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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Room 429-2
Palais des Nations
CH-1211 Geneva 10
Switzerland

5th March 2014

Dear Ms Marshall

Communication ACCC/C/2010/53

1. We write further to our letters of 10 September 2012 and 26 October 2012 and in advance of the forthcoming fifth Meeting of the Parties regarding the above communication.
2. As we indicated in those letters, we did not agree with the Committee making recommendations in relation to this communication.

Background

3. As the Committee will recall, communication 53 concerned allegations of non-compliance with the Convention under the three pillars of the Convention by a residents' committee in the context of the construction of the Edinburgh Tram Network and associated impacts on road traffic.
4. The Committee dismissed most of these claims. However, it examined the question of whether Edinburgh City Council should have refused a request for raw data on the state of the air and atmosphere.
5. The Committee found that such information constituted environmental information under the Convention. It also found that withholding data merely on the basis that it has not been processed did not come within the exceptions available to public authorities under the Convention.
6. The Committee was also made aware that the communicant did not use the free of cost administrative procedure of complaint to the Scottish Information Commissioner and that the data was released to Edinburgh City Council.



Committee's findings and recommendations

7. The Committee made a finding of non-compliance on the grounds that the requested raw data was not provided to the public, but also stated that the United Kingdom was no longer in non-compliance because the raw data was subsequently provided to the public.

8. The Committee went on to recommend that the Meeting of the Parties:

“recommend to the Party concerned to ensure that the practice to release raw data in on-going decision-making processes is maintained”.

United Kingdom comments on findings and recommendations

9. Following our letters to the Committee in 2012, we do not think it would be appropriate for the Meeting of the Parties to make such recommendations. We make the following observations, many of which will already be familiar to the Committee following previous correspondence:

a. The Committee's finding of non-compliance does not take account of the failure by the communicant to seek the appropriate domestic remedy. This is important because these domestic procedures are there to deliver compliance by the United Kingdom. We cannot be sure that every authority in every case will always make the right decision on whether to release information or not. To suggest that the United Kingdom is in non-compliance because one local authority made a particular decision is to look at the United Kingdom's position in isolation from the systems put in place for reviewing individual decisions and which are there to ensure that the United Kingdom complies with the Convention.

b. No suggestion has been made, considered or discussed that the systems in place for reviewing individual decisions by public authorities are insufficient in Convention terms. In our view, findings on whether the United Kingdom as a Party complies with the Convention or not cannot ignore the question of whether the systems put in place are sufficient for these purposes. There has been no cause and therefore no need to discuss the compatibility or otherwise of the system for releasing environmental information with the Convention.

c. The Annex to decision I/7 states at paragraph 21 that the Committee:

“should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of address”.

There is no suggestion or basis for saying that the remedy is unreasonably prolonged or an ineffective and insufficient means of address meaning that the processes in place should have been taken into account.

d. We understand that the Committee has argued that it is not bound to wait for domestic remedies to be exhausted before accepting and advancing a

communication. However, as we have stated to the Committee, most recently in the context of communications 77, 83, 85 and 86, the principle of the exhaustion of domestic remedies, as reflected in paragraph 21, is a well-established principle of customary international law. The reasons for this include the following:

- i. municipal law should be given the opportunity to provide a remedy before an international body intervenes;
- ii. avoiding forum shopping by potential claimants;
- iii. preventing international tribunals from being inundated with claims;
- iv. international tribunals should always be a court of last resort rather than a court of first instance.

These principles apply to the compliance mechanism under the Aarhus Convention.

10. We remain of the view that domestic remedies must have been exhausted – provided that they are not unreasonably prolonged or are ineffective – by a communicant before the Committee progresses their communication. This will help ensure that:

- a. the whole of a Party's system for delivering compliance with the Convention is examined rather than just part of it;
- b. the Committee acts consistently with its previous actions (*cf.* Committee's handling of communications 19, 38 and 67);
- c. the Committee acts consistently with the procedures outlined in the Annex to decision I/7; and
- d. the Committee acts consistently with the requirements of customary international law.

11. We believe that these issues are reflected in the unusual nature of the Committee's findings, i.e. stating that the United Kingdom was in non-compliance with the Convention for as long as a single local authority continued to withhold information.

12. While it is helpful for the Committee to have given its views on the meaning of the term "environmental information" and the application of the exceptions to disclosing such information in this context, it could have done so without taking the additional step of suggesting that the United Kingdom did not comply with the Convention. Such a step was unnecessary as well as, in our view, inappropriate in these circumstances.

13. With regard to the recommendation itself, the Committee is asking for the Meeting of the Parties to "ensure that the practice to release raw data in on-going decision-making processes is maintained". The United Kingdom already has systems in place to ensure that practices concerning the release of environmental information are consistent with the Convention. Indeed this was the case before the Committee issued its findings

because such systems are those which would be ignored by failing to take into account domestic remedies.

Effects of adopting the findings and recommendations

14. In summary, it would, in our view, set a worrying trend for the Meeting of the Parties to endorse findings and recommendations of this nature.
15. It could suggest that potential communicants can take cases straight to the Compliance Committee without making use of domestic remedies, even where there are no allegations that such remedies are themselves unsuitable or incompatible with the Convention.
16. It may also lead to the Committee making findings in cases in which only part of the picture is provided, meaning that Parties who rely on having coherent systems for holding public authorities to account are put at a disadvantage.
17. It may undermine the argument, from paragraph 21 of decision I/7, that it is never too late in the process for the Committee to take account of domestic remedies, and that once the admissibility hurdle has been cleared there is no continuing duty on the Committee to consider closing a communication or issuing findings of compliance as information about domestic remedies emerges.
18. It would also reinforce the suggestion that the Committee must execute its duty to “Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention” (paragraph 37(a), Annex to decision I/7), by making findings of non-compliance and issuing formal recommendations for transmission to the Meeting of the Parties, even where such steps are not necessary or appropriate in the circumstances.

Next steps

19. We notified the secretariat and the Chair of the Working Group of the Parties that we intended to make an intervention under the agenda item on the compliance mechanism on 26 February 2014, in order to use the opportunity to inform other Parties and attendees of our position regarding domestic remedies. However, we have to note that the Chair requested that we did not take the floor, on the basis that it would be beyond the scope of the Working Group to mention any matter of substance on compliance.
20. In the absence of a draft decision on compliance at this Working Group we were advised to write to the Compliance Committee, bringing this to the attention of other Parties by the publication of this letter on the UNECE website, and to raise the matter at the Meeting of the Parties. Whilst we were grateful to the Chair and the secretariat for advising us of which steps to take, we were disappointed not to be able to use the opportunity to advise other Parties and observers attending the Working Group in person. This was in spite of having made it clear that we did not intend to go into the specifics of this particular communication.

21. We also note that there does not appear to be any clear procedure for drawing to the attention of Parties and others concerns such as those we have expressed here. In the interests of transparency and effective management of the work of the Meeting of the Parties, we think that it is important to avoid such matters being raised at the last moment.
22. It would perhaps be helpful for the Meeting of the Parties to clarify procedures, both in relation to making interventions to raise general points about compliance at future Working Groups and regarding disagreement with the Committee's recommendations.
23. We ask that this letter be drawn to the attention of the Bureau, as we have been advised by the Chair of the Working Group and the secretariat.
24. We also request that the secretariat include this letter amongst the documents posted on the UNECE website for the forthcoming Meeting of the Parties as well as in the correspondence relating to communication 53. We remain concerned that other Parties may not otherwise be made aware of our concerns on domestic remedies and the proposed issue of this type of recommendation sufficiently in advance of the Meeting of the Parties, particularly given that we were not able to take the floor on this matter at the 17th Working Group.
25. We hope that the Compliance Committee and the Bureau will be able to reflect our concerns when respectively preparing their report and draft decision on compliance.

Yours sincerely

Ahmed Azam

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United Kingdom National Focal Point