs protection for the hearing on costs on either a "no order for costs" or "each party pay their own costs" basis. In January 2013, the High Court refused to direct that the one day pre-action costs protection hearing should be on an "each party pays their own costs" but that instead it should be on the basis of "costs in the application", i.e., costs to be awarded to the successful party.

24. The communicant appealed and in November 2013 the Court of Appeal granted a protective costs order of £2,500 with a cross-cap on the respondent's cost liability of £15,000 for the appeal hearing of the communicant's application for costs protection in her private nuisance proceedings. By judgment of 21 July 2014, the Court of Appeal dismissed the communicant's application for costs protection, chiefly on the ground that the case did not involve significant environmental benefit. The communicant applied to the Supreme Court for permission to appeal the Court of Appeal judgment. This application was refused on 24 February 2015.

C. Substantive issues

ACCC/C/2013/85

25. The communicant of communication ACCC/C/2013/85 alleges that the availability of ATE insurance to fund the costs and expenses of private nuisance proceedings and cover

[7] *Austin and others v. Miller Argent (South Wales) Ltd* (decision of 11 November 2010) (unreported).
[8] *Austin and others v. Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928.

the risk of exposure to an opponent's costs is critical to ensuring that private nuisance proceedings can be pursued. The communicant contends that the potential costs risk is severe, as demonstrated by *Austin v. Miller Argent* (see para. 22 above), where the operator sought costs of over £250,000. The communicant contends that costs for environmental nuisance cases almost always exceed £100,000 and often £2 million. It cited various cases in which it alleged that, but for ATE insurance, the claimants would have been prevented from effective legal action.[9]

26. The communicant alleges that the introduction of LASPOA section 46 breaches articles 9, paragraphs 3, 4 and 5, of the Convention. It submits that article 9, paragraphs 3 and 4, taken together, require the Party concerned to ensure that members of the public have access to judicial procedures to challenge acts or omissions by private persons and public bodies that contravene national environmental laws and that those procedures must provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive. It contends that by removing the ability to recover the ATE insurance premium in private nuisance proceedings, the Party concerned has made a critical judicial procedure for challenging acts and omissions resulting in environmental harm unfair, inequitable and prohibitively expensive.

27. The communicant alleges that by enacting LASPOA section 46, the Party concerned is also in breach of article 9, paragraph 5, of the Convention, as section 46 will add or increase financial and other barriers to environmental justice.

28. The communicant submits that the Party's non-compliance with article 9, paragraphs 3, 4 and 5, could be resolved through one or more of the following:

(a) Committing not to bring into force LASPOA section 46;

(b) Introducing regulations to permit recovery of ATE insurance premiums in environmental nuisance claims, as is already done for personal injury claims;

(c) Expressly including environmental nuisance claims within the protective costs order regime, without reciprocal caps on claimants' costs;

(d) Introducing qualified one-way costs shifting in private nuisance litigation.

ACCC/C/2013/86

29. The communicant of communication ACCC/C/2013/86 alleges that the Party concerned fails to ensure that private nuisance proceedings are fair, equitable, timely and not prohibitively expensive as required under article 9, paragraph 4, of the Convention.

30. The communicant also alleges that the Party concerned fails to recognize that, contrary to Rule 45.41, paragraph 2, of the Civil Procedure Rules, an "Aarhus Convention claim" should not be limited to claims for judicial review and should include, for instance, private nuisance claims.

31. The communicant contends that she has been trying to resolve dust and noise pollution since 2008, but to date has been prevented from the review of her case on the merits due to costs concerns. She submits that she has been involved in six High Court hearings since 2010, and issued three Court of Appeal proceedings — all relating to costs. Despite this, it has not been possible to issue legal proceedings to stop the pollution because of the costs concerns. The communicant submits this has prevented her having timely access to justice as required by article 9, paragraph 4, of the Convention.

[9] See communication ACCC/C/2013/85, para. 76.

32. The communicant asks the Committee to, inter alia, find that:

(a) Private nuisance proceedings fall clearly within the Convention and, if there is any doubt as to whether a private nuisance claim falls within the Convention, a purposive, inclusive approach should be taken such that the Convention is assumed to apply;

(b) If the Party concerned continues to rely upon protective costs orders for costs protection in environmental cases, then such orders must apply to all cases subject to the Convention, including private nuisance proceedings. Further, the protective costs order mechanism must not in itself be prohibitively expensive;

(c) LASPOA section 46 unduly restricts access to justice in environmental matters such that the Party fails to comply with the Convention, and the Party should take action to remedy that failure, the simplest way being to stipulate that section 46 does not apply to cases within the Convention, including private nuisance claims.

Response of the Party concerned

33. In its response of 20 December 2013, the Party concerned states that private nuisance claims are not required by article 9, paragraph 3, of the Convention and, even if some provision for private nuisance claims is required by article 9, paragraph 3, it cannot be required for private nuisance claims as a class, covering every type of claim. The requirements of article 9, paragraph 3, are met by the availability of other procedures, and those procedures likewise meet the requirements of article 9, paragraph 4. Similarly, there is no breach of article 9, paragraph 5.

34. The Party concerned cites the following as possible alternatives to private nuisance proceedings for those experiencing environmental problems:

(a) Complaint to the relevant regulator or local authority with a view to the authority's taking action under section 80 of the Environmental Protection Act 1990 (EPA);

(b) Complaint to the relevant regulator or local authority where the contravention is alleged to breach a condition or licence, or amount to an offence which it is the duty of the regulator or local authority to enforce;

(c) Complaint to the Parliamentary Ombudsman or Local Government Ombudsman;

(d) Statutory nuisance proceedings under section 82 of the EPA;

(e) Judicial review;

(f) Seeking a prosecution of the person responsible, or mounting a private prosecution.

35. The Party concerned submits that possible alternatives to ATE insurance to reduce the costs of private nuisance proceedings include:

(a) Before the event (BTE) insurance;

(b) Conditional fee agreements.

These alternatives are discussed in more detail in paragraphs 58–60 below.

Substantive issues common to both communications

36. In sum, the two communications raise the following substantive issues:

(a) Should private nuisance proceedings, in general, be considered as "judicial procedures to challenge acts or omissions by private persons and public authorities which contravene national law relating to the environment" under article 9, paragraph 3?;

(b) If private nuisance proceedings are to be considered as procedures under article 9, paragraph 3 (or to the extent that they should be so considered), must they meet the requirements of article 9, paragraph 4, including being not prohibitively expensive, or may compliance with those requirements be achieved through access to alternative procedures?;

(c) If the requirements of article 9, paragraph 4, indeed apply to private nuisance proceedings, does LASPOA section 46 actually make private nuisance claims prohibitively expensive under article 9, paragraph 4, or impose a financial barrier under article 9, paragraph 5?

The parties' submissions on the above points are summarized below.

(a) Should private nuisance proceedings be considered as "judicial procedures to challenge acts or omissions by private persons and public authorities which contravene national law relating to the environment" for the purposes of article 9, paragraph 3?

37. Both communicants submit that the courts of the Party concerned have recognized that private nuisance may fall within the ambit of the Convention.[10] They also point to the Committee's findings on communication ACCC/C/2007/23, which held: "The Committee finds that in the context of the present case, the law of private nuisance is part of the law relating to the environment of the Party concerned, and therefore within the scope of article 9, paragraph 3, of the Convention."[11]

38. The Party concerned disputes that article 9, paragraph 3, necessarily applies to private nuisance claims. It contends that, as stated by the High Court in *Austin v. Miller Argent*, "the question has not been decided in the courts of England and Wales".[12] It submits that the Court of Appeal in *Morgan v. Hinton Organics*[13] did not determine the issue, but merely assumed for the purposes of the argument before it that the Convention was capable of applying to some private nuisance cases. The Court also accepted that, for the purposes of the Convention, the particular remedy sought in a particular case needed to be seen in the wider context of available remedies generally, which would need to be considered individually not only in terms of costs but of legal efficacy.

39. The Party concerned submits that, as noted in the Jackson Report,[14] the tort of nuisance covers a wide variety of matters. Nuisance was defined in *Bamford v. Turnley* as "any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant's] land or his use or enjoyment of that land".[15] Private

[10] For example, *Morgan v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] Env LR 30, paras. 22 and 44, and *Barr v. Biffa Waste Services Ltd* [2012] EWCA Civ 312.

[11] ECE/MP.PP/C.1/2010/6/Add.1, para. 45.

[12] [2013] EWHC 2622, para. 7.

[13] Ibid.

[14] Lord Justice Jackson, *Review of Civil Litigation Costs*: *Final Report*, Ministry of Justice, December 2009 (London, The Stationery Office, 2010). Available from http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

[15] (1860) 3 B & S 62; 122 ER 25.

nuisance is therefore primarily concerned with protecting the rights of individual property owners to enjoy their land. On occasion, an instance of private nuisance will have a wider effect such as to constitute an environmental threat to the public more widely, but the essence of private nuisance remains the protection of private property rights. Many nuisance claims involve encroachment, which is akin to trespass, and it is difficult to see how such interference would constitute a breach of national law relating to the environment. Even where the interference takes the form of noise or dust, a distinction may be drawn between actions for private nuisance mounted to protect private property rights and actions which more clearly vindicate general public rights to a clean environment — or, as it was put in the Jackson Report, where the acts complained of are "damaging to the environment, in particular toxic torts such as pollution of watercourses".[16]

40. To the extent that the Convention may apply to private nuisance, the Party concerned endorses the Jackson Report's conclusion that it would apply only to those cases where the alleged nuisance is an activity: (a) damaging the environment; and (b) adversely affecting the wider public. Only a small proportion of private nuisance claims therefore involve matters which may be argued to bring them within the Convention's scope. Private nuisance claims as a class do not come within its scope.

41. The communicants submit that the Convention's application to private nuisance is wider than the Jackson Report suggests. Moreover, they disagree that if the issue under challenge has an impact on the environment but may affect only one or a few individuals, the nuisance is not part of national law relating to the environment. They add that the Aarhus Convention Implementation Guide[17] attributes a wide meaning to the environment including the state of human health and life.

(b) Does compliance require that private nuisance proceedings meet the requirements of article 9, paragraph 4, or may compliance be achieved through access to alternative procedures?

42. The Party concerned submits that compliance with article 9, paragraphs 3 and 4, of the Convention is achieved through the public having access to a number of other types of procedures (see para. 34 above) and access to private nuisance proceedings is not required.

43. The communicants concede that some of the alternative procedures may be appropriate in some instances, but submit that these alternatives do not, individually or collectively, ensure compliance with the Convention. They contend that, indeed, many options provide little or no effective remedy at all, and that the significant shortcomings in each or all of the alternatives suggested mean that private nuisance has to be part of national law relating to the environment. Moreover, the availability of adequate and effective remedies under article 9, paragraph 4, includes the possibility of injunctive relief and private nuisance is the main way through which such relief is secured in the Party concerned.

44. The parties' submissions regarding the adequacy of the possible alternative procedures available are summarized below.

[16] p. 314.

[17] *The Aarhus Convention: An Implementation Guide*, 2nd ed., United Nations publication, Sales No. E.13.II.E.3.

(i) Complaint to the relevant regulator or local authority, including with a view to the authority taking action under section 80 of the EPA

45. The Party concerned asserts that members of the public can report potential or alleged breaches of environmental legislation to the appropriate regulator, for the regulator to investigate and consider whether there is a need to take enforcement action, for example under section 80 of the EPA.

46. The communicants submit that the right to complain to an authority which may or may not then take administrative action does not provide access to relevant procedures in any meaningful sense.

(ii) Complaint to the relevant ombudsman

47. The Party concerned contends that if members of the public are dissatisfied with the responsible regulator, they may complain to the relevant ombudsman, usually after complaining to the regulator itself. If the ombudsman takes up the complaint, he or she will normally report to the complainant and the authority complained of once the investigation has been concluded. The ombudsman may make a report to Parliament if the investigation raises an important public policy issue or if the authority complained of does not accept the recommendations.

48. The communicants submit that a complaint to the relevant ombudsman is limited to reviewing maladministration of a regulator. An ombudsman cannot consider complaints about environmental pollution by an individual or corporate body. Even if the ombudsman finds maladministration, he or she has no power to order a remedy for the environmental harm but can only recommend that the public body take action.

(iii) Statutory nuisance proceedings under section 82 of the EPA

49. The Party concerned submits that there are strong judicial statements endorsing section 82 of the EPA (and proceedings under it) as: "a statute specifically directed to the protection of the environment and contemplating action taken by the aggrieved layman" and "intended to provide ordinary people, numbered amongst whom are those who are disadvantaged … with a speedy and effective remedy".[18] The Party submits that the domestic proceedings of the communicant of communication ACCC/C/2013/86 could have been brought as statutory nuisance proceedings, and adds that the Jackson Report noted that costs recovery under section 82 is "somewhat more generous than costs recovery on the standard basis in the civil courts".[19]

50. The communicants accept that proceedings under section 82 could provide an alternative mechanism to private nuisance in some instances. They contend, however, that section 82 proceedings have a number of limitations including: (a) the many types of environmental nuisances outside the statutory nuisance definition;[20] (b) the best practicable means defence; (c) the reasonable excuse defence; (d) the stricter procedural and evidential limitations of section 82 proceedings, which are governed by the Criminal Procedural Rules, without the possibility to settle costs issues in advance; (e) the defence that the nuisance is not ongoing; (f) the Prosecution of Offenders Act 1985, which does not make provision for multiple claimants; (h) the limits on the level of compensation payable; and (i) the potential for a costs claim by a successful defendant.

[18] *Hewlings v. McLean Homes East Anglia Ltd* [2001] 2 All ER 281.

[19] p. 316.

[20] Communication ACCC/C/2013/85 (pp.14–17) lists categories of nuisance the communicants allege would not come within the definition of statutory nuisance.

(iv) Judicial review

51. The Party concerned submits that, in many cases, the breach at issue will concern an alleged breach of a condition or licence or an offence for which a regulator or local authority is responsible for enforcement. In such cases, where the breach or nuisance is clear, so will be the duty of action (for example, the duty to investigate a complaint under section 79 of the EPA or to serve an abatement notice under section 80). Such matters are clearly capable of founding a claim for judicial review.

52. The communicants submit that an application for judicial review challenging the regulator or authority's acts or its failure to act does not provide any realistic means of review. A failure to act is subject to challenge on *Wednesbury* grounds,[21] which the Party's courts consider to be a high hurdle, even in cases where a precautionary approach to environmental protection applies.[22] The communicants note that the Compliance Committee has previously expressed concern regarding the use of the *Wednesbury* standard.[23] Moreover, judicial review of a regulator is expensive and it is unlikely that the court would require a regulator to take effective enforcement action.

(v) Mounting a private prosecution

53. The Party concerned submits that conduct alleged to constitute a criminal offence — including offences constituting statutory nuisance under the EPA or the common law offence of public nuisance — may be subject to a private prosecution. A public nuisance may arise in respect of a person's act not warranted by law or the omission of a legal duty that endangers the health, property or comfort of the public. This differs from private nuisance in that the damage, injury or inconvenience affects everyone or a class of people (e.g., those within a particular neighbourhood), and is ordinarily available in circumstances where a statutory offence is not.

54. The communicants point out that there are virtually no instances where the public concerned has successfully pursued a prosecution of public nuisance. They contend that a private prosecution for public nuisance cannot therefore be considered as providing any realistic mechanism of review.

(c) If the requirements of article 9, paragraph 4, apply to private nuisance proceedings, does LASPOA section 46 render such proceedings prohibitively expensive (article 9, para. 4), or impose a financial barrier (article 9, para. 5)?

55. The communicants submit that LASPOA section 46, which removes the right to recover ATE insurance premiums, makes private nuisance claims prohibitively expensive under article 9, paragraph 4, of the Convention. Moreover, by introducing a barrier to access to justice that did not exist before, it directly conflicts with article 9, paragraph 5, of the Convention regarding the removal or reduction of such barriers. The communicants provide a list of private nuisance claims that they allege cannot be pursued after the possibility to recover ATE insurance premiums was cancelled.[24]

56. The Party concerned contends that LASPOA section 46 gives effect to a primary recommendation of the Jackson Report. The issue of the recoverability of ATE insurance premiums was given full consideration in that report and subsequently in Parliament. Lord

[21] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.
[22] See, e.g., *Aston v. Secretary of State for Comm. and Local Govt.* [2013] EWHC 1936 (Admin).
[23] ECE/MP.PP/C.1/2010/6/Add.3, para. 125.
[24] Communication ACCC/C/2013/85, para. 27.

Justice Jackson concluded regarding private nuisance claims, that to the extent that there was any problem, it was not so widespread as to be in breach of the Convention.

57. With respect to article 9, paragraph 5, of the Convention, the Party submits that provision requires Parties to consider the extension of appropriate assistance mechanisms to remove or reduce financial or other barriers — and is not a prohibition on any changes which may arguably not benefit claimants.

58. Moreover, the Party concerned contends that BTE insurance is a potential alternative mechanism to ATE insurance for funding private nuisance claims.

59. The communicants submit that BTE insurance is an inadequate answer to address non-compliance with the Convention, because the overwhelming majority of proposed claimants do not have BTE insurance in place before the event giving rise to the nuisance occurs. For example, in *Austin and others v. Miller Argent (South Wales) Ltd*[25] only 2 out of more than 500 claimants had BTE insurance in place. The communicants contend that even when persons have BTE insurance in place, every effort is made by a BTE insurer to prevent the policy covering environmental nuisance claims.

60. The Party concerned also submits that claimants will still be able to engage solicitors on conditional fee agreements, even if they do not have BTE insurance. The communicant of communication ACCC/C/2013/86 counters that, though she instructed her legal representatives by way of a conditional fee agreement regarding her own legal fees, she still could not afford to issue private nuisance proceedings without a pre-action order providing costs protection.

D. Domestic remedies

61. The Party concerned submits that, since the ACCC/C/2013/86 communicant was still making active use of domestic procedures during the Committee's consideration of the communications, it would not be appropriate for the Committee to consider that communication at this stage. The Party invites the Committee to suspend consideration of communication ACCC/C/2013/86 until domestic remedies have been exhausted. The Party concerned does not object to the admissibility of communication ACCC/C/2013/85.

III. Consideration and evaluation by the Committee

62. The United Kingdom ratified the Aarhus Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

63. The Committee decided at its forty-fourth meeting to consider communications ACCC/C/2013/85 and ACCC/C/2013/86 jointly (see para. 10).

64. The Committee decides not to examine the ACCC/C/2011/86 communicant's allegations concerning her private nuisance claim for noise and dust from the opencast coal mining operation, because at the time of the Committee's deliberations the case was still ongoing at the domestic level. The Committee notes that after the Committee's draft findings were published. on 23 February 2015, the Supreme Court refused permission to appeal, this being the final determination of the matter. The Committee accordingly takes the case into account as an example illustrating the practice of private nuisance proceedings in the Party concerned.

[25] [2011] EWCA Civ 92.

65. The Committee also decides not to deal with the ACCC/C/2013/86 communicant's allegations concerning non-compliance with article 9, paragraph 2, of the Convention by the Party concerned, as these allegations were not sufficiently substantiated and moreover were related to the case then still ongoing at the domestic level.

66. The Committee recalls its findings on communication ACCC/C/2008/33 (United Kingdom), in which it concluded that "by failing to ensure that *the costs for all court procedures subject to article 9* are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention".[26] Subsequently, the Committee recommended the Party concerned "review its system for allocating *costs in environmental cases within the scope of the Convention* and undertake practical and legislative measures … to ensure that *such procedures* are fair and equitable and not prohibitively expensive and provide a clear and transparent framework".[27] These recommendations were subsequently welcomed by decisions IV/9i and V/9n of the Meeting of the Parties. In this respect, the Party concerned interprets the above conclusions and recommendations as applying only to judicial review procedures and not private nuisance proceedings (see also para. 6 above). The Committee stresses that, in its view, the findings endorsed and recommendations welcomed by decisions IV/9i and V/9n of the Meeting of the Parties apply to all court procedures subject to article 9 of the Convention, not only judicial review procedures. However, in the light of the Party's position on this point, the communications have been considered under the Committee's ordinary, not summary proceedings, procedure.

67. The Committee will examine each of the substantive issues set out in paragraph 36 above.

(a) Private nuisance proceedings as national law relating to the environment (article 9, para. 3)

68. The communicants submit that private nuisance cases in general, as a category or "class", fall within the scope of article 9, paragraph 3, of the Convention. In contrast, the Party concerned argues that the essence of private nuisance proceedings is to protect private property rights, not the environment, and that therefore article 9, paragraph 3, does not apply to private nuisance claims "as a class". The Party concerned adds that it is for its national law to define what should be considered as "national law relating to the environment".

69. As a preliminary matter, the Committee stresses that the terms used in the Convention, as an international agreement, must be interpreted in the context of international law and the Convention itself, in the light of its object and purpose.[28] To this end, what constitutes "national law relating to the environment" must be interpreted in accordance with the object and purpose of the Convention.

70. The Convention does not define the term "national law relating to the environment". Article 2, paragraph 3, does, however, contain a definition of "environmental information". This definition is broad and includes, inter alia, "factors such as noise", "conditions of human life", and "built structures". As the Committee pointed out in its findings on

[26] ECE/MP.PP/C.1/2010/6/Add.3, para. 141, emphasis added.
[27] Ibid., para. 145, emphasis added.
[28] 1969 Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, No. 1-18232, article 31.

communication ACCC/C/2011/63 (Austria), this also implies a broad understanding of the term "environment" in article 9, paragraph 3.[29]

71. In this vein, in those findings, the Committee found that "the text of the Convention does not refer to 'environmental laws', but to 'laws relating to the environment'", and consequently that "article 9, paragraph 3, is not limited to 'environmental laws', e.g., laws that explicitly include the term 'environment' in their title or provisions".[30] The Aarhus Convention Implementation Guide states that "the provisions on access to justice essentially apply to all matters of environmental law"[31] and that "national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment."[32] The Committee finds that a broad interpretation of the term "national law relating to the environment" should likewise be applied when considering whether article 9, paragraph 3, of the Convention applies to private nuisance proceedings.

72. In its findings on communication ACCC/C/2008/23 (United Kingdom), the Committee concluded that, in the context of that case, which related to offensive odours from a waste composting site, the law on private nuisance was part of the law relating to the environment of the Party concerned, and therefore was within the scope of article 9, paragraph 3, of the Convention. The Committee considers that the same conclusion should apply to cases of private nuisance resulting from noise, odours, smoke, dust, vibrations, chemicals, waste or other similar pollutants. In *Coventry v. Lawrence, No. 1,* the Supreme Court held that "since the middle of the 19th Century common law nuisance has played an important complementary role to regulatory controls, on the one hand stimulating industry to find better technical solutions to environmental problems, and, on the other, stimulating the legislature to fill gaps in the regulatory system."[33] The fact that the law of private nuisance primarily relates to protecting the rights of individual property owners to enjoy their land does not exclude that it at the same time regularly concerns various components of the environment and aims to protect them.

73. The Committee therefore concludes that, in general, private nuisance proceedings should be considered as judicial procedures aimed to challenge acts or omissions by private persons and public authorities that contravene national law relating to the environment in the sense of article 9, paragraph 3, of the Convention. This does not mean that the Convention must necessarily apply to each and every private nuisance proceeding. In practice, the principal criteria for assessing the Convention's applicability to a specific private nuisance case would be whether the nuisance complained of affects the "environment", in the broad meaning of this term (see paras. 70–71 above). The number of people affected, the claimant's motivation for bringing private nuisance proceedings or the proceedings' possible significance for the public interest are not decisive to an assessment of whether the procedure falls within the scope of national law relating to the environment.

(b) Alternatives to private nuisance proceedings (article 9, paras. 3 and 4)

74. The communicants submit that if private nuisance proceedings are within the scope of article 9, paragraph 3, of the Convention, they must necessarily meet the requirements of article 9, paragraph 4, as that provision's requirements apply to all procedures referred to in

[29] ECE/MP.PP/C.1/2014/3, para. 54.
[30] Ibid., para. 52.
[31] p. 187.
[32] p. 197.
[33] [2014] UKSC 13, para. 176.

paragraphs 1, 2 and 3 of article 9. Therefore, private nuisance procedures must not be prohibitively expensive. The Party concerned counters that members of the public have access to other low cost procedures to challenge the same acts and omissions and, consequently, even if private nuisance proceedings are within the scope of article 9, paragraph 3, they would not have to meet the requirements of paragraph 4. Rather, there would only be non-compliance if the alternative procedures were either not available to members of the public or would not provide for effective remedies.

75. The Committee must therefore determine whether the requirements of article 9, paragraph 4, must be met for all procedures falling within the ambit of paragraph 3, or whether the Party concerned can achieve compliance with the Convention so long as members of the public have access to even one alternative procedure through which they could challenge a particular act or omission, and which would provide for adequate and effective remedies.

76. In past findings, the Committee has repeatedly held that, when evaluating compliance with article 9, it pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in paragraph 18 of the preamble of the Convention that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced". For example, in its findings on communication ACCC/C/2006/18 (Denmark), the Committee noted that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, so long as there were other means for challenging those acts and omissions.[34]

77. Similarly, in its findings on communication ACCC/C/2011/63 (Austria), the Committee found that "whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention."[35]

78. Following this line of reasoning, it is apparent to the Committee that if the legal system of the Party concerned provides for more than one procedure through which members of the public can challenge a particular act or omission contravening national law related to environment, it is sufficient for compliance with the Convention that at least one of these procedures meets all the requirements of article 9, paragraphs 3 and 4. The Committee points out, however, that it would be in keeping with the goals and spirit of the Convention to maintain several such procedures meeting all these requirements.

79. The Committee stresses that, for any procedure to be considered as a fully adequate alternative to another, it must be available to at least the same scope of members of the public, enable them to challenge at least the same range of acts and omissions, provide for at least as adequate and effective remedies, and meet all the other requirements of article 9, paragraphs 3 and 4, of the Convention.

80. In this regard, the Committee refers back to the definition of private nuisance set out in paragraph 15 above. It follows from this definition that the scope of the members of the public entitled to bring private nuisance proceedings is limited to the users or occupiers of land or to those entitled to enjoy the land or some right connected with that land. The range of acts and omissions which can be subject to a private nuisance claim is wide and includes various kinds of interferences, often related to different aspects of the environment.

[34] ECE/MP.PP/2008/5/Add.4, para. 30.

[35] ECE/MP.PP/C.1/2014/3, para. 63.

Moreover, private nuisance claims can be used to challenge acts and omissions infringing the rights of the applicant in various situations: continuous and long-lasting interference; "one-off" activities causing serious harm;[36] disturbing activities ongoing for a certain period and subsequently ceased;[37] or even in cases when the harm has not yet commenced, but there is a reasonable presumption that if the activity goes ahead it will result in "substantial and imminent damage".[38] The remedies available in the private nuisance proceedings include injunctions, inter alia, to terminate or limit the nuisance or to take some other action to redress the nuisance and, under some circumstances, the award of damages.

81. The Committee must determine whether the administrative and judicial procedures presented by the Party concerned (see para. 34 above), individually or collectively, represent adequate alternatives to private nuisance proceedings, bearing in mind the characteristics summarized in the above paragraph.

(i) Complaints to the relevant regulator, local authority or ombudsman

82. The Party concerned asserts that where the alleged nuisance concerns a breach of a licence condition or where the activity amounts to an offence, any member of the public can report it to the appropriate regulator (administrative authority), which should consider whether to take enforcement action. Where the breach is alleged to amount to a statutory nuisance, it is possible to make a complaint with a view to the authority taking action under section 80 of the EPA. If members of the public are not satisfied with the actions taken by the authority, or with its refusal to take such measures, they can complain to the relevant ombudsman.

83. As the Committee stated in its findings on communication ACCC/C/2006/18 (Denmark), article 9, paragraph 3, requires more than a right to address an administrative agency about an illegal activity.[39] It is intended to provide members of the public with access to adequate remedies regarding acts and omissions which contravene environmental law, and with the means to have environmental laws enforced and made effective. Parties to the Convention are therefore obliged to ensure that members of the public meeting the criteria, if any, laid down in national law, have access to administrative or judicial procedures to directly challenge the acts and omissions of private persons or public authorities which they allege contravene national environmental law.

84. The right to ask a public authority to take action does not amount to a "challenge" in the sense of article 9, paragraph, 3, and especially not if the commencement of action is at the discretion of the authority, as is the case in the Party concerned. Rather, members of the public must be able to actively participate in the process of reviewing the acts or omissions, the legality of which they question.[40] The process must also meet all the requirements of article 9, paragraph 4, of the Convention. If the Party opts to provide for access to justice

[36] Joint reply by communicants of 5 September 2014, para. 11, citing *Vernon Knights Associates v. Cornval Council* [2014] Env LR 6.

[37] Ibid., paras. 12–14, citing *Thomas v. Merthyr Tydfil Car Auction Ltd* [2013] Env LR 12 and *Barr v. Biffa Waste Services Ltd* [2013] QB 455.

[38] Ibid, paras. 15–16, citing *Fletcher v. Bealey* (1884) ChD 688.

[39] ECE/MP.PP/2008/5/Add.4, para. 28.

[40] See also the Aarhus Convention Implementation Guide, p. 199: "Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but the public also has an important role to play."

through administrative review procedures, those procedures must fully compensate for any absence of judicial procedures.[41]

85. The Committee does not consider that the possibility for members of the public to report alleged nuisances to the responsible administrative authorities (regulators), and then subsequently to complain to the ombudsman, provide for adequate alternatives to private nuisance proceedings. These possibilities are not connected with any procedural rights enabling members of the public to effectively commence a procedure to review the act or omission allegedly causing the nuisance, to actively participate in such proceedings, or to enforce adequate remedies. Furthermore, the ombudsman cannot deal with the alleged nuisance as such, but may only review the actions of the regulator and provide recommendations.

(ii) Judicial review of complaints to the relevant regulator, local authority or ombudsmen

86. The Party concerned submits that, if an alleged nuisance constitutes a breach of a condition of licence or an offence, this may require a duty of action by the responsible administrative authority and, should the authority fail to take appropriate action, members of the public can seek judicial review of this failure. This, according to the Party concerned, should be considered as one of the alternatives to private nuisance proceedings.

87. The Committee notes that private nuisance proceedings aim to challenge acts or omissions by users of land (usually private persons) that have allegedly caused, or are causing, harm to their neighbours. Only some, and by no means all, of private nuisances involve a breach of a licence or amount to an offence. Moreover, even if an alleged private nuisance would also constitute a breach of a licence or an offence, the focus of any ensuing judicial review would not be the private nuisance itself, but rather an act or omission by the public authority related to its regulatory powers. As the Court of Appeal pointed out in *Austin v. Miller Argent*, "It seems to us unrealistic to believe that the powers conferred upon public authorities will suffice to achieve the Convention's objectives".[42]

88. The Committee therefore concludes that judicial review of the responsible administrative authority's failure to take appropriate action in case of a licence breach or an offence by an operator does not represent an adequate alternative to private nuisance proceedings.

(iii) Statutory nuisance proceedings

89. The Party concerned claims that the "statutory nuisance proceedings" under section 82 of the EPA represent a further alternative to private nuisance claims. Under section 82, any person aggrieved by a statutory nuisance is entitled to start judicial proceedings against the responsible person. If the existence of the statutory nuisance is proved, the court may make an abatement order requiring that the nuisance is stopped and may also impose a fine.

90. The Committee has no doubt that statutory nuisance proceedings represent a judicial procedure in the sense of article 9, paragraph 3, through which members of the public, aggrieved by acts or omissions amounting to a statutory nuisance, can challenge those acts or omissions. It is also clear from the parties' submissions that there is a considerable overlap between the scope of private and statutory nuisance proceedings. The communicants concede that in some cases statutory nuisance proceedings might indeed

[41] See the findings of the Committee on communication ACCC/C/2008/32 (European Union) (ECE/MP.PP/C.1/2011/4/Add.1), para. 92.

[42] [2014] EWCA Civ 1012, para. 18.

provide an adequate alternative to a private nuisance claim. Yet they allege that many types of environmental nuisances fall outside the definition of statutory nuisance, and furthermore that claimants face a number of barriers that are not present in private nuisance claims. The Committee must therefore consider the extent to which these alleged differences and barriers prevent statutory nuisance proceedings from being a fully adequate alternative to private nuisance claims.

91. Concerning the respective scope of private nuisance and statutory nuisance, the communicants have provided a list of environmental nuisances that they allege would not constitute a statutory nuisance but could be challenged through a private nuisance claim (including smoke emissions, fumes and gases from business premises, noise from traffic, harm caused by contamination of land or shadowing). The Party concerned has not disputed this list.[43] Moreover, the communicants submit that the scope of private nuisance continues to evolve through case law over time, whereas the categories of statutory nuisances are explicitly defined in section 79, paragraph 1, of the EPA.

92. Based on the above, the Committee finds that while the majority of environmental nuisances appear to fall within the scope of both private nuisance and statutory nuisance under the EPA, a number could only be challenged by a private nuisance claim. In such cases, statutory nuisance cannot be considered to be an adequate alternative to private nuisance proceedings.

93. Another aspect concerns the issue of whether the nuisance must be ongoing (existing) at the date of the complaint. Under section 82 of the EPA, this is a necessary condition for a statutory nuisance procedure. In contrast, a private nuisance claim can in certain circumstances be used to challenge serious harms caused by "one-off" activities, as well as activities that were ongoing for a certain period but have subsequently ceased, or as a means of protection against substantial and imminent damage which can reasonably be presumed if an activity goes ahead (see para. 80 above). The Committee finds that in all these situations, if the particular nuisance concerns the environment, the nuisance should be considered as within the scope of article 9, paragraph 3. Therefore, statutory nuisance proceedings would not represent an adequate alternative to a private nuisance claim in these cases either.

94. The communicants submit that a further deficiency of statutory nuisance is that the possibility to claim compensation (damages) as a remedy is more limited than in private nuisance.

95. In both types of proceedings, the primary remedy sought by claimants is to stop or diminish the nuisance. In private nuisance, as a rule, a finding of nuisance should normally be followed by an injunction, unless specific circumstances provide otherwise.[44]

96. However, in some circumstances the courts in private nuisance cases can award damages to compensate the harm instead of an injunction. According to the communicants, the judgment of the Supreme Court in *Coventry v. Lawrence, No. 1*, indicates that the award of damages in private nuisance cases may become more common in the future.[45]

97. In statutory nuisance proceedings, when the nuisance is proved, the court issues an abatement order. In addition, the courts can make a compensation order for personal injury, loss or damage arising from the statutory nuisance. This order, however, can only compensate for damage that occurred during the period of the proceedings and is therefore, according to the communicants, generally very modest.

[43] E.g., letter of the Party concerned of 5 September 2014, para. 23.

[44] *Coventry v. Lawrence, No. 1*, [2014] UKSC 13, para. 101–115.

[45] Ibid., paras. 120–132, 154–161.

98. The Party concerned submits that, according to the Aarhus Convention Implementation Guide,[46] article 9, paragraph 3, envisages that members of the public may bring court proceedings to have the law enforced, rather than to redress personal harm. The Party concerned argues that it follows that compensation or damages should not be considered as remedies in the sense of article 9, paragraph 4, for procedures under article 9, paragraph 3.

99. From the information provided, the Committee understands that injunctions or abatement orders are, in practice, the most common and adequate remedies to enforce the law in the case of environmental nuisances. However, as the judgment of *Coventry v. Lawrence, No. 1* cited in paragraph 96 above illustrates, there are cases in which an injunction or abatement order is not a reasonable solution. In such cases, compensating the claimant with damages may be the only adequate and effective remedy. This does not mean that the case is not related to the environment any more. As the Aarhus Convention Implementation Guide's commentary on article 9, paragraph 4, states: "Adequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and/or to provide for restoration" and "although monetary compensation is often inadequate to remedy the harm to the environment, it may still provide some satisfaction for the persons harmed".[47]

100. The Committee therefore concludes that, with respect to environmental nuisances for which monetary compensation for the damage occurring before the case was brought to court would be the only available or reasonable remedy, statutory nuisance proceedings do not amount to an adequate alternative to a private nuisance claim, as they do not provide for such a remedy.

101. The communicants referred to a number of other limiting aspects of statutory nuisance proceedings, namely, the defences of "best practicable means" and "reasonable excuse", stricter procedural and evidential limitations, an inability to use such proceedings in cases of multiple claimants, and the possibility of a costs claim by a successful defendant. The Committee decides not to deal with these aspects, as it does not find them necessary for determining whether statutory nuisance proceedings represent a fully adequate alternative to private nuisance claims, since for the reasons set out in paragraphs 99 to 108 above it has already found that such proceedings do not.

102. Based on the above findings, and without making any finding regarding the aspects set out in paragraph 101 above, the Committee is of the view that statutory nuisance proceedings may to a considerable extent provide an alternative to private nuisance claims. However, it finds that for a number of cases this conclusion would not apply, since:

(a) The definition of statutory nuisance does not cover all the kinds of environmental nuisance which can be challenged by means of a private nuisance claim;

(b) Statutory nuisance proceedings cannot be used in situations when the nuisances are not ongoing;

(c) Statutory nuisance does not provide the possibility for compensation through the award of damages in cases where this would be the only available or reasonable remedy.

For these reasons, the Committee finds that statutory nuisance proceedings do not represent a fully adequate alternative to private nuisance claims.

[46] p. 197.
[47] p. 200.

(iv) Private prosecution

103. The Party concerned alleges that, in cases where a nuisance amounts to a criminal offence, in addition to statutory nuisance proceedings, which as such are criminal in nature, any person can institute criminal proceedings. The Party concerned does not provide any details about the scope of private nuisance cases which might be challenged by means of a private prosecution, nor the specific conditions and requirements for starting such a prosecution. Neither does it provide any examples of successful private prosecutions for environmental nuisance. Therefore, the Committee does not find private prosecution to be an adequate alternative to a private nuisance claim.

(v) Conclusion regarding alternatives to private nuisance proceedings

104. It follows from the above examination that with respect to the requirements of article 9, paragraphs 3 and 4, of the Convention, only statutory nuisance proceedings may be considered to be a viable alternative to a private nuisance claim. However, in a number of respects, statutory nuisance does not provide an adequate alternative either (see para. 102 above). The Committee thus finds that the administrative and judicial procedures presented by the Party concerned do not either individually or collectively provide for a fully adequate alternative to private nuisance proceedings.

(c) Costs of private nuisance proceedings (article 9, para. 4)

105. Having found that there is no fully adequate alternative to private nuisance proceedings, the Committee must next determine whether private nuisance proceedings in the Party concerned are in fact prohibitively expensive under article 9, paragraph 4, of the Convention.

106. When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, the Committee considers the cost system of the Party concerned, or its relevant parts, as a whole and in a systemic manner.[48] Therefore, the Committee considers whether, taking into account the entry into force of LASPOA section 46, the legal system of the Party concerned as a whole makes the costs of private nuisance proceedings within the scope of article 9, paragraph 3, prohibitively expensive.

107. In its findings on communication ACCC/C/2008/33, the Committee held that the usual "costs follow the event" rule (which, according to section 44.2, paragraph 2, of the Civil Procedure Rules also applies as a general rule in private nuisance proceedings in England and Wales) is not inherently objectionable under the Convention, and the compatibility of this rule with the Convention depends on the availability of other aspects of the legal system to modify the effects of the basic rule in cases involving members of the public as litigants.[49] The Committee finds that the above conclusion is equally applicable to private nuisance cases.

108. Also in its findings on communication ACCC/C/2008/33, the Committee found that without a clear rule to prevent prohibitively expensive court procedures, the measures then available under the legal system of the Party concerned, including a wide discretion for courts regarding the award of costs, did not ensure that costs remained at a level which met the requirements of the Convention. The Committee therefore concluded that "by failing to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the

[48] See findings on communication ACCC/C/2008/33 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.3), para. 128.

[49] Ibid., para. 129.

legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention".[50] With respect to private nuisance proceedings within the scope of article 9, paragraph 3, the Committee finds that there is similarly an absence of any clear legally binding directions from the legislature or judiciary ensuring that the costs for private nuisance proceedings within the scope of article 9, paragraph 3, are not prohibitively expensive.

109. Despite the different characteristics of private nuisance proceedings and challenges to acts and omissions by public authorities, to the extent that each is within the scope of article 9, paragraph 3, of the Convention, the requirements of article 9, paragraph 4, apply to both. The Committee therefore considers that the above findings on communication ACCC/C/2008/33 are relevant also for private nuisance proceedings within the scope of article 9, paragraph 3. Such a conclusion is supported by the communicants' submission, not rebutted by the Party concerned, that the costs of environmental nuisance cases almost always exceed £100,000 per party (see para. 25 above).

110. In its findings on the communication ACCC/C/2008/33, the Committee recommended that the Party concerned "review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures … to ensure that such procedures: (i) are fair and equitable and not prohibitively expensive; and (ii) provide a clear and transparent framework".[51] This recommendation was subsequently welcomed by decisions IV/9i and V/9n of the Meeting of Parties.

111. The Party concerned subsequently amended its procedural rules to introduce costs limits for proceedings defined as "Aarhus Convention Claims".[52] However, according to the Party's submissions to the Committee, these costs limits apply only to judicial review cases, not to private nuisance claims.

112. Given that (a) the Party concerned takes the view that private nuisance proceedings fall outside the costs limits introduced through the procedural rules, (b) the Party has not put before the Committee any other means (besides those already examined in the Committee's findings on communication ACCC/C/2008/33) through which it ensures private nuisance proceedings are not prohibitively expensive, and (c) it is not disputed that the costs in private nuisance proceedings typically exceed £100,000, the Committee finds that the Party concerned has failed to ensure that private nuisance proceedings falling within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive.

113. This conclusion is further strengthened by the entry into force of section 46 of LASPOA, since its prohibition on successful claimants recovering the premium for ATE insurance introduces an additional financial burden for members of the public seeking access to private nuisance procedures. On the basis of the information before it, the Committee considers that the Party concerned cannot presently rely on BTE insurance as a mechanism to eliminate this additional burden as the vast majority of the public, i.e., potential private nuisance claimants, do not have BTE insurance. Moreover, the Committee does not consider any kind of private insurance scheme whose general availability is not guaranteed by law to be capable of ensuring a Party's compliance with the Convention's requirement that members of the public have access to procedures which are not prohibitively expensive. The same reasoning applies to the possibility for claimants to engage solicitors on conditional fee agreements, an option which is likewise not guaranteed

[50] Ibid., para. 141.
[51] Ibid., para. 145.
[52] Civil Procedure Rule 45.41, para. 2.

by law but depends on the willingness of the solicitor involved, and which furthermore does not prevent claimants from the risk of other high costs in the proceedings.

114. The Committee accordingly finds that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

(d) Article 9, paragraph 5

115. In its findings on communication ACCC/C/2008/33, the Committee further held that that the system of the Party concerned as a whole was not such as "to remove or reduce financial … barriers to access to justice", which article 9, paragraph 5, of the Convention requires Parties to consider.[53] Through decision V/9n, the Meeting of the Parties endorsed the Committee's finding that the Party concerned was still not in full compliance with this provision. Given this decision, the Committee does not consider it necessary to adopt further findings with regard to article 9, paragraph 5.

IV. Conclusions and recommendations

116. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

117. The Committee finds that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention (see para. 114 above).

B. Recommendations

118. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 109 to 114 above to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive.

[53] ECE/MP.PP/C.1/2010/6/Add.3, para. 136.

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Compliance Committee

Fifty-sixth meeting
Geneva, 28 February–3 March 2017
Item 9 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/71 concerning compliance by Czechia

Adopted by the Compliance Committee on 13 September 2016

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I. Introduction

1. On 31 May 2012, Brigitte Artmann (the communicant), a member of the public, submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Czechia to comply with its obligations under article 3, paragraph 9, and articles 6 and 9 of the Convention. Specifically, the communication alleges that members of the public in Germany did not have the same possibility to participate in the decision-making procedure concerning the Temelín Nuclear Power Plant (Temelín NPP) as members of the public in Czechia.[1]

2. At its thirty-seventh meeting (Geneva, 26–29 June 2012), the Committee determined on a preliminary basis that the communication was admissible.

3. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 16 August 2012. On the same date, a letter was sent to the communicant. Both were asked to address a number of questions from the Committee.

4. The communicant and the Party concerned responded to the Committee's questions on 28 November 2012 and 14 January 2013, respectively. The communicant commented on the Party's response on 2 February 2013.

5. Additional information was submitted by the communicant and the Party concerned on 4 March and 22 March 2013, respectively.

6. The Committee held a hearing to discuss the communication at its fortieth meeting (Geneva, 25–28 March 2013), with the participation of the communicant and the Party concerned. During the hearing, the Committee confirmed the admissibility of the communication and put questions to both parties, inviting them to respond in writing after the meeting.

7. The communicant and Party concerned submitted their responses on 14 and 20 May 2013, respectively. On 26 May 2013, the communicant sent comments on the response of the Party concerned and, on 13 June 2013, the Party concerned sent comments on the communicant's comments. The communicant provided its reaction to the Party's comments the same day.

8. The Committee agreed its draft findings at its virtual meeting on 1 June 2016, completing them through its electronic decision-making procedure on 15 June 2016. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded to the parties for comments on 27 June 2016, inviting their comments by 25 July 2016.

9. The communicant and the Party concerned provided comments on 10 July 2016 and 6 September 2016, respectively.

10. The Committee finalized its findings in closed session at its virtual meeting on 13 September 2016, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document for its fifty-sixth meeting.

[1] Documents concerning this communication, including correspondence between the Committee, the communicant and the Party concerned, are available on a dedicated web page of the Committee's website (http://www.unece.org/envenv/pp/compliancecommittee/71tablecz.html).

II. Summary of facts, evidence and issues[2]

A. Legal framework

International and European Union law

11. Both Czechia and Germany are Parties to the Aarhus Convention. They are also Parties to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

12. Czechia has signed bilateral cooperation agreements with Germany and Austria regarding nuclear energy and safety. The agreements also cover the exchange of information regarding preparations for construction of the Temelín NPP.

13. Nuclear power plants (NPPs) are subject to the European Union Environmental Impact Assessment Directive (EIA Directive).[3]

National law[4]

14. Under Czech law, the first step in decision-making for a project such as the Temelín NPP is an environmental impact assessment (EIA) procedure regulated by Act No. 100/2001 Coll. on EIA (EIA Act). The EIA Act regulates both domestic and transboundary EIA procedures, as well as the related public participation procedures. Section 16, paragraphs 1 and 2, of the Act prescribe the contents of the notice to be given to the public regarding the procedure. Section 16, paragraphs 3 and 4, set out the manner in which notice is to be carried out, namely:

> (3) The relevant authority shall ensure that, information and statements referred to in paragraphs 1 and 2 are published:
>
> a. on the official notice boards of the affected territorial self-governing units
>
> b. on the Internet, and
>
> c. in at least one of the other ways usual in the affected territory (e.g. in the local press, on the radio, etc.).
>
> (4) The date of publication shall be considered to be the day when the information and statement pursuant to paragraphs 1 and 2 were displayed on the official notice board of the affected region. The affected territorial self-governing units shall be obliged to display the information and statements pursuant to paragraphs 1 and 2 immediately on their official notice board for a period of at least 15 days and inform the relevant authority thereof.

15. For the permitting procedure on the Temelín NPP, the reference to "affected territorial self-governing units" in section 16, paragraph 4, of the EIA Act was interpreted to include municipalities whose administrative territory includes an internal or external part of the emergency planning zone (approximately the area of a circle with a radius of 13

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

[3] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended.

[4] This subsection refers to the legislation of the Party concerned at the time of the decision-making procedure at issue in this case.

kilometres centred in the containment area of the first production unit of the Temelin NPP).[5]

16. For projects where, according to the EIA Act "the affected territory can extend beyond the territory of [Czechia]", the EIA Act envisages transboundary consultations with the affected States.

17. The EIA procedure is completed with the issuance of an EIA statement. Under Czech law at the time of the decision-making procedure in the present case, the EIA statement was not a permit itself, but constituted an expert basis upon which the next steps in the decision-making for a development consent, such as the zoning, planning permit, or building permit procedure, would be built.

B. Facts

18. Temelín NPP is located near the village of Temelín in Czechia. Construction of four operating units began in 1987, with completion scheduled for 1991. Owing to political events, construction of reactors 3 and 4 ceased in the 1990s, while construction of reactors 1 and 2 proceeded slowly. Temelín reactor 1 was eventually commissioned in 2000 and Temelín reactor 2 in 2002.

19. The plan to complete reactors 3 and 4 was revived in 2005. The EIA process was launched in 2008. In 2012, bids were opened for the public contract for completing the Temelín NPP.

20. The Party concerned did not conclude a bilateral agreement with Germany pursuant to the Espoo Convention, but Germany was involved in all stages of the transboundary EIA process in accordance with that Convention. Consultations with Germany within the transboundary EIA process took place in June 2011.

21. The official hearing for the EIA process took place in Ceske Budejovice, Czechia, on 22 June 2012 for Czech citizens and interested persons from neighbouring countries. Informal discussions with EIA experts were also organized in Vienna on 30 May 2012 and Passau, Germany, on 12 June 2012. The EIA statement was issued on 18 January 2013.

22. The communicant participated in the EIA process from 2010.

C. Domestic remedies and admissibility

23. According to the communicant, since the hearing in Passau was an informal meeting, no remedies are available under German law. Moreover, since the official hearing in Ceske Budejovice and the EIA process itself were conducted under Czech law, any available remedies exist only under Czech law with no opportunity to appeal to a German court. She submits it is difficult for her and other members of the German public to access these remedies because of their unfamiliarity with the Czech legal system and the language barrier.

24. On 6 August 2012, the communicant submitted a complaint with the European Commission.[6]

25. The Party concerned challenged the communication's admissibility on the grounds that the decision-making on reactors 3 and 4 is still in its initial stages. It submits that the

[5] Response of the Party concerned to communication, annex E1.

[6] See annexes to communicant's letter of 28 November 2012.

primary objective of the Aarhus Convention is to set standards for the permission phase, which the Temelín project has not yet reached, and the communication should therefore be declared inadmissible.

D. Substantive issues

Article 3, paragraph 9

26. The communicant alleges that, by not organizing a formal hearing in Germany, the Party concerned failed to comply with article 3, paragraph 9, of the Aarhus Convention because the opportunities for the public in Germany to participate in the EIA procedure were not the same as those for the public in the Party concerned.

27. The communicant contends that at least one formal hearing in Germany was justified by the project's complexity and transboundary dimension and the thousands of comments submitted by German citizens. Instead, only an informal public discussion, outside the formal EIA procedure, was held in Germany. Consequently, German citizens had to travel to the formal hearing in Czech territory, bearing the costs of travel, accommodation and time off work.

28. The communicant alleges that, in April 2012, German Chancellor Angela Merkel asked the Czech Government to hold a formal public hearing in Germany, but that request was not accepted.

29. The Party concerned disputes the allegations, stating that natural and legal persons in Germany received the same attention as natural and legal persons in Czechia. It submits there is no legal basis under national or international law for a country of origin to organize a public hearing in the territory of the affected country. Moreover, there was no obligation under national or international law to organize an informal discussion in Germany, but it voluntarily did so in order to ensure the transparency of the project for the public in Germany.

30. Regarding the official hearing, the Party concerned submits that, in order to ensure broad public participation, the invitation was sent to the public concerned in Czechia and abroad on the same day, well in advance of the meeting. The location was selected for its accessibility by road, parking capacity, venue size (capacity for 2,500 people) and proximity to borders with Germany and Austria (approximately 80 and 40 kilometres, respectively).

Article 6, paragraph 2

31. The communicant contends that there was a failure to adequately notify the public concerned in Germany. Despite the possible widespread environmental impacts of a nuclear accident, only persons living in German border districts were informed about the possibility to participate in the EIA procedure. Persons living elsewhere in Germany received no official notification at all. Even in the German border districts, there were no public notifications in newspapers or other public media. The only information available was on the official websites of the ministries and councils of the border districts and cities.

32. The Party concerned submits that, since the onset of the EIA procedure, it has kept neighbouring countries informed in a timely manner. On 29 June 2010, the EIA documentation, fully translated into German, and including an electronic version on compact disc, was sent by the Czech Ministry of Environment to the Bavarian State Ministry for Environment and Health and the Saxon State Ministry for the Environment and Agriculture with a copy "for information" to the German Federal Ministry for the

Environment, Nature Conservation, Building and Nuclear Safety. The covering letter, inter alia, stated:[7]

> Within the meaning of Section 16, para. 3 of the Act and in accordance with Article 4 para. 2 of the Espoo Convention, we would request that you ensure that information on the documentation and on when and where the documentation can be consulted is published within a reasonable time on the official notice boards of the affected areas and in at least one of the other ways usual in the affected territory (e.g. in the local press, on radio, etc.), along with the information that anyone may send his/her written comments on the documentation within 30 days of the date on which the information on the documentation was posted on the official notice board of the South Bohemia Region. Pursuant to the provisions of Section 16 para. 4 of the Act, the period during which this information is to be displayed is at least 15 days.

The letter also stated that, in accordance with section 12, paragraph 1, of the Czech EIA Act, the deadline for submission of comments in cases of transboundary assessment might be extended by up to 30 days if the affected State so requested.

33. The Party concerned submits that, once the above information was provided to the German authorities, it could not influence the manner in which the German authorities chose to inform the public.

34. The Party concerned states that the EIA documentation was also posted online in the Czech language on the websites of the Czech Environmental Information Agency (www.cenia.cz/eia) and the Ministry of Environment.

Article 6, paragraph 2 (d) (ii)

35. The communicant alleges that there was no proper public notice for the public in Germany about the hearing in Ceske Budejovice, and information about the hearing was not easy to access. Though she made several requests to the Party concerned prior to the hearing for information on its format, none was provided. No agenda was made public, nor was information given on the proposed duration of the hearing, whether all participants would be entitled to speak and whether, if needed, the hearing would continue the next day.

36. The Party concerned did not comment on these allegations.

Article 6, paragraph 3

37. The communicant alleges that, given the project's transboundary nature and complexity, the time frames provided in 2010 and 2012 for the public to comment and the time allotted for the formal hearing did not enable the public to participate in an adequate, timely and effective manner as required by article 6, paragraph 3.

38. The communicant alleges that the public was given 30 days in August 2010, extended by a further 30 days in September, to comment on 2,000 pages of EIA documentation. However, this period coincided with the vacation period (Bavarian summer holidays in 2010 ended on 13 September 2010), leaving effectively only 17 days for the public in Germany to participate. The period to comment on the EIA expert report, from 7 May until 18 June 2012, was similarly inadequate. In Bavaria there were holidays from 26 May until 10 June, leaving 27 days for submitting comments. Moreover, the public in the border districts of Hof and Wunsiedel, where the communicant lives, was first notified through the local newspaper on 29 May, meaning the public in that area had only 18 days to comment. The communicant refers to the Committee's findings on communication

[7] See response from the Party concerned to communication, annex A1.

ACCC/C/2008/24 (Spain),[8] which considered the timing of opportunities for the public to examine and comment on documentation relating to a proposed activity.

39. The communicant states that a single day for such a large-scale hearing was clearly too short. Moreover, the hearing was poorly organized, resulting in frustration for participants. For example, though the hearing opened at 10 a.m., officials' speeches took so long that public participation only started at 3:30 p.m. Moreover, because public authorities spoke first, few of them stayed through the afternoon, much less the evening and night.

40. The communicant alleges that, though the organizers were informed that she was nominated as a speaker on behalf of the German Greens and others, she was not included on the speakers' list. Only three questions were allowed per speaker per turn. Her first opportunity to speak came at around 5:30 p.m., and then she had to queue for another turn. Her next turn to raise three questions came at 3 a.m., when both the public and organizers were extremely tired. She had 68 further questions, but no opportunity to raise them. She submitted those questions in writing after the hearing, but received no response.

41. The communicant contends that Czech citizens present at the hearing were allowed to speak earlier than German citizens; as a result, they could go home earlier. As well as breaching article 6, paragraph 3, she submits that this was discrimination under article 3, paragraph 9.

42. She alleges that, although the public hearing was organized on a hot summer day, participants had no access to water or to buy food. Only after repeated demands were they allowed to bring water into the venue.

43. The communicant states she travelled 280 kilometres, which took nearly 5 hours, to take part in the hearing, but was not able to participate effectively. Many German citizens had to leave the hearing at 8 p.m. to catch buses home, and were left disappointed and frustrated at being unable to participate properly.

44. The Party concerned refutes these allegations, submitting that German citizens had ample opportunity to participate. The EIA documentation was translated into German and disseminated to the public in Germany and Austria. Moreover, the EIA Act provides longer commenting periods for the public outside Czech territory. The public in Germany had 60 days in 2010 to provide comments on the EIA documentation, and 43 days in 2012 to submit comments on the EIA expert report. The Party concerned states that around 70,000 comments were received, the majority from Germany and Austria.

45. The Party concerned submits that the hearing in Ceske Budejovice started on 22 June 2012 at 10 a.m. and concluded 17 hours later, when all questions were exhausted. Interpretation was provided in German and Polish. There were only 250 participants and everybody could participate. The hearing finished only when no more questions were raised. The Party did not comment on the allegation that the hearing's lengthy duration impacted the communicant's ability to participate effectively.

46. Regarding the speaking order, the Party concerned explains that the order ensured the public was aware of authorities' and municipalities' views, particularly since it was primarily municipalities that were presenting the affected public's opinions. After their presentations, full attention (and most of the time allocated) was given to the public's questions, which were often directly related to the municipalities and authorities' presentations. That is the normal procedure for public hearings in Czechia.

47. The Party concerned did not comment on the public hearing's organization.

[8] See ECE/MP.PP/C.1/2009/8/Add.1.

Article 6, paragraphs 4, 6 and 7 — use of "envelope" or "black box" method

48. The communicant states that it was never made clear what type of reactor would be chosen for the Temelín NPP. Although four technologies were apparently under consideration at the time of the public participation procedure, no decision had been made and the technology was presented using the so-called "envelope" or "black box" method. The choice of technology was not disclosed at the time of the public hearing on 22 June 2012, rather the decision was due to be taken without public oversight on 2 July 2012. No technological details were given for the designs considered, nor were their differences highlighted or assessed in the EIA documentation. This meant that the public was not able to verify whether the potential environmental effects of each design fell within the legally set criteria for safety; they could not know what the risk of severe accidents and potential emissions was, or assess the potential environmental impacts of the different designs.

49. The communicant also submits that the German translation of the final EIA statement was published with a big delay — initially only a 40-page summary was translated. Thus, it was not possible for the public to properly assess the EIA statement.

50. The communicant further submits that, through its failure to provide access to all technical and scientific information relevant to the decision-making, the Party concerned breached article 6, paragraph 6, and particularly subparagraphs (a) and (c), of the Convention. Moreover, as it was denied access to that information, the public was unable to comment on the design alternatives while they were under consideration, and was therefore unable to participate when all options were open, as required by article 6, paragraph 4, or to submit its own analyses of the potential risks or impacts of those designs, pursuant to article 6, paragraph 7.

51. The Party concerned refutes the allegations concerning article 6, paragraphs 4, 6, and 7. It states that, given that no supplier for the reactor had yet been selected, the "envelope" method was used for the EIA procedure. The assessment of impacts proceeded with the potential maximum impacts of the individual types of reactors in the "envelope", represented by the option with the worst possible environmental impact and also taking into consideration the concurrent effect of existing power plant operations and the existing background. It submits that this approach is consistent with other countries' practice and article 6, paragraph 4, of the EIA Directive. A technical description of all reactor types under consideration was provided in chapter B.I.6 of the EIA documentation, "Description of the technical and technological solution for the project". The description was divided into a general part, defining the project with generation III+ PWR type power units, and a specific part, describing the technical aspects of the power units. The input and output parameters of the project were conservatively estimated on the basis of this information, and that made it possible to make a qualitative and quantitative evaluation of the environmental impact in accordance with article 3 of the EIA Directive. The approach secured the timely and effective participation of the public concerned when all options were open.

Article 6, paragraph 7 — questions at the hearing

52. The communicant alleges that at the hearing she was denied her rights under article 6, paragraph 7, of the Convention because she was limited to three questions per turn, and was not able to ask the 68 further questions she wished to raise on behalf of the public in Germany that she represented.

53. The Party concerned did not comment specifically on this allegation, but maintained generally that the hearing finished when no further questions had been raised.

Article 6, paragraph 8

54. The communicant alleges that, in breach of article 6, paragraph 8, the Czech Ministry of Environment did not take proper account of the public's input in the final EIA statement. For example, the EIA statement concluded that the NPP would have only a low impact on public health and the radiological effects of operation would not threaten the health of people living nearby. The communicant claims that the Ministry did not take into account studies submitted by the public on the relationship between childhood leukaemia and distance from nuclear reactors or the health effects of a serious nuclear accident. The EIA statement also concluded there would be no impact on the environment following decommissioning, failing to take into account the problem of long-term radioactive waste, and conversely concluding that the environmental impact after decommissioning would be positive. The Ministry of Environment accepted a compartmentalized, "salami-slicing" approach to public participation regarding the NPP and radioactive waste storage, although it had been informed by the public that this was in breach of the Convention.

55. The Party concerned refutes the communicant's allegation and states that all comments received, whether they came from within or outside Czech territory, were considered in an identical manner in the finalization of the EIA expert report.

Article 9, paragraphs 2 and 4

56. The communicant submits that there are no opportunities for physical persons (either Czech or German citizens) to challenge decisions, acts or omissions regarding the EIA procedure. Moreover, not all of the potentially affected public is entitled to participate in the subsequent procedures. Lastly, a German citizen seeking to appeal to Czech courts will be faced with high costs. She alleges that the Party concerned thus fails to comply with article 9, paragraphs 2 and 4, of the Convention.

57. The Party concerned states that the EIA procedure is concluded by the issuing of the EIA statement, which is not a decision to construct the project, but a professional basis for subsequent procedures in which it will be taken into account. The EIA statement will thus be subject to judicial action only when it is taken into account in subsequent procedures. The public has a right to bring an action during the subsequent procedures on condition that they meet the statutory requirements, e.g., they are affected owners of neighbouring plots. The Party concerned stresses that the courts interpret the term "neighbouring" extremely widely; all owners of property, even distant, which might be affected can be participants in the subsequent procedures. The Party concerned did not comment on the cost issue.

III. Consideration and evaluation by the Committee

58. Czechia deposited its instrument of accession to the Aarhus Convention on 6 July 2004. The Convention entered into force for Czechia on 4 October 2004.

59. Neither party disputes that the Temelín NPP is an activity referred to in annex I, paragraph 1, to the Convention and is therefore subject to the requirements of article 6 and article 9, paragraph 2.

60. With respect to the submissions on admissibility of the Party concerned (para. 25 above), the Committee notes that the Party has not denied that article 6 must be applied in the context of a multi-stage decision-making process such as the present.[9] The Committee

[9] See Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (ECE/MP.PP/2014/2/Add.2), para. 17.

reiterates that, since the EIA procedure is normally linked closely to decisions that determine whether or not a proposed activity may proceed, it should thus be regarded as part of the decision-making process regardless of the fact that in the Czech legal framework the EIA statement is not a permitting decision per se. Furthermore, according to the evidence before the Committee, the EIA procedure is the principal procedure in the Party's legal framework to address environmental concerns and to allow broad public participation. It is, moreover, the stage of the decision-making which is specifically designated to address transboundary issues, including by allowing the participation of the foreign public. While the entire decision-making procedure on the Temelín NPP may not yet have been concluded, the EIA stage has been completed and therefore can be assessed against the Convention's requirements. Thus, the Committee finds the objection of the Party concerned to the admissibility of the communication to be unsustainable.

61. The Committee will first examine the communicants' allegations regarding article 6 and then article 3, paragraph 9, since without assessing the extent to which the public in Germany had the possibility to effectively participate in the decision-making it is not possible to properly assess whether discrimination has occurred or not.

62. The Committee decides not to examine the allegations regarding article 6, paragraph 8, because the communicant has not provided sufficient evidence to show that the Party concerned failed to take due account of the outcome of the public participation in the EIA statement. Thus, on the evidence before it, the Committee does not find this allegation to be sufficiently substantiated.

63. The Committee also will not deal with the allegations regarding article 9. The communicant has not submitted case law or any other evidence to substantiate her allegations concerning that article, for instance on costs or standing of German citizens to challenge the EIA statement before the courts of the Party concerned.

64. Finally, the Committee decides not to deal with the allegation that German citizens were made to speak last at the hearing, as the communicant has not provided evidence to substantiate that claim. The Committee will, however, examine other allegations regarding article 3, paragraph 9 below.

Article 2, paragraph 5 — the public concerned

65. As a preliminary point, the Committee notes that the Party concerned has not disputed that the communicant, and other members of the public in Germany, are among the public concerned in relation to the Temelín NPP.

Article 6 in the transboundary context

66. Concerning the application of article 6 in a transboundary context, the Committee welcomes the recommendations on how to ensure more effective participation of the public concerned from affected countries contained in the 2014 Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations).[10]

67. It is clear from the wording of article 6 that the obligations imposed by that article are not dependent on obligations stemming from other international instruments. An international treaty may envisage that a Party of origin and an affected Party share joint responsibility for ensuring public participation in the territory of the affected Party (as under the Espoo Convention), or even that the affected Party has sole responsibility for this.

[10] ECE/MP.PP/2014/2/Add.2, paras. 23–26.

However, the obligation to ensure that the requirements of article 6 are met always rests with the Party of origin.

68. The situation in such cases is akin to those where the domestic legal order delegates administrative tasks for public participation to other domestic bodies. Accordingly, as the Maastricht Recommendations state, if "the legal framework seeks to delegate any administrative tasks related to a public participation procedure to persons or bodies other than the competent public authority, it should be borne in mind that the ultimate responsibility for ensuring the public participation procedure complies with the requirements of the Convention will still rest with the competent authority".[11] The Committee considers this wording applies equally to situations where the responsibility for certain tasks related to public participation in the affected country's territory rests (by virtue of an international instrument or ad hoc agreement) on that country's public authorities.

69. In the light of the above, the Committee stresses that, whether in a domestic or transboundary context, the ultimate responsibility for ensuring that the public participation procedure complies with the requirements of article 6 lies with the competent authorities of the Party of origin.

Article 6, paragraph 2 — notification

70. With respect to the allegations concerning article 6, paragraph 2, the Committee will focus on two aspects: notifying the public concerned; and appropriate and adequate information regarding the public hearing.

(a) Notifying the public concerned

(i) Notification in a transboundary context

71. Though the Convention does not expressly address a Party's responsibilities when organizing a public participation procedure in a transboundary context, it nevertheless makes clear that, for all decision-making subject to article 6, the Party must ensure that the public concerned is informed in an adequate, timely and effective manner. The Committee notes that the Czech Ministry of Environment gave clear instructions to the German authorities on how to notify the public in Germany (see para. 32 above) and that these instructions were consistent with the means of notification envisaged for notifying the public in Czechia. Nevertheless, the Committee is not convinced that these instructions were sufficient to ensure effective notification in the transboundary context. The Committee recalls its findings on communication ACCC/C/2006/16 concerning Lithuania, where it noted that "the requirement for the public to be informed in an 'effective manner' means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities".[12] The Committee notes that neither the notification requirements in article 16, paragraphs 3 and 4, of the EIA Act (see para. 14 above) nor the Ministry's request to the German authorities include a clear requirement to this effect.

72. As indicated above, ultimately it is for the competent public authorities of the Party of origin to ensure that the public participation procedure complies with the requirements of article 6, also in situations where the foreign public is involved. In cases that are not subject to a transboundary procedure under an international treaty (e.g., the Espoo Convention), the requirement to inform the public concerned in the affected countries in an adequate, timely

[11] Ibid., para. 28.

[12] ECE/MP.PP/2008/5/Add.6, para. 67.

and effective manner will be the sole responsibility of the competent authority of the Party of origin. Ensuring that the notification is effective may include, inter alia, publishing announcements in the popular newspapers and by other means customarily used in the affected countries, as well as by exploring possibilities for using more dynamic forms of communication (e.g., through social media). In cases that are subject to a transboundary procedure under an international treaty, the Party of origin remains responsible under the Aarhus Convention for the adequate, timely and effective notification of the public concerned in the affected country, either by carrying out the notification itself or by making the necessary efforts to ensure that the affected Party has done so effectively.

(ii) Notification regarding ultrahazardous activities

73. The Committee notes that, for the purposes of the permitting procedure on the Temelín NPP, the reference to "affected territorial self-governing units" in section 16, paragraph 4, of the EIA Act was interpreted to include municipalities whose administrative territory included an internal or external part of the emergency planning zone (approximately the area of a circle with a radius of 13 kilometres centred in the containment area of the first production unit of the Temelín NPP) (see para. 15 above).

74. The Committee is convinced that in the case of decision-making on ultrahazardous activities[13] like an NPP, being activities invariably of wide public concern, particular attention must be taken at the stage of identifying the public concerned and selecting the means of notification in order to ensure that all those who potentially could be concerned in the decision-making, including the public concerned outside its territory, have a reasonable chance to learn about the proposed activities and their possibilities to participate. In this regard, the public may potentially be concerned both because of the possible effects of the normal or routine operation of the NPP and because of the possible effects in case of an accident or other exceptional incident. In both cases, the decision-making may impact not only on matters, such as property or health, but also on less measurable aspects, like quality of life. For an ultrahazardous activity such as an NPP, members of the public may be affected or be likely to be affected by, or have an interest in, the environmental decision-making within the scope of the Convention even if the risk of an accident is very small. In determining who is concerned by the environmental decision-making, the Committee also considers the magnitude of the effects if an accident should indeed occur, whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident, and the perceptions and concerns of persons living within the possible range of the adverse effects. It is clear to the Committee that with respect to NPPs, the possible adverse effects in case of an accident can reach way beyond State borders and over vast areas and regions.

75. For the above reasons, the Committee considers that the geographical scope of the potential effects of the Temelín NPP, including in the event of an accident, cannot be confined only to the "municipalities whose administrative territory includes an internal or external part of the emergency planning zone". In this context, the Committee notes the rather inconsistent approach of the Party concerned to defining the public concerned for the purpose of notification of the Temelín NPP EIA procedure. For domestic purposes it was confined to the public living in the "municipalities whose administrative territory includes an internal or external part of the emergency planning zone" (i.e., within a radius of 13

[13] "An activity with a danger that is rarely expected to materialize but might assume, on that rare occasion, grave (more than significant, serious or substantial) proportions", *Yearbook of the International Law Commission, 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, 2001, commentary to article 1, para. 2.

kilometres), whereas in Germany it included the public in the districts of Bavaria bordering Czechia (more than 100 kilometres away).

76. More generally, the Committee notes that, while a legal framework that chiefly relies on the affected territorial self-governing units using locally specific ways of informing the public may well be adequate for activities whose potential effect on the environment would be confined to that locality, it may be insufficient for ultrahazardous activities that are invariably of wide public concern (whether specific activities subject to article 6 or in the context of plans and programmes subject to article 7). Moreover, notice on the Ministry's web page would not in itself be enough in order to ensure effective notification of the public, as it is not reasonable to expect members of the public to proactively check the Ministry's website on a regular basis just in case at some point there is a decision-making procedure of concern to them. In this respect the Committee recalls paragraph 64 (c) of the Maastricht Recommendations, which provides that public notice should be placed also in "the newspaper(s) corresponding to the geographical scope of the potential effects of the proposed activity and which reaches the majority of the public who may be affected by or interested in the proposed activity".

77. In the light of the above, the Committee finds that by requiring that only the public in Czechia living in the "municipalities whose administrative territory includes an internal or external part of the emergency planning zone" (i.e., within a radius of 13 kilometres) be notified, the Party concerned failed to ensure that all the public in Czechia that potentially could be concerned had a reasonable chance to learn about proposed activities. Likewise, although the distance in which the public in Germany was notified was wider, only the public in the districts of Bavaria bordering with Czechia was notified and not in other parts of Germany (see paras. 31–32 above).

78. Having reviewed article 16 of the EIA Act, the Committee considers that the law of the Party concerned does not contain a sufficient guarantee that in the case of decision-making regarding activities having clearly more than local scope (such as an NPP) all those who potentially could be concerned, including the public concerned outside its territory, would indeed have a reasonable chance to learn about proposed activities and their possibilities to participate.

79. For the above reasons, the Committee finds that, by not providing a clear requirement in its legal framework to ensure that public authorities, when selecting means of notifying the public, are bound to select such means which, bearing in mind the nature of the proposed activity, would ensure that all those who potentially could be concerned, including the public outside its territory, have a reasonable chance to learn about the proposed activity, the Party concerned has failed to comply with article 6, paragraph 2, of the Convention with respect to its legal framework.

(b) Appropriate and adequate information regarding the public hearing

80. The Committee notes that only very basic information about the hearing, namely its timing and venue, was provided in advance. While that might meet the requirements of article 6, paragraph 2 (d) (iii), the Committee considers that it does not meet the requirement in article 6, paragraph 2 (d) (ii), to adequately and effectively inform the public concerned of its opportunities to participate. If a hearing is to be held, the public concerned should be notified of its opportunities to participate in that hearing, e.g., the format of the hearing, the format in which the public may make interventions, and any time limits on those interventions. This is particularly important in the case of a foreign public concerned, which may be entirely unfamiliar with how hearings are conducted in the Party of origin, though it should not be presumed that all members of the public concerned from the Party of origin will necessarily know this either. Moreover, the Party concerned has not disputed

that it failed to respond to the communicant's request to the Ministry of Environment on 26 May 2012 for further information regarding the format of the upcoming hearing.[14]

81. In the light of the above, the Committee considers that the Party concerned did not provide adequate and effective notification of the opportunities for the public to participate in the public hearing on 22 June 2012 in accordance with article 6, paragraph 2 (d) (ii), of the Convention. The Committee is thus convinced that if the hearing on 22 June 2012 were to remain the last possibility for the public concerned, including the public concerned in Germany, to participate in the permitting procedure for the Temelín NPP, and in particular to provide its input on the issues under consideration at the hearing on 22 June 2012, the Party concerned would have failed to comply with article 6, paragraph 2 (d) (ii). However, since the shortcomings identified above could be rectified at a future stage of the multi-stage permitting procedure, provided that all options under consideration at the time of the hearing on 22 June 2012 would then still be open, the Committee does not make a finding of non-compliance on this point. The Committee stresses, however, that, were the permitting procedure to continue without rectifying the shortcomings identified above, the Party concerned would be in non-compliance with article 6, paragraph 2 (d) (ii).

Article 6, paragraph 3

82. Article 6, paragraph 3, of the Convention requires that public participation procedures include reasonable time frames for the different phases, allowing sufficient time, inter alia, for the public to prepare and participate effectively. The Committee considers two aspects of the communicant's allegations regarding this provision, namely the time frames for submitting written comments and the public hearing on 22 June 2012.

(a) Timing and duration for submitting written comments

83. The Czech authorities gave two opportunities to German citizens to submit written comments: first, 60 calendar days on the EIA documentation (2 August–30 September 2010); and, second, 43 calendar days on the EIA expert report (7 May–18 June 2012).

84. As the communicant observed, in its findings on communication ACCC/C/2008/24, the Committee considered the timing of the commenting period (as opposed to its duration) (see para. 38 above). In those findings, the Committee stated:

> While the month of August is indeed a traditional summer holiday season month in many countries, the given time frame began on August 25 2005 and included most of the month of September, which is considered a "regular" working month. Under these circumstances, the Committee does not consider the given time frame as amounting to non-compliance with the Convention.[15]

The Committee considers that finding to be equally relevant to the present case.

85. Moreover, holiday periods in countries of the ECE region differ, especially during summer. The Committee considers it would be unworkable if the Convention required Parties to entirely avoid organizing public participation procedures during other Parties' holiday periods. Thus, on the issue of the timing of the two commenting periods, the Committee does not find the Party concerned to be in non-compliance with article 6, paragraph 3.

[14] See Communication, annex 3.

[15] ECE/MP.PP/C.1/2009/8/Add.1, para. 93.

86. Regarding duration, the Committee considers a period of 60 days for the German public to comment on the EIA documentation and 43 days to comment on the EIA expert report were likewise sufficient to meet the requirements of article 6, paragraph 3.

(b) Timing and duration of public hearing

87. Regarding the timing of the hearing, which was held four days after the period for written comments ended, the Committee does not consider this inherently problematic. Article 6, paragraph 7, of the Convention does not require the hearing to be a vehicle through which public authorities must demonstrate how they have already taken due account of the public's written comments. Rather, the hearing is an opportunity for the public to be heard and also offers the opportunity for the applicant to present the project and respond to questions and comments.[16]

88. Concerning the hearing's duration, neither party disputes that the hearing lasted from 10 a.m. until 3 a.m. the next morning (i.e., 17 hours). Given a transboundary project of such a contentious nature as an NPP, the Committee considers that the competent authorities should have foreseen that the hearing might require longer than one working day and they should therefore have planned and organized accordingly. As it was, the Committee considers that organizing the hearing in such a manner was not acceptable. Article 6, paragraph 3, requires that the time frame for each phase of the public participation procedure must be reasonable and enable the public to participate effectively. The public cannot be expected to participate effectively if its opportunity to be heard comes only after it has been already sitting in the hearing for more than a full working day. Nor does it ensure that the public authorities present are in a fit state to take due account of that participation.

89. Bearing the above in mind, the Committee considers that the time frame for the hearing on 22 June 2012 was neither reasonable nor could ensure that the public participating therein could do so effectively in accordance with article 6, paragraph 3. The Committee is convinced that if that hearing were to remain the last possibility for the public concerned, including the public concerned in Germany, to participate in the permitting procedure for the Temelín NPP, the Party concerned would fail to comply with article 6, paragraph 3. However, since this shortcoming could be rectified at a future stage of the multi-stage permitting procedure, provided that all options under consideration at the time of the hearing on 22 June 2012 would then still be open, the Committee does not make a finding of non-compliance on this point. It stresses, however, that if the permitting procedure were to continue without rectifying the shortcoming identified, the Party concerned would be in non-compliance with article 6, paragraph 3, of the Convention.

Article 6, paragraphs 4, 6 and 7 — the use of the "envelope" or "black box" method

90. Neither party disputes that the Party concerned used the "envelope" or "black box" method to assess the technological specifications and related safety aspects of the proposed reactor during the EIA procedure for the Temelín NPP. An evaluation of the "envelope" or "black box" method per se is outside the remit of the Committee's examination. Rather, the Committee may only examine the extent to which the approach meets the requirements of the Convention and, in this regard, the communicant's allegations that the approach fails to comply with article 6, paragraphs 4, 6 and 7.

[16] *The Aarhus Convention: An Implementation Guide*, United Nations publication, Sales No. E.13.II.E.3, p. 154.

(a) Article 6, paragraph 4

91. With respect to article 6, paragraph 4, the Committee cites with approval the Maastricht Recommendations, which state that:

> While the competent authority may have certain discretion as to the range of options to be addressed at each stage of the decision-making, at each stage where public participation is required, it should occur when all the options to be considered at that stage are still open and effective public participation can take place. If a particular tier of the decision-making process has no public participation, then the next stage that does have public participation should provide the opportunity for the public to also participate on the options decided at that earlier tier.[17]

92. The Committee considers that the discretion as to the range of options to be addressed at consecutive stages of the decision-making is closely related to the opportunities for public participation on those options. A multi-stage decision-making procedure in which certain options are considered at a stage without public participation and where no subsequent stage provides an "opportunity for the public to also participate on the options decided at that earlier tier"[18] would be incompatible with the Convention. Similarly, a multi-stage decision-making procedure that provides for public participation on certain options at an early stage but leaves other options to be considered at a later stage without public participation would likewise not be compatible with the Convention.

93. The Committee understands that no decision on the technological design of the reactor has yet been made (see para. 51 above). In the light of this, the Committee finds that, so long as the public concerned, including the public concerned in Germany, will be provided with the opportunity to participate effectively in the stage of the decision-making at which the exact designs or technical specifications (including the risk factors and potential environmental impacts of each) are under consideration, the use of an "envelope" or "black box" approach at the EIA stage does not, in itself, constitute non-compliance with the requirement in article 6, paragraph 4, of the Convention to provide for early public participation when all options are open. The Committee stresses, however, that if the permitting procedure were to continue and the public concerned was not provided with the opportunity to participate effectively in that stage, the Party concerned would be in non-compliance with article 6, paragraph 4, of the Convention.

(b) Article 6, paragraph 6

94. Since the permitting of the Temelín NPP is a multi-stage decision-making procedure, the obligations in article 6, paragraph 6, must be seen in that context. In this regard, while the competent authority may have certain discretion as to the range of options to be addressed at each stage of the decision-making, at each stage at which public participation is required all information relevant to the decision-making at that particular stage which is available to the public authorities should be made available to the public concerned (excepting information exempted from public disclosure in accordance with article 4, paragraphs 3 and 4).

95. Information regarding the specific technology to be used is clearly of relevance for the decision-making on whether to permit the Temelín NPP and is therefore subject to the requirements of article 6, paragraph 6.

[17] ECE/MP.PP/2014/2/Add.2, para. 18.

[18] Ibid.

96. Therefore, if the public authorities were in fact provided with any further information relevant to the decision-making than that made available to the public concerned (excepting information exempted from public disclosure in accordance with article 4, paragraphs 3 and 4), that would amount to non-compliance with article 6, paragraph 6.

97. However, having reviewed the evidence before it, the Committee understands that the "envelope" approach was also used to provide information to the competent authorities, and the Committee has been provided with no evidence to indicate that the competent authorities were provided with any further information at the EIA stage than was provided to the public concerned. In the light of the above, the Committee finds the allegation that the use of the "envelope" approach in this case resulted in non-compliance with article 6, paragraph 6, to be unsubstantiated.

(c) Article 6, paragraph 7

98. The communicant alleges that the use of the "envelope" approach was also in non-compliance with article 6, paragraph 7, of the Convention because the public concerned was not able to submit any comments, information, analyses or opinions that it considered relevant to the proposed activity. In keeping with its finding in paragraph 93 above, the Committee finds that, so long as at the stage of the decision-making at which the exact designs or technical specifications (including risk factors and potential environmental impacts) are to be considered by the competent authorities, the public concerned, including the public concerned in Germany, will be allowed to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity while all options are still open and having been provided with all information relevant to the decision-making, the use of the "envelope" or "black box" approach at the EIA stage does not, in itself, constitute non-compliance with article 6, paragraph 7.

Limit on number of questions and questions not answered

99. Concerning the allegation that the communicant was denied her rights under article 6, paragraph 7, at the hearing because she was limited to three questions per turn, the Committee notes that the Convention leaves considerable discretion to Parties as to how public hearings should be conducted. However, as *The Aarhus Convention: An Implementation Guide* correctly states, while the Convention does not establish particular standards for public hearings, rules for their conduct should be made in accordance with the Convention's provisions, in particular article 3, paragraphs 1 and 2.[19]

100. Parties may choose to codify the rules for public hearings in detail in their legislation or by way of established administrative practice. Alternatively, the rules for public hearings may be set case by case by the authorities responsible for each hearing. Whichever approach is taken, Parties must ensure that the rules to be applied are clear, transparent and consistent, as required by article 3, paragraph 1, and non-discriminatory, as required by article 3, paragraph 9, of the Convention. Furthermore, in accordance with article 3, paragraph 2, Parties should endeavour to ensure that officials provide guidance to the public so that it knows and understands the rules to be applied during the hearing in advance. As mentioned above, this is of particular importance in the case of the foreign public concerned, which may be entirely unfamiliar with how hearings are conducted in the Party of origin.

[19] *Implementation Guide*, p. 154.

101. The discretion granted to Parties as to how hearings should be conducted includes the relative speaking orders of experts, officials and others presenting the activity and representatives of affected local communities. It also includes the hearing structure itself, e.g., separate sessions for questions and comments or discussion. The Committee therefore considers that limiting the number of questions or comments to three questions or comments per turn is a legitimate way to structure a hearing.

102. Even limiting the total number of questions or comments to be raised during the hearing may be acceptable in certain cases, provided there are legitimate reasons for doing so and the public is adequately informed of the limitation in advance of the hearing. In such cases, the public should be invited to submit any remaining questions or comments in writing within a reasonable stated time frame. Questions submitted in this manner would then be subject to article 4, with the time frames under article 4 adjusted to fit within the time frames for submitting comments under the public participation procedure or, alternatively, the time frames for submitting comments extended to take into account the time frames under article 4. Likewise, comments submitted in this manner would be subject to the legal regime of article 6, and in particular paragraphs 3, 7, 8 and 9.

103. In the light of the above observations, the Committee does not find the limit of three questions or comments per turn to amount to non-compliance with article 6, paragraph 7.

104. Regarding the communicant's allegation that she had a large number of unanswered questions at the end of the hearing, the Committee notes the parties' differing factual accounts on this point, since the Party concerned asserts that the hearing only finished "when no further questions had been raised by the general public".[20] Irrespective of which version of events is correct, the Committee does not find that the fact the public concerned may have had a large number of remaining questions at the end of the hearing, in itself, to amount to non-compliance with article 6, paragraph 7. Rather, at the end of the hearing and regardless of whether any participants had indicated their wish to submit additional questions or comments, the competent authorities should have informed the public concerned of its opportunity to put any further questions or comments in writing and to have informed the public concerned of the time frames for it to do so.

105. Bearing the above in mind, on the basis of the chronology presented to the Committee, it appears that the period for written comments on the EIA expert statement ended on 18 June 2012, i.e., before the hearing. This means that there was no opportunity for the public concerned to submit written comments in the light of what it learned at the hearing itself. The Committee notes that preferably the time frame for submitting written comments in a public participation procedure should extend for a reasonable time beyond the date of any public hearing in order that the public concerned has the possibility to submit comments in the light of what it learns at the hearing. The Committee recalls the communicant's assertion that the Party concerned has to date not responded to the questions she sent to the Ministry of Environment in written form after the hearing. Having not been provided with a copy of the communicant's questions, the Committee is not in a position to assess whether they were in the form of questions requesting information (i.e., amounting to a request for information under article 4), comments to be taken into account in the decision-making procedure under article 6, paragraph 7, or otherwise. The Committee does not therefore make a separate finding on this point.

[20] Response of the Party concerned to communication, p. 4.

Article 3, paragraph 2 — assistance to the public

106. The communicant did not make an allegation under article 3, paragraph 2, so the Committee does not make a finding regarding this provision. However, it expresses its concern that the Party concerned did not appear to take steps to make sure that the rules to be applied during the hearing were known and understood by the public concerned in advance. The Committee reminds the Party concerned of its obligation under article 3, paragraph 2, of the Convention to endeavour to ensure its officials assist and provide guidance to the public, inter alia, in seeking access to information and public participation in decision-making.

Article 3, paragraph 9 — without discrimination as to citizenship, nationality or domicile

107. In deciding whether the Party concerned has complied with article 3, paragraph 9, the Committee considers the general test to be whether the public concerned in Germany was given any less favourable treatment than the public concerned in Czechia with regard to its opportunities to participate in the procedure. The Committee considers three aspects of this question, as set out below.

(a) Distances travelled to the hearing by the public

108. The Committee considers that by organizing the public hearing in a town close to the German-Czech border, the Party concerned made an effort to ensure that the public in Germany was able to participate in the same way that the public in Czechia was, and thus the Committee does not find there to have been discrimination within the meaning of article 3, paragraph 9, in this respect.

(b) Information about the hearing made available to the public

109. On the basis of the information before it, there is nothing to indicate that the public in Czechia was provided with any additional information about the format of the hearing and its opportunities to participate than was provided to the public in Germany. Thus, the Committee does not find there to have been discrimination within the meaning of article 3, paragraph 9, in this respect. It notes, however, that, in public participation procedures involving the public in countries other than the country of origin, the competent public authorities should be mindful of the need to give clear and full explanations of the relevant procedures, as the foreign public cannot be presumed to be familiar with how such procedures work in the Party of origin. This being said, it should not be assumed that all members of the public concerned from the country of origin are familiar with such procedures either.

(c) No formal hearing in Germany

110. The Committee notes that neither Czech nor international law require that the country of origin organize a formal hearing in the territory of the affected country. Moreover, article 6, paragraph 7, does not require a hearing to be conducted in all cases, but, rather, as appropriate, bearing in mind the need to ensure effective public participation in the decision-making. While there is no express requirement under national or international law, including the Convention itself, to conduct a hearing in the affected country, neither is there anything to prevent it. The Committee finds, however, that there is no legal basis to conclude that in this case the failure of the Party concerned to organize an official hearing in Germany constituted a breach of article 3, paragraph 9.

111. In the light of its findings in paragraphs 108–110 above, the Committee does not find the Party concerned to have failed to comply with article 3, paragraph 9.

IV. Conclusions and recommendations

112. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

113. The Committee finds that, by not providing a clear requirement in its legal framework to ensure that public authorities, when selecting means of notifying the public, are bound to select such means which, bearing in mind the nature of the proposed activity, would ensure that all those who potentially could be concerned, including the public outside the territory of the Party concerned, have a reasonable chance to learn about the proposed activity, the Party concerned has failed to comply with article 6, paragraph 2, of the Convention with respect to its legal framework.

114. Regarding the decision-making on the Temelín NPP, the Committee is convinced that if the public participation procedure on the EIA stage were to remain the last possibility for the public concerned, including the public concerned in Germany, to participate in the permitting procedure for the Temelín NPP, the Party concerned would fail to comply with article 6, paragraphs 2 (d) (ii), 3, 4, 6 and 7, of the Convention.

115. However, since the shortcomings identified in paragraphs 81 and 89 above could be rectified at a future stage of the multi-stage permitting procedure, provided that all options under consideration at the time of the EIA procedure would then still be open, the Committee does not make findings of non-compliance with respect to these points. It stresses, however, that if the permitting procedure were to continue without rectifying these shortcomings, the Party concerned would be in non-compliance with article 6, paragraphs 2 (d) (ii) and 3, of the Convention.

116. Likewise, the Committee finds that, so long as the public concerned, including the public concerned in Germany, is provided with the opportunity to participate effectively in the stage of the decision-making at which the exact designs or technical specifications (including risk factors and potential environmental impacts) are under consideration, the use of the "envelope" or "black box" approach at the EIA stage does not, in itself, constitute non-compliance with article 6, paragraphs 4, 6 and 7. The Committee stresses, however, that if the permitting procedure were to continue without providing the public concerned with the opportunity to participate effectively in that stage, the Party concerned would be in non-compliance with article 6, paragraphs 4, 6 and 7, of the Convention.

B. Recommendations

117. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned provides:

(a) A legal framework to ensure that when selecting means of notifying the public under article 6, paragraph 2, public authorities are required to select such means as will ensure effective notification of the public concerned, bearing in mind the nature of the proposed activity, and including, in the case of proposed activities with potential transboundary impacts, the public concerned outside the territory of the Party concerned;

(b) The necessary arrangements to ensure that:

(i) When conducting transboundary procedures in cooperation with the authorities of affected countries, the competent public authorities make the necessary efforts to ensure that the public concerned in the affected countries is in fact notified in an effective manner;

(ii) There will be proper possibilities for the public concerned, including the public outside the territory of the Party concerned, to participate at the subsequent stages of the multi-stage decision-making procedure regarding the Temelín NPP;

(c) A report to the Committee at the latest nine months in advance of the sixth session of the Meeting of the Parties on the measures taken and the results achieved in implementing the above recommendations.

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Meeting of the Parties to the Convention on access to information, public participation in decision-making and access to justice in environmental matters

Compliance Committee

Fifty-sixth meeting
Geneva, 28 February–3 March 2017
Item 9 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2013/81 concerning compliance by Sweden

Adopted by the Compliance Committee on 18 November 2016

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I. Introduction

1. On 27 February 2013, a member of the public, Bernd Stümer (the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Sweden had failed to comply with its obligations under the Convention. The communication alleges that the Party concerned fails to comply with articles 4, 5, 6, 7, 8 and 9 of the Convention both in relation to the permitting process for the issuance of permits for two wind turbines near the town of Strängnäs, Sweden, (Helgarö/Strängnäs wind turbines) and in general. The communication[1] alleges, among other things, that the Convention's provisions are consistently overridden with respect to building permits for wind turbines.[2]

2. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7 of the Meeting of the Parties to the Convention. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 26 April 2013.

3. Between 26 April 2013 and 1 December 2015, the communicant and the Party concerned provided additional information and answered questions from the Committee on a number of occasions.

4. At its forty-seventh meeting (Geneva, 16–19 December 2014), the Committee provisionally scheduled that it would hold a hearing to discuss the substance of the communication at its forty-eighth meeting (Geneva, 24–27 March 2015).

5. The Committee held a hearing to discuss the substance of the communication at its forty-eighth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.

6. Following the hearing, the communicant and the Party concerned provided additional information and answered questions from the Committee on several occasions.

7. The Committee agreed its draft findings at its fifty-third meeting (Geneva, 21–24 June 2016), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 29 June 2016. Both were invited to provide comments by 27 July 2016.

8. The communicant and the Party concerned provided comments on 9 August and 17 August 2016, respectively.

9. At its virtual meeting on 13 September 2016, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings through its electronic decision-making procedure on 18 November 2016 and instructed the secretariat to prepare official versions of its findings as a formal pre-session document for its fifty-sixth meeting and to ensure its availability in the three official languages of the United Nations Economic Commission for Europe.

[1] Documents concerning this communication, including correspondence between the Committee, the communicant and the Party concerned, are available on a dedicated web page of the Committee's website (http://www.unece.org/env/pp/compliance/compliancecommittee/81tablesweden.html).

[2] See communication, p. 2, first to seventh paragraphs.

II. Summary of facts, evidence and issues[3]

A. Facts

10. On 10 January 2008, the Diocese of Strängnäs notified the Environment Committee in the Municipality of Strängnäs (*Miljö- och räddningsnämnden i Strängnäs kommun*) about its plans to construct wind turbines near Strängnäs, and applied for a building permit for the turbines.[4]

11. Since the plans concerned two wind turbines, each with a height of 140 meters, no permit under the Environmental Code was needed (see para. 27). Instead the applicant notified the regulatory authority, i.e., the Environment Committee in the Municipality of Strängnäs (the municipal committee responsible for the municipality's tasks within the area of environmental and health protection), and applied for a building permit under the Planning and Building Act (1987:19).[5]

12. The wind turbines were to be located on the properties Näs 1:4 and Knutsberg 1:2. The distance between the intended locations of the wind turbines and the nearest residential property was at least 680 metres.[6]

13. On 22 February 2008, the Environment Committee decided, in accordance with the Environmental Code, on measures to be undertaken by the applicant including the location and height of the turbines and the noise, shadows and reflections from the turbines or rotor blades.

14. On 31 March 2009, a notification regarding the application for the building permit under the Planning and Building Act was sent to known affected parties, namely individuals who owned land near the intended installations. They were given three weeks to comment on the application.

15. On 3 April 2009, the application for the building permit was announced in the local newspaper and concerned parties were given the opportunity to comment on the application within three weeks.[7]

16. On 3 November 2010, the Planning and Building Committee of the Municipality of Strängnäs (*Plan- och byggnämnden i Strängnäs kommun*) issued a building permit for two wind turbines with a height of 140 meters each.[8]

17. On 14 January 2011, the communicant and other individuals living in the areas surrounding the location of the planned wind turbines and two environmental organizations appealed the building permit to the County Administrative Board of Södermanland (*Länsstyrelsen i Södermanlands län*).[9] Their appeal stated, among other things, that wind turbines were dangerous machines that must comply with Directive 2006/42/EC of the

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

[4] Response of the Party concerned to the communication dated 26 September 2013, p. 3 (first para.); and communication, p. 3.

[5] Response of the Party concerned to the communication dated 26 September 2013, p. 5.

[6] Response of the Party concerned to the communication dated 26 September 2013, p. 3 (first para.), see also letter from the communicant dated 28 June 2014, p. 1.

[7] Response of the Party concerned to the communication dated 26 September 2013, p. 3.

[8] Response of the Party concerned to the communication dated 26 September 2013, p. 3. Communication, p. 3 (as to the date).

[9] Letter from the communicant dated 18 September 2014, p. 4.

European Parliament and the Council of 17 May 2006 on machinery (Machinery Directive), and the construction of the two wind turbines would expose the communicant and other local residents to a risk of life-threatening injuries.[10]

18. In three separate decisions (15 December 2011, 4 January and 23 March 2012),[11] the County Administrative Board of Södermanland found the appeals by the communicant and about 30 other appellants inadmissible because they were not considered to be affected by the intended activities in such a way that they had a right to appeal the decision of the Committee under section 22 of the Administrative Procedure Act; their properties were situated too far away from the intended location of the closest wind turbine. The County Administrative Board found 10 appeals admissible, but not well founded, and the appeals were refused.[12]

19. The communicant and other appellants (both those whose appeals were found inadmissible and those whose appeals were found admissible but were unsuccessful on the merits of the case) appealed to the the Land and Environmental Court at the Nacka District Court (*Nacka tingsrätt, mark- och miljödomstolen*).[13]

20. On 15 May 2013, the Nacka District Court rejected the appeal by the communicant (case P129-12).[14]

21. The communicant appealed the Nacka District Court decision to the Land and Environment Court of Appeal (*Mark- och miljööverdomstolen*), but was not given leave to appeal. The decision of 21 August 2014 by the Land and Environment Court of Appeal cannot be appealed.[15]

22. On 15 May 2014, the Nacka District Court revoked the local authority's decision to issue a building permit for the two wind turbines because no inventory of birds had been carried out (cases P635-12 and P1924-12). The Court's decision was appealed to the Land and Environment Court of Appeal by the communicant and others. The communicant was not given standing in the appeal, but, among others, an owner of property within Helgaro-Väla 1:1 (Johan Andersson) was. The communicant remained involved in the case as the representative of Mr. Andersson.[16]

23. On 9 March 2015, the Land and Environment Court of Appeal delivered its judgment in cases P5593-14 and P5594-14. In an overall consideration of what had emerged in the case, the Court made the assessment that the investigation in the case did not provide sufficient support for the conclusion that the siting of the turbines on the site in question met the requirements for an adaptation to the natural values in the area. The appeals were therefore refused and no building permit was granted.

[10] Comments from the Party concerned of 10 December 2014, p. 3.

[11] Annexes 1–3 of the additional information from the communicant dated 7 September 2015.

[12] Response of the Party concerned to the communication dated 26 September 2013, p. 3 (second to last paragraph).

[13] Response of the Party concerned to the communication dated 26 September 2013, p. 4.

[14] Comments from the Party concerned dated 10 December 2014, p. 3.

[15] Decision 2014-08.21, case 5592-14. See comments from the Party concerned dated 10 December 2014, pp. 3–4, and letter from the communicant 18 September 2014, p. 2.

[16] Comments from the Party concerned dated 10 December 2014, p. 4; letter from the communicant dated 18 September 2014, p. 4.

B. Legal framework[17]

Access to information

24. In Sweden, the right of access to environmental information is provided for under the general principle of public access to official documents, prescribed in chapter 2 of the Freedom of the Press Act.[18] The procedure for the management of official documents and provisions concerning secrecy are specified in the Public Access to Information and Secrecy Act. A public authority's decision to refuse access to official documents must be communicated in writing to the person that made the request. The decision must state the reasons for refusal and provide information about the applicant's access to appeal, including when and how such an appeal should be made (Administrative Procedure Act, sects. 20–21).

25. A person whose request to obtain a document has been rejected, or whose request for access to an official document has been granted subject to reservations, is normally entitled under the Freedom of the Press Act to request that the matter be reviewed by a court. The Public Access to Information and Secrecy Act contains provisions concerning when reservations may be imposed and the court to which appeals should be addressed. If the requester wishes to go to court, he or she is generally entitled to appeal against the decision (Freedom of the Press Act, chap. 2, art. 15, and Public Access to Information and Secrecy Act, chap. 6, sect. 7). Appeals are generally made to an Administrative Court of Appeal. A decision of an Administrative Court of Appeal may be appealed to the Supreme Administrative Court, though the Supreme Administrative Court must first grant a leave of appeal, which is mainly done in cases of precedential interest. If the request is made to a Land and Environment Court, an appeal is handled by the Land and Environment Court of Appeal and then by the Supreme Court (Public Access to Information and Secrecy Act, chap. 6, sects. 8–9). The appeal must be made within three weeks from the day when the appellant was notified of the decision (Administrative Procedure Act, sect. 23, and Administrative Court Procedure Act, sect. 6a) and, if the appeal concerns a decision by a Land and Environment Court, within three weeks from the date of the decision (Public Access to Information and Secrecy Act, chap. 6, sect. 10, and Code of Judicial Procedure, chap. 52, sect. 1). The appeal is delivered to the decision-making authority, which then sends the appeal to the court. Before sending over the appeal, the authority has the opportunity, if the appeal concerns a decision that the authority has made as first instance, to review its decision. If the decision is manifestly wrong, it has a duty to correct it, provided that this can be done rapidly and simply without detriment to a private party (Administrative Procedure Act, sect. 27). On appeal, the court steps into the role of the decision maker, and decides whether or not to give the appellant access to the relevant information.

26. If the requester is refused access to information or considers that the required procedure has not been followed, he or she can also complain to the Parliamentary Ombudsman (Justitieombudsmannen). The Ombudsman may criticize the authority, and also, rarely, bring charges for misuse of office according to chapter 20, section1, of the Penal Code. Criticism by the Ombudsman carries considerable authority, though it is not binding and the Ombudsman cannot require an authority to release information in an individual case.

[17] The legal provisions referred to are the provisions that it is necessary to consider for the purposes of these findings. As the application concerning the building permit for the wind turbines in Strängnäs was made before 2 May 2011, the older wording of the Planning and Building Act, that is the wording of the Planning and Building Act (1987:10), was applied in the Swedish courts.

[18] Response of the Party concerned to the communication dated 26 September 2013, p. 8.

Permitting process for wind turbines

27. The building of wind turbines and the establishment of wind farms are activities regulated under the Swedish Environmental Code and the Planning and Building Act. A building permit is not mandatory if the wind farm or turbine requires a permit under chapter 9 of the Environmental Code (so as to avoid overlapping processes). Under the Swedish Environmental Code, a wind farm with more than six wind turbines, or two or more wind turbines with a height that exceeds 150 metres, requires a permit. If an application does not exceed six wind turbines or, alternatively, two wind turbines with a height that exceeds 150 metres, a permit can be replaced by a notification to the regulatory authority under chapter 9 of the Environmental Code. If an application is dealt with by a notification to the regulatory authority the applicant will also need to apply for a building permit.[19]

Access to justice regarding building permits under the Planning and Building Act

28. At the time the application was made, building permits under the Planning and Building Act and decisions relating to violations of the Planning and Building Act were subject to administrative appeal to a County Administrative Board. The decision by the County Administrative Board could then be appealed to a Land and Environment Court (Planning and Building Act 2010:900, chap. 13, sects. 3 and 6). The court would decide the case on the merits and decide whether or not to change the decision. An appeal could be made by concerned parties. Section 22 of the Administrative Procedure Act provides: "A person whom the decision concerns may appeal against it, provided that the decision affects him adversely and is subject to appeal."

29. Environmental non-governmental organizations (NGOs) meeting the requirements specified in the Environmental Code have standing in appeal cases concerning detailed plans entailing revoking shore protection, or if the plan can be assumed to result in a significant environmental impact owing to the fact that the planned area may be used for activities or measures requiring environmental impact assessment (Planning and Building Act 2010:900, chap. 13, sect. 12). Hence, according to chapter 16, section 13, of the Environmental Code these decisions under the Planning and Building Act can be appealed by non-profit associations whose purpose is to promote nature conservation or environmental protection, provided the organization has been active for at least three years in Sweden and has at least 100 members or else can show that it has "support from the public". Environmental NGOs can appeal building decisions under the conditions of section 22 of the Administrative Procedure Act, just like individuals, but they do not have the same standing rights for building rights as they have for planning decisions.

C. Substantive issues

30. Among other things, the communicant states that development of wind power in the Party concerned has caused, and continues to cause, damage to the environment and to human health. In addition, building of wind turbines generates very large emissions of carbon dioxide, which "can never be made good by electricity from wind turbines replacing electricity from coal plants that do not exist in Sweden".[20]

[19] Response of the Party concerned to the communication dated 26 September 2013, p. 5.

[20] Communication, pp. 5–6.

Access to information — articles 4 and 5

Article 4

31. With respect to article 4 of the Convention, the communicant alleges that the Strängnäs Municipality and the County Administrative Board of Södermanland have refused to respond to his and his network's questions about the safety of wind turbines and the safety measures required under the Machinery Directive.[21] He alleges that they have never received any explanation as to why their information requests have been denied.[22]

32. The communicant also alleges that he requested documents necessary for an appeal against the permit for wind turbines, but the authorities refused access to the necessary documents. He made a complaint to the Parliamentary Ombudsman and received 740 pages of documentation.[23] He alleges, however, that these were not the documents about market surveillance under the Machinery Directive he had requested, but, rather, documents of inspection notices under the Work Environment Act (*Arbetsmiljölagen* (1977:1160)) and had nothing to do with Machinery Directive.[24] The communicant submits that even the Ombudsman was unable to obtain answers from the Swedish Work Environment Authority regarding the communicant's questions to that agency on the safety of wind turbines or requirements on action taken in accordance with the Machinery Directive. The requested information included, inter alia, questions regarding warning signs as required under the Machinery Directive and documentation demonstrating that market surveillance in accordance with the Machinery Directive had been carried out.[25]

33. The Party concerned argues that nothing in the communication shows that the communicant has been denied access to documents held by the municipality concerning the application of the building permit for the two wind turbines in question.[26]

Article 5

34. The communicant alleges multiple breaches of article 5. He alleges a general breach of article 5 because no information about the dangers of the wind turbines has been given to the public.[27] He also alleges failure to comply with a number of the specific requirements of article 5, including those set out in paragraphs 1 (a)–(c), 2, 2 (b) (ii), 3, 3(a)–(b), 4, 5 and 7 (a)–(c) of that article.[28]

35. The Party concerned observes that, on 31 March 2009, the municipality of Strängnäs sent information to concerned parties regarding the application for a building permit for the construction of the two wind turbines in Strängnäs. While the communicant was not considered to be a concerned party by the municipality and was not therefore sent the information personally, the same information was also published in the local newspaper, the Journal of Strängnäs (*Strängnäs tidning*) on 3 April 2009. The Party concerned

[21] Communicant's reply dated 24 September 2013 to the Committee's questions, pp. 4, 5, 24.
[22] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 5.
[23] Communication, p. 3. Similarly, in the letter from the communicant dated 8 December 2014 (received 10 December 2014), p. 1.
[24] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 24.
[25] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 25.
[26] Opening statement of the Party concerned at the hearing held at the Committee's forty-eighth meeting.
[27] Communicant's reply dated 24 September 2013 to the Committee's questions pp. 5–7 and 28.
[28] Communicant's reply dated 24 September 2013 to the Committee's questions, pp. 5–7.

considers that it has correctly implemented the requirements of article 5, paragraph 2, of the Convention in its national law.[29]

Public participation in decision-making — articles 6, 7 and 8

Article 6, paragraphs 2, 3, 6 and 7

36. The communicant alleges the Party concerned has failed to comply with article 6 of the Convention both in respect of the wind turbines near Strängnäs and wind turbines generally in Sweden.[30] The communicant alleges that the public concerned has been denied information about how the safety requirements of the Machinery Directive apply to wind turbines.[31] He alleges that as a result of this denial, the Party concerned is in breach of article 6, paragraph 2, of the Convention regarding notification of the public concerned. He also submits that being denied this information has meant that the public concerned cannot prepare and participate effectively, and this is a breach of article 6, paragraph 3, of the Convention. Furthermore, being denied this information is in breach of article 6, paragraph 6, of the Convention as the public concerned is entitled to have access to all information relevant to the decision-making.

37. As a separate allegation under article 6, paragraph 2, of the Convention, the communicant alleges that in several cases the only information provided on the permit process for a wind turbine was a simple advertisement in a local newspaper. He asserts that this is a clear violation of legal procedure and deprives the public concerned of their rights under the Convention.[32]

38. With respect to article 6, paragraph 7, of the Convention, the communicant alleges that, on direct orders from the Government, the Machinery Directive is not applied in decision-making procedures for permits for wind turbines in Sweden.[33] Similarly, during public consultations on wind turbines in Sweden, the authorities will not answer questions from the public about safety under the Machinery Directive, and this is in breach of article 6, paragraph 7, of the Convention.[34]

39. The Party concerned contends that a permit for construction of two wind turbines of the kind at issue in this case is not an activity that falls under annex I to the Convention, nor is it a type of a project that the Swedish legislature has decided may have a significant effect on the environment. The Party concerned therefore fails to see that the requirements of article 6 of the Convention are relevant in respect of the building permit procedure regarding these two turbines.

Article 7

40. With regard to article 7 of the Convention, the communicant alleges that there has been a breach in the case of the wind turbines near Strängnäs and in general.[35] The communicant alleges that on no occasion were the public invited to participate in the preparation of plans, programmes and policies relating to the expansion of wind turbines on

[29] Opening statement of the Party concerned at the hearing held at the Committee's forty-eighth meeting.
[30] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 8.
[31] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 8.
[32] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 23.
[33] Communication, p. 4, communicant's reply dated 24 September 2013 to the Committee's questions, p. 11.
[34] Communicant's reply dated 24 September 2013 to the Committee's questions, pp. 9–20.
[35] Communication, p. 2 (first to seventh paragraphs).

Helgarö. He alleges that, on the contrary, the municipality had tried to conceal its plans concerning building permits for wind turbines on Helgarö.[36]

41. The Party concerned rejects this allegation.[37]

Article 8

42. The communicant alleges that the public concerned has not been able to participate during the preparation of executive regulations and/or generally applicable legally binding normative instruments concerning permits for wind turbines.[38] The communication alleges that media reports in 2012 reported that the Government intended to speed up the process for the issue of wind turbines by amending the Environmental Code. The communicant states that his network wrote to the Government requesting to participate in the preparation of this legislation.[39] According to the communicant, no response was received from the Government.[40]

43. The Party concerned rejects this allegation.

Access to justice — article 9

44. With regard to article 9 of the Convention, the communicant submits that there are breaches both in the case of the wind turbines near Strängnäs and under the law of the Party concerned in general.[41] The communicant submits that the courts of the Party concerned rarely or never mention the Aarhus Convention on issues related to wind turbines.[42] He claims that, from 2008 to date, during hundreds of lawsuits regarding permission for wind turbines, the Convention was mentioned by the judicial system only once.[43]

45. The Party concerned contests all the allegations made by the communicant concerning article 9 of the Convention.

Denial of access to challenge contravention of national law regarding the environment (Machinery Directive)

46. The communicant claims that the County Administrative Boards reject all references to the European Union Machinery Directive. The communicant further contends that, by government decree, the Machinery Directive may not be included in a judicial review of permits for wind turbines.[44] In support of his allegation, he refers to two documents from the Swedish Government that he claims state that "In this trial [the] Machinery Directive is not to be taken into account."[45] By order of 9 March 2012 from the Swedish Government

[36] Communication, p. 5.
[37] Response of the Party concerned to communication, p. 6.
[38] Communication, p. 2.
[39] Letter to Minister of 18 November 2012 (in Swedish) available from http://www.helgaro-liv.se/FN 2013/18-11-2012 till minister Ek.doc (last accessed on 15 December 2016).
[40] Communication, p. 5.
[41] Communication, p. 2.
[42] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 23.
[43] I.e., in case HD 2012-12-18 O 4925-11. (See communicant's reply dated 24 September 2013 to the Committee's questions, p. 33.)
[44] Communication, p. 7, and communicant's reply dated 24 September 2013 to the Committee's questions, p. 20.
[45] Documents available (in Swedish) from http://www.helgaro-liv.se/FN 2013/9-3-2012 reg arbdep.pdf and http://www.helgaro-liv.se/FN 2013/17-3-2011 regering.pdf (both last accessed on 15 December 2016). See communicant's reply dated 24 September 2013 to the Committee's questions, p. 28 (see also pps. 30–31).

only the Environment Code (*Miljöbalken 1998:808*) and the Planning and Building Act (*Plan- och bygglagen 2010:900*) can be considered in the judicial review of permits for wind turbines. The communicant alleges that Swedish courts comply with that order and no judgment exists concerning the application of the Machinery Directive.[46] He submits that the Government's order prevents the public from exercising its right to challenge the substantive and procedural legality of decisions, acts or omissions subject to article 6 of the Convention.[47]

47. The communicant submits that the Government's order of 9 March 2012 prevents the proper implementation of access to justice, as courts cannot take into account the Government's failure to implement the design and safety regulations and market surveillance requirements of the Machinery Directive.[48] He contends that a court should not be entitled to exempt certain laws that do not fit the court's views on the merits, or that the Government has ordered to be excluded.[49]

48. The Party concerned states that the courts in Sweden have an independent status within the Swedish constitution. Neither the Government nor any other authority may decide how a court should adjudicate in a particular case.[50]

Denial of standing

49. The communicant alleges several problems with the law of the Party concerned on standing:

50. First, the communicant alleges the rules for locus standi in the Party concerned are so vague that they can be interpreted arbitrarily by the courts.[51]

51. Second, he alleges that, even though the legal requirement for associations to have 2,000 members in order to have standing has been reduced to 100 members, this still deprives most associations concerned with wind turbines of locus standi in Sweden, as in Sweden wind turbines are located in sparsely populated rural areas where it is almost impossible to create an association of 100 members.[52] In support of his allegations, the communicant cites the decision by the Supreme Court in the case of *Taggen Vindpark*.[53]

52. Third, with respect to his own standing to challenge the wind turbines in Helgarö-Strängnäs, the communicant claims that his property, located at Väla gård Helgarö, 64592 Strängnäs, is situated next to the land on which the wind turbines were to be built,[54] yet he was denied standing.

53. With respect to the communicant's standing to appeal the permit for the wind turbines, the Party concerned submits that the address of the communicant is Väla 3, 64592

[46] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 20.
[47] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 31.
[48] Communication, pp. 4 and 6, and communicant's reply dated 24 September 2013 to the Committee's questions, pp. 11, 32 and 33.
[49] Communicant's e-mail of 8 March 2014 (mislabelled as 8 March 2013).
[50] Response of the Party concerned to the communication dated 26 September 2013, p. 4.
[51] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 30.
[52] Communication, p. 10.
[53] Communication, p. 9, see also communicant's reply dated 24 September 2013 to the Committee's questions, pp. 22–23. In this case, published as *Nytt juridiskt arkiv* 2012, p. 921, the Supreme Court refused leave to appeal because the organization only comprised some 10 members, had been active less than three years and had not been able to show that the organization as such had the support of the public.
[54] Communication, p. 1.

Strängnäs, which corresponds to the real estate property Helgarö-Väla 1:2.[55] The Party concerned asserts that all of the real estate properties named Helgarö-Väla (except Helgarö-Väla 1:1) are located between 1.5 and 3 kilometres (km) from the location of the closest proposed wind turbine, and therefore the Party believes that the communicant does not live closer than 1.5 kilometres from the location of the closest turbine. [56] The Party concerned submits that the fact that the courts did not hold the communicant to be a concerned party and therefore denied him legal standing in the case concerning the permitting process for the issuance of building permits for the two wind turbines in question cannot be considered a breach of the Convention.[57]

54. The Party concerned states that a construction permit or a detail plan for wind mills can be appealed by an individual if that individual is considered to be a concerned party. Concerned parties according to Swedish law are those who have a direct concern of private interest.[58] The Party concerned asserts that the Supreme Court and the Environmental Court of Appeal have applied a generous attitude regarding who may be considered to be concerned[59] and cites a 1997 decision of the Supreme Administrative Court in this regard:

> in principle, every person who may be harmed or exposed to other kinds of inconvenience by environmentally harmful activity in a permit decision is considered a party in interest. However, a mere theoretical or completely insignificant risk of damage or detriment is not sufficient. (RÅ 1997 ref. 38).[60]

55. The Party concerned says that owning land near planned wind turbines or other installations or activities that might be harmful to the environment qualifies an individual as a party concerned. However, an individual does not have to own nearby land to qualify as a party concerned.[61] The Party concerned cites case law that individuals living within sight and at a distance of 550 metres from the location of planned wind turbines have been considered parties of concern (RÅ 1992 ref. 81). Likewise, an individual living approximately 800 metres from the location of a proposed wind turbine was considered as a party concerned by the court and was therefore allowed to appeal the building permit approving the turbine (case P 1574-13, 3 June 2003).[62]

56. The Party concerned states that once it is established that an applicant is allowed to appeal, the scope of review is complete, meaning that the individual can invoke all kinds of interests. No arguments are precluded, thus the appellant can plead any private or public interest in the case.[63]

57. With respect to standing of associations, the Party concerned states that NGOs other than those with 100 members or more can also be granted standing, provided they can show that they have the "support from the public". Moreover, in 2012 a proposal to remove the criteria on nationality and length of time in activity (though not the number of members) was circulated for referral by the Ministry of Environment. It was well received, and internal discussion on how to proceed with the proposal is ongoing.[64]

[55] Comments from the Party concerned dated 10 December 2014, p. 3.
[56] Comments from the Party concerned dated 10 December 2014, p. 3.
[57] Comments from the Party concerned dated 10 December 2014, p. 5.
[58] Response of the Party concerned to the communication dated 26 September 2013, p. 5.
[59] Response of the Party concerned to the communication dated 26 September 2013, pp. 5–6.
[60] Reiterated in comments from the Party concerned 10 December 2014, p. 4.
[61] Comments from the Party concerned 10 December 2014, p. 4.
[62] Comments from the Party concerned 10 December 2014, pp. 4–5.
[63] Comments from the Party concerned 10 December 2014, p. 5.
[64] Response of the Party concerned to the communication dated 26 September 2013, pp. 13–14.

Lack of impartiality — the County Administrative Board

58. The communicant submits that the foundation of a democracy is that political power is separated from the judicial power. He submits, however, that this principle is infringed in matters of wind turbines in Sweden by the fact that the first instance in an appeal regarding a wind turbine is the County Administrative Board. He submits that the Board is not a court, but the organization through which political power, through Government directives, is exerted. When officers of the County Administrative Board, who have to obey government directives, deliver decisions, these are the foundations for the entire subsequent legal proceedings. This disregards the right of citizens to independent and impartial justice in matters relating to their environment.[65]

59. The Party concerned rejects the communicant's allegation. It contends that County Administrative Boards handle and decide administrative cases quite independently from the Government and central agencies (Instrument of Government, chap. 12, sect. 2). A ministry or a superior authority cannot intervene in an individual administrative procedure. Due administrative procedure means, among other things, that the authority has to communicate the developments of the case with concerned parties (Administrative Procedure Act, sect. 17), to provide a reasoned decision (ibid., sect. 20), and access to the materials (ibid., section 16).

Access to effective remedies — the Parliamentary Ombudsman

60. The communicant alleges that the Parliamentary Ombudsmen cannot give access to effective remedies as required under article 9 of the Convention. The communicant also alleges that the Ombudsman has not investigated his network's complaints of bias by officials[66] nor helped to get the information he had requested on how the safety regulations in the Machinery Directive should be applied.[67]

61. The Party concerned submits that inadequate or improper administrative procedure may be brought to the attention of the Parliamentary Ombudsman, who may criticize the authority, and also bring charges for misuse of office according to chapter 20, section 1, of the Penal Code. Generally, the Ombudsman's decision will stay at criticism. Such criticism carries much authority. However, it does not provide any remedy for the individual. The Ombudsman cannot make the authority provide access to the information in the relevant individual case.[68] Similarly, the ombudsmen have disciplinary functions, and act through opinions. They have the competence to prosecute civil servants for misuse of office. They cannot, however, intervene in an individual case, and only scrutinize the administrative handling of the case.[69]

D. Domestic remedies and admissibility

62. The communicant's recourse to domestic remedies regarding his requests for access to information is summarized in paragraph 32 above.

63. The communicant's recourse to domestic remedies with respect to the building permit for the Helgarö/Strängnäs wind turbines is summarized in paragraphs 17–23 above.

[65] Communication, p. 8.
[66] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 24.
[67] Communicant's reply dated 24 September 2013 to the Committee's questions, p. 25 (full stops added).
[68] Response of the Party concerned to communication dated 26 September 2013, p. 9.
[69] Response of the Party concerned to communication dated 26 September 2013, p. 13.

64. The substance of the Land and Environment Court of Appeal's judgment of 9 March 2015 was broadly favourable to the communicant: the court found that the building permit, to which the communicant was opposed, should not be granted. But the communicant alleges that there were a number of acts by the Swedish authorities that demonstrated a breach of provisions of the Convention by the Party concerned.

65. The Party concerned contests the admissibility of the communication on the ground that the communicant's court proceedings were still ongoing at the time of his submission of the communication and thus there were still domestic remedies available in accordance with paragraph 21 of the annex to decision 1/7.

III. Consideration and evaluation by the Committee

66. Sweden ratified the Convention on 20 May 2005. The Convention entered into force for Sweden on 18 August 2005, being 90 days after the deposit of Sweden's instrument of ratification.

Admissibility

67. The Committee notes that, as described in paragraphs 17–23 above, the communication was submitted before domestic remedies were exhausted. While stressing that domestic remedies should, in general, always be exhausted before the submission of a communication, given that domestic remedies were exhausted before the Committee finalized its findings in this case, the Committee finds the communication is admissible, except for the claim regarding article 4 of the Convention, which the Committee finds inadmissible for the reasons given in paragraphs 71–73 below.

68. The Committee will not consider the European Union secondary legislation relating to machinery because it has received no evidence that such legislation is relevant to any alleged breach of the Convention by the Party concerned. Nor will the Committee consider the Swedish Courts' decisions except insofar as those decisions relate to alleged breaches of the Convention.

The identity of the communicant

69. As a preliminary point, since the original communication was submitted in the name of Bernd Stümer only, the Committee considers Mr. Stümer to be the sole communicant in this case, while the organization Formningen Landskapsskydd i Strängnäs (FLIS), which supports Mr. Stümer, has acted as an observer.

70. With respect to the communicant's subsequent assertion that FLIS should also be considered a communicant,[70] the Committee emphasizes that the following findings would not have differed in any way had FLIS been a communicant.

Article 4

71. The communicant made a number of requests for information to the Municipality of Strängnäs. The Parliamentary Ombudsman's decision of 11 March 2009 held that there had been a number of failures by the municipality to process those requests in accordance with the law. With respect to the communicant's request for information filed on 17 November 2008, the Ombudsman's decision assumes that was subsequently correctly dealt with; the Committee has been given no evidence that contradicts the Ombudsman's assumption.

[70] Communicant's reply dated 24 September 2013 to the Committee's questions.

72. To the extent, therefore, that the communicant considers that the Parliamentary Ombudsman, in its decision of 11 March 2009, upheld his concerns regarding the authorities' inadequate response to his requests for access to information, the Committee finds the Ombudsman's decision criticizing the authorities' various failures has already addressed the communicant's concerns at the domestic level.

73. However, to the extent that the communicant considers that any of his complaints regarding access to information under article 4 were not, or were not adequately, addressed by the Ombudsman, the communicant should have exercised his rights to go to court with respect to those information requests. As he did not do so, the Committee finds that his remaining allegations under article 4 are inadmissible in accordance with paragraph 21 of the annex to decision I/7 for failure to exhaust available domestic remedies.

Article 5

74. The communicant alleges that specific categories of information should have been disseminated by the Party concerned under article 5 of the Convention, and in particular in accordance with paragraphs 1 (a)–(c), 2, 2 (b) (ii), 3, 3 (a)–(b), 4, 5 and 7 (a)–(c) of that article. The Committee has on a number of occasions[71] stressed that article 5, paragraph 1 (a), of the Convention requires each Party to ensure that "public authorities possess and update environmental information which is relevant to their functions". However, with respect to the communicant's allegations under the provisions of article 5 in the current case, the Committee finds that, while the communicant made many allegations of non-compliance with that article, he has not substantiated any allegation with sufficiently detailed, clear and specific arguments that would convince the Committee that those provisions of article 5 of the Convention have indeed been breached in this case. The Committee thus finds the allegations under article 5 unsubstantiated.

Article 6

75. The communicant alleges a number of breaches of article 6. The Committee, however, has received no evidence that establishes that the Party concerned was obliged to apply article 6 to the decisions on the wind turbines in question. In particular, the Committee has been provided with no legal basis to find that the decisions to permit the wind turbines falls within the scope of either paragraph 1 (a) or 1 (b) of article 6.

76. As far as paragraph 1 (a) of article 6 is concerned, the Committee notes that wind turbines are not expressly mentioned in annex I to the Convention. It follows that the only way in which the wind turbines in this case would fall within paragraph 1 (a) would be if the construction of the turbines were an activity referred to in paragraph 20 of annex I to the Convention, i.e., if it were an activity where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation; but the communicant has not sought to argue, or present any evidence, that paragraph 20 of annex I applies.

77. What is more, there is no evidence before the Committee to suggest that it has been determined by the Party concerned that the construction of the wind turbines in question is an activity that may have a significant effect on the environment as provided for by article 6, paragraph 1 (b).

[71] See, for example, the findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland (ECE/MP.PP/C.1/2014/5), para. 88. See also the findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union (ECE/MP.PP/C.1/2012/12), para. 90.

78. The Committee therefore finds that article 6 did not apply to the decision-making on the building permits for the two wind turbines, and thus there was no breach of the provisions of article 6 in this case.

Articles 7 and 8

79. The communicant alleges general breaches of article 7, but has not provided the Committee with any evidence regarding the preparation of any specific plan, programme or policy that would engage that article. The Committee thus finds his allegations regarding article 7 to be unsubstantiated.

80. The communicant also alleges general breaches of article 8, but has likewise not put before the Committee evidence of the preparation of any executive regulations and/or generally applicable legally binding normative instruments to which that article would apply. In this regard, the Committee notes the communicant's refers briefly to media reports in 2012 regarding a possible amendment to the Environmental Code, but since the communicant did not elaborate on this further, the Committee understands that an amendment process did not, in fact, take place. The Committee thus finds the allegations regarding article 8 to be unsubstantiated also.

Article 9, paragraph 2

81. Article 9, paragraph 2, of the Convention requires Parties to ensure members of the public concerned 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 and, where so provided for under national law, of other relevant provisions of the Convention.

82. Since the Committee has found that the wind turbines in question are not subject to the provisions of article 6, and there is no evidence that the law of the Party concerned provides for article 9, paragraph 2, to apply to other provisions of the Convention, the Committee also finds that there is no breach of article 9, paragraph 2, in this case.

Article 9, paragraph 3

83. Article 9, paragraph 3, of the Convention provides that each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

84. The Committee has previously found that the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. Parties are not obliged to establish a system of popular action in their national laws so that anyone can challenge any decision, act or omission relating to the environment; but, on the other hand, Parties may not use the flexibility provided for in article 9, paragraph 3, as an excuse for introducing or maintaining criteria so strict that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national law relating to the environment.[72]

[72] See the Compliance Committee's findings and recommendations with regard to communication ACCC/C/2005/11 concerning Belgium (ECE/MP.PP/C.1/2006/4/Add.2), para. 35, and its report on compliance by Denmark with its obligations under the Convention (ECE/MP.PP/2008/5/Add.4), para. 29.

85. The Committee has not been given any evidence that suggests that the criteria laid down in the national law with respect to environmental associations are outside the margin of discretion allowed to Parties when implementing article 9, paragraph 3. In this regard, the Committee notes that associations with less than 100 members are entitled to standing so long as they can show they have the "support from the public" and have been active at least three years (see para. 29 above).

86. As for the criteria for individuals, the applicable legislation, section 22 of the Administrative Procedure Act, provides: "A person whom the decision concerns may appeal against it, provided that the decision affects him adversely and is subject to appeal."

87. Under the jurisprudence of the Supreme Administrative Court, "in principle, every individual who may be harmed, or exposed to other kinds of inconvenience by an environmentally harmful activity allowed by a permit decision is considered as a concerned party. However, a mere theoretical or completely insignificant risk of damage or detriment is not sufficient."[73] With respect to building permits, the Supreme Administrative Court has ruled that "such decisions are deemed to concern — in addition to the applicant — owners of the properties bordering directly on the property that the building permit applies to and, in addition owners of properties in close neighbourhood that are particularly affected on account of the nature and scope of the measure covered by the building permit, natural conditions at site, etc.".[74]

88. The Committee considers that there is nothing to suggest that the criteria described for standing to appeal building permits, as set out in legislation and developed in jurisprudence, violate article 9, paragraph 3, of the Convention.

89. The next question for the Committee is to consider whether the reviewing bodies in the present case applied the established criteria for standing in a way that ran beyond the scope permitted by article 9, paragraph 3, of the Convention.

90. In its decision of 15 December 2011, the County Administrative Board of Södermanland made a decision on the appeal of the decision of the Planning and Building Committee of the Municipality of Strängnäs on a building permit for two wind turbines — Näs 1:4 and Knutsberg 1:2. The Board said:

> Under case law building permit decisions are considered to concern owners of the properties bordering directly on the property that the building permit applies to and, as previously mentioned, also owners of properties in a close neighbourhood that are particularly affected on account of the nature and scope of the measure that the building permit refers to, natural conditions at the site, etc. None of the properties with the designation Björsund, Helgaro, Helgarö-Väla (with the exception of Helgarö-Väla 1:1), Helgarö-Åsby, Rällinge or Stenstavik is a neighbour sharing a border with either Knutsberg 1:2 or Näs 1:4, and they are, in addition, located between 1.5 and more than 3 km from the closest wind turbine. Nor do Knutsberg 1:16 (with a distance of about 1 km from the closest wind turbine) or Knutsberg 1:6, 1:13 or 1:14 meet this requirement. The latter three properties are located between 1.2 and 1.3 km from Näs 1:4. In view of this, the owners of/residents on these properties cannot be considered to be affected by the intended activities in such a way that they have a right to appeal the decision of the

[73] See paragraph 54 above.

[74] RÅ 1992 report 81, cited in Nacka Land and Environment Court, judgement of 15 May 2014, case P129-12.

> Committee under section 22 of the Administrative Procedure Act. Their appeals shall therefore be rejected.[75]

91. The communicant lives on the property Helgarö-Väla 1:2, so he is one of the persons whose appeal was dismissed in this case.

92. In its judgment of 15 May 2014 in case P129-12, the Nacka District Court considered, among other things, the communicant's appeal against the decision of the County and Administrative Board. With respect to the communicant's appeal, the court found as follows:

> Regarding Bernd Stümer, the court notes that his property is not a property bordering on any of the properties on which the wind turbines are to be erected. Nor has it emerged that Bernd Stümer's property is located in a close neighbourhood that is particularly affected in view of the nature and scope of the measure covered by the building permit, the natural conditions at the site etc. The references that Bernd Stümer has made to the [European Court of Human Rights] and a ruling of the [Court of Justice of the European Union] do not alter the assessment of the Court in this part of the case. In line with the deliberations that the Court has made above, public interests cannot be cited to support standing. The Court therefore shares the assessment of the County Administrative Board that Bernd Stümer cannot be considered to have a right to appeal the decision. Bernd Stümer's appeal shall therefore be refused.[76]

93. In its decision of 21 August 2014, the Land and Environment Court of Appeal concluded that there was no reason to grant leave to appeal against the decision of the Nacka District Court with respect to the communicant's standing, hence the judgment by the Nacka District Court remained in force.

94. In the Committee's view, those two passages indicate that distance was the principal consideration when finding that the communicant did not have standing. The Committee notes that the Party concerned has argued that distance was not the only factor taken into account by the County Administrative Board when it determined who had standing, and that the Board referred to the case law at large (which requires an assessment of all the circumstances of the individual case) and made its decision on the basis of that case law.

95. The Committee considers that the view taken by the Party concerned is not that clear from the County Administrative Board's decision. Indeed, it might be inferred that the Board excluded Mr. Stümer from having a right to appeal against the decision to grant the building permits because, first, his property did not share a border with the land on which the wind turbines were being built and, second, because his property was too far away to be located in a close neighbourhood that would be particularly affected by the wind turbine. It is not immediately apparent that the Board, in reaching the second conclusion, took into account all the relevant circumstances; the text of the decision might be taken to imply that the Board took into account only Mr. Stümer's property's distance from the wind turbines.

96. In this regard, while not an allegation raised in this case, it is clear to the Committee that the requirement in article 9, paragraph 4, for review procedures to be "fair" should be read as a requirement to ensure that claimants are able to know the reasons for the decision of the review body, inter alia, to enable the claimants to challenge that decision where they so choose.

[75] Annex 2 to the e-mail from the Party concerned dated 5 October 2015, p. 4.

[76] Annex 1 to the e-mail from the Party concerned dated 5 October 2015, p. 11.

97. Returning to the present case, the Committee is concerned that there is little evidence in the respective decisions of the Swedish courts to show how, if at all, any factor other than distance was taken into account when considering whether Mr. Stümer should have had standing to appeal against the decision to grant the building permits.

98. Despite the discretion given to Parties in article 9, paragraph 3, to lay down criteria for standing in their national law, if reviewing bodies, when considering whether the criteria were met in practice failed to take into account all considerations relevant to those criteria, that Party would be in non-compliance with article 9, paragraph 3. Clearly every wind turbine will be different, and have a potentially different impact. While it is impossible to write a conclusive list of the possible impacts of wind turbines, the Committee considers that, depending on the circumstances, it may be necessary to take into account some of the following considerations when assessing the potential impact of wind turbines:

(a) A wind turbine may have an impact on an individual because of noise and vibration or shadow flicker, and due regard should be given to safety considerations, such as proximity to roads and railways, air traffic safety, proximity to power lines and the possibility of interference with communication systems. The construction of turbines may also have an impact on an individual;

(b) It may be the case that national laws lay down criteria within the meaning of article 9, paragraph 3, that relate to damage to the environment at large, in which case there may be access to justice because of potential damage to habitats, plant and animal species, or architectural and cultural heritage.

99. This list is not exhaustive. There may well be other factors to take into account on a case-by-case basis.

100. In this context, the Committee notes that the law of the Party concerned lays down criteria for standing that relate to the impact of a decision or activity on an individual. The factors listed in paragraph 98 (a) above may therefore be among those relevant for the reviewing bodies of the Party concerned to consider when examining whether its criteria for standing are met.

101. The Committee does not consider that in each and every case that a wind turbine is constructed all the considerations in paragraph 98 (a) will apply; but the Committee is convinced that it would not be consistent with the criteria laid down by the Party concerned, and therefore, with article 9, paragraph 3, to exclude standing to challenge an act or omission concerning a wind turbine only with reference to distance. It follows that the Committee does not consider it would be legitimate to exclude from standing everyone more than a certain distance, for example 1.5 kilometres, away from a turbine, on the basis of distance alone.

102. In the circumstances of the case before the Committee, and in particular because of the County Administrative Board of Södermanland's reference to the criteria laid down in the national law (see para. 90 above), the Committee has not found conclusive evidence that the Swedish review bodies only took distance into account. However, if the review bodies of the Party concerned were indeed to take only distance into account in determining standing to challenge wind turbine decisions, this would not be consistent with the criteria it has laid down in its national law, and thus with article 9, paragraph 3, of the Convention**.**

103. Nevertheless, for the reason given in the paragraph above, the Committee finds that it does not have conclusive evidence to find that the Party concerned was in non-compliance with article 9, paragraph 3, in the circumstances of the present case.

Article 9, paragraph 4

104. The communicant has alleged that the County Administrative Board is an organization through which political power is exerted and this disregards the right of citizens to independent and impartial justice in matters relating to their environment.

105. A biased review procedure would fail to deliver the fair remedies required by article 9, paragraph 4; but no evidence of bias has been put before the Committee and in any event the Board's decision was subject to appeal. The Committee therefore finds the communicant's allegation to be unsubstantiated.

106. The communicant also alleges that the Parliamentary Ombudsmen cannot give access to effective remedies; but in any event a complaint to the Parliamentary Ombudsman is one of several remedies available. No evidence has been put before the Committee to indicate that the other available remedies are ineffective; in this respect the communicant could have taken the issue to the courts, but failed to do so. The Committee therefore finds the communicant's allegation with respect to the availability of effective remedies to be unsubstantiated.

IV. Conclusions

107. Having considered the above, the Committee finds that the Party concerned is not in non-compliance with articles 5, 6, 7, 8 and 9 of the Convention in the circumstances of this case.