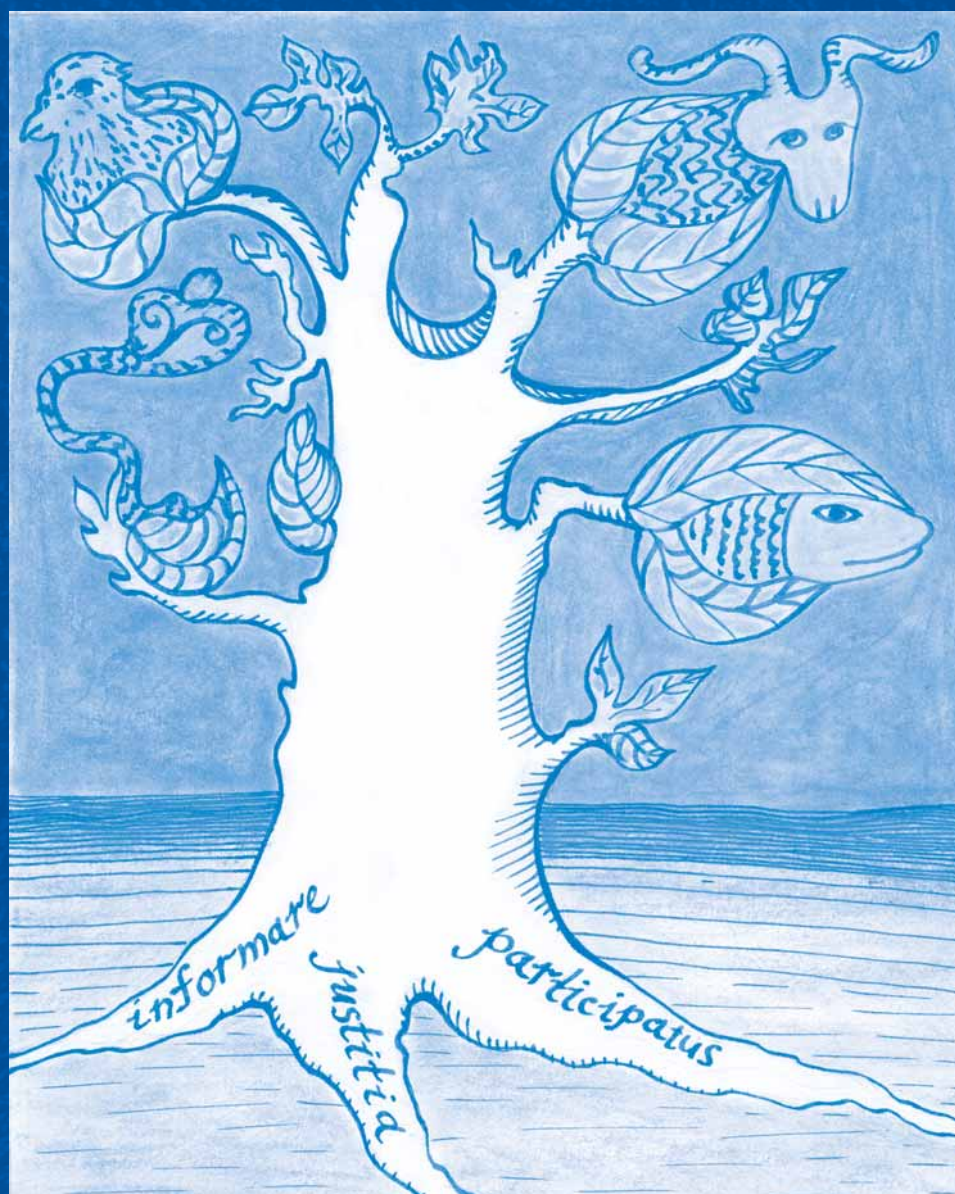


# Case Law of the Aarhus Convention Compliance Committee

2004-2011



**Case Law  
of the Aarhus  
Convention  
Compliance Committee  
(2004-2011)**

# Case Law of the Aarhus Convention Compliance Committee (2004-2011) *Second edition*

**A. Andrusyevych, T. Alge, C. Konrad (eds)**, Case Law of the Aarhus Convention Compliance Committee (2004-2011), 2<sup>nd</sup> Edition (RACSE, Lviv 2011)

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**First edition:** A. Andrusyevych, T. Alge, C. Konrad (eds), Case Law of the Aarhus Convention Compliance Committee (2004-2008) (RACSE, Lviv 2008)

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## INTRODUCTION

This is the second edition of the *Case Law of the Aarhus Convention Compliance Committee*. It attempts to summarize the practice of the Compliance Committee of the Aarhus Convention. Since its set up in 2002 by the First Meeting of the Parties of the Aarhus Convention, the Committee has dealt with numerous issues related to practical implementation of the Convention by the parties. In many cases, the Committee had to interpret and apply Convention's provisions to specific situations brought to its attention by the public and parties, as well as its own rules of procedures. Therefore, substantial case law was developed by the Committee during 2004-2011. Understanding this case law may help policy makers and practitioners apply and use the Convention in a more effective and uniform way promoting common standards for practical enforcement of environmental human rights in UN ECE region.

This second edition updates the *Case Law of the Aarhus Convention Compliance Committee* (which covered 2004-2008) with new interpretations by the Compliance Committee as well as decisions adopted by the Meeting of the Parties (MOP) of the Aarhus Convention. The latter is new to this publication since the first edition did not include decisions by MOP.

*The Case Law of the Aarhus Convention Compliance Committee* was designed as a reference tool as explained below and comprises three parts, the first two representing similar approach. The **first part** is Aarhus Convention text (without GMO amendment) with inserted interpretations of its provisions by the Committee. The **second part** is Decision I/7 of the 1st Meeting of the Parties (establishing the compliance mechanism and setting its key procedural elements) with Committee's case law on procedural issues (such as admissibility requirements). In addition, this edition includes relevant parts of the decisions by MOP with a view of reflecting measures adopted towards countries found in non-compliance with the provisions of the Aarhus Convention. Note that countries addressed by compliance decisions of MOP-2 (2005) were subject to the second circle of compliance review and, therefore, these countries were addressed by compliance decisions of MOP-3 (2008). When developing this publication it was decided not to provide any substantial comments on the interpretations made by the Committee except for a few explanatory notes providing brief context to some of the statements by the Committee. The **third part** includes summaries of all cases (triggered by communications with one exception) submitted to the Compliance Committee. These summaries aim to provide background information on the substantive issues submitted for the consideration by the Compliance Committee and, hopefully, will help the reader better understand the context of the Committee's interpretations of the Convention in specific cases. Lastly, this part includes two reference tables to help the reader identify or analyze relevant case law of the Compliance Committee.

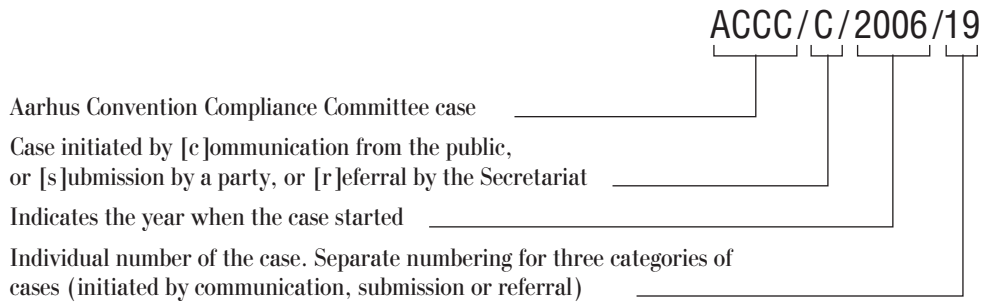
The publication covers all cases considered by the Compliance Committee as of May 2011, including those declared inadmissible, except for cases for which decisions were not ready at the time of publication. It does not include pending cases. For those unfamiliar with documentation details within UN ECE system, we provide a brief explanation of the reference numbers used in this publication. We hope this will help the readers to make further research when needed.

All documents used for this publication were taken from and can be accessed at the official web-site of the Aarhus Convention: [www.unece.org/env/pp](http://www.unece.org/env/pp).

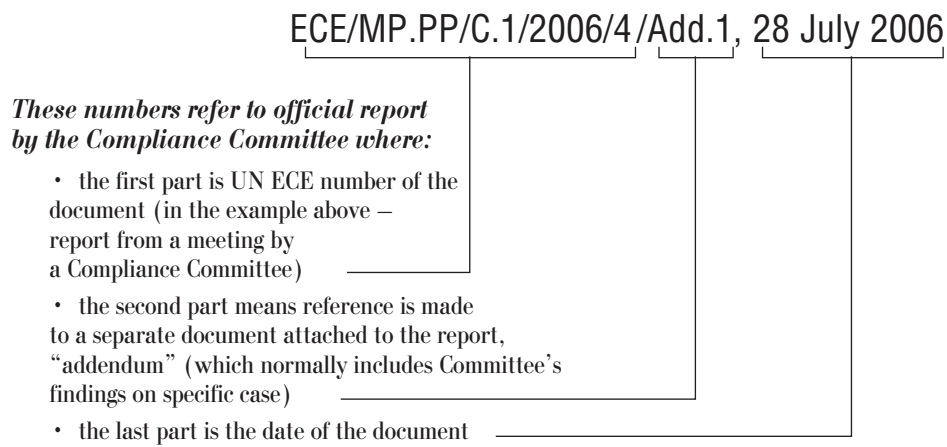
The second edition of the Case Law of the Aarhus Convention Compliance Committee was developed by the European ECO Forum legal team members: Andriy Andrusevych, Resource & Analysis Center "SOCIETY AND ENVIRONMENT" (Ukraine), Thomas Alge, OEKOBUERO (Austria) and Clemens Konrad, OEKOBUERO (Austria). This publication is part of a project supported by the Sigrid Rausing Trust.

More information about European ECO Forum and Aarhus Convention can be found at [www.participate.org](http://www.participate.org)

## CASES REFERENCE NUMBERS:



## DOCUMENT REFERENCE NUMBERS:



**CASES INCLUDED INTO PARTS I AND II  
OF THIS PUBLICATION:**

Reference number	State Concerned
ACCC/S/2004/01	Ukraine (by Romania)
ACCC/C/2004/1	Kazakhstan
ACCC/C/2004/2	Kazakhstan
ACCC/C/2004/3	Ukraine
ACCC/C/2004/4	Hungary
ACCC/C/2004/5	Turkmenistan
ACCC/C/2004/6	Kazakhstan
ACCC/C/2004/7	Poland
ACCC/C/2004/8	Armenia
ACCC/C/2004/9	Armenia
ACCC/C/2004/10	Kazakhstan
ACCC/C/2005/11	Belgium
ACCC/C/2005/12	Albania
ACCC/C/2005/14	Poland
ACCC/C/2005/15	Romania
ACCC/C/2006/16	Lithuania
ACCC/C/2006/17	European Community
ACCC/C/2006/18	Denmark
ACCC/C/2006/19	United Kingdom
ACCC/C/2007/21	European Community
ACCC/C/2007/22	France
ACCC/C/2008/23	United Kingdom
ACCC/C/2008/24	Spain
ACCC/C/2008/25	Albania
ACCC/C/2008/26	Austria
ACCC/C/2008/27	United Kingdom
ACCC/C/2008/28	Denmark
ACCC/C/2008/29	Poland
ACCC/C/2008/30	Moldova
ACCC/C/2008/32	European Community
ACCC/C/2008/33	United Kingdom
ACCC/C/2008/34	Spain
ACCC/C/2008/35	Georgia
ACCC/C/2009/36	Spain
ACCC/C/2009/37	Belarus
ACCC/C/2009/38	United Kingdom
ACCC/C/2009/39	Austria
ACCC/C/2009/40	United Kingdom
ACCC/C/2009/41	Slovakia
ACCC/C/2009/42	Hungary
ACCC/C/2009/43	Armenia
ACCC/C/2010/46	United Kingdom
ACCC/C/2010/47	United Kingdom
ACCC/C/2010/49	United Kingdom
ACCC/C/2010/52	United Kingdom

## PART I

## PREAMBLE

# CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

The Parties to this Convention,

Recalling principle I of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved 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,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,

Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,



**PREAMBLE**

Recognizing 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,

Acknowledging that public authorities hold environmental information in the public interest,

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

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.”

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 34)*

Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

Conscious of the role played in this respect by ECE and recalling, inter alia, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference «Environment for Europe» in Sofia, Bulgaria, on 25 October 1995,

Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Conscious that the adoption of this Convention will have contributed to the further strengthening of the «Environment for Europe» process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

Have agreed as follows:

## Article 1 OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 36.)*

NOTE: There's nothing in the text of the Aarhus Convention defining part of it as "operative provisions". International law practice and studies normally use the term "operative" to distinguish main part of a treaty from, normally, preamble and annexes to it.

## Article 2 DEFINITIONS

For the purposes of this Convention,

1. «Party» means, unless the text otherwise indicates, a Contracting Party to this Convention;

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). 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).

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 122)*

2. «Public authority» means:

(a) Government at national, regional and other level;

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).

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 23)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 19)*

NOTE: The information requests were sent to Chairperson of the State Real Estate Cadastre Committee and the Mayor of Yerevan.

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 21)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 25)*

The municipality of Hillerod 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 Hillerod 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).

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 25)*

**(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;**

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).

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 17)*

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.

*(Hungary ACCC/C/2004/4, ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 10)*

**(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;**

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).

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 17)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.67)*

**(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.**

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 26)*

NOTE: the EIB is the European Investment Bank

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 69)*

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 61)*

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 70)*

When determining how to categorize a decision, and act or an omission under the Convention, its label in the domestic law of a Party is not decisive (cf. ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, para 29)).

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 71)*

**3. «Environmental information» means any information in written, visual, aural, electronic or any other material form on:**

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 32)*

- (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para.18)*

NOTE: The feasibility study (of technical and economic issues) was preceding legislative proposal to import radioactive wastes for their disposal in Kazakhstan.

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 20)*

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.

*(Moldova ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011, para.29)*

- (c) The state of human health and safety, conditions of human life, 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 (b) above;

[...] (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;

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 30)*

4. «The public» means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

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 nongovernmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 26)*

NOTE: Foreign organizations mentioned here are in fact organizations established and operating in another country.

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 16)*

5. «The public concerned» means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 18)*

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 nongovernmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 26)*

[...] 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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.81)*

## Article 3 GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice 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.

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 23)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 24)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 41)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 42)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 43)*

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 27)*

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 28)*

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 34)*

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 40)*

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.

*(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 22)*

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.

*(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 27)*

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).

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 94)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 35)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 36)*

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).

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 58)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 59)*

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para 26)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 31)*

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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 46)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 140)*

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.

*(Moldova ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011, para.38).*



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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.53)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.54)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.55)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.56)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.68)*

2. Each Party shall endeavour to ensure that 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.

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 interestbearing account, but there is no evidence before the Committee that they did so.

*(United Kingdom ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, October 2010, para. 54)*

In respect of the communicant's allegations that the Report to Inform 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 Appropriate Assessment. It does not consider that the communicant's allegations give rise to a breach of article 3, paragraph 2 of the Convention.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 68)*

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.
4. Each Party shall 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.

[...] 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.

*(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 20)*

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.

*(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 21)*

5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.
6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

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.

*(Hungary ACCC/C/2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 17)*

The Committee does not exclude the possibility when determining issues of noncompliance to take into consideration general rules and principles of international law, including international environmental and human rights law, which might be relevant in context of interpretation and application of the Convention. However, there is an existing provision in the Convention, dem-

onstrating 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.

*(Hungary ACCC/C/2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 18)*

7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.
8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.64)*

NOTE: The Mayor of a small town published articles in a newspaper describing local environmental activists as “new inquisitors”, “manipulators”, “ignorant” and “promoting scandal”.

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.

*(United Kingdom ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, October 2010, para. 53)*

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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 47)*

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

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.

*(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 16)*

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 nongovernmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 26)*

## Article 4 ACCESS TO ENVIRONMENTAL INFORMATION

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 23)*

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para 25)*

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 39)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 41)*

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 33)*

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 37)*

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

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.

*(Romania ACCC/C/2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008 para. 30)*

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para 34.)*

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para 35.)*

- (a) Without an interest having to be stated;

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, par 20)*

- (b) In the form requested unless:

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 for a cost of 13 Euro, instead of paper copies of the documentation of 600 pages for a cost of 2.05 Euro/page), Spain failed to comply with article 4, paragraph 1 (b), of the Convention.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.70)*

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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.61)*

NOTE: The information related to a proposed project was made available at two computers located in another city, without a possibility to copy it.

- (i) 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
- (ii) The information is already publicly available in another form.

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 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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para 30.)*

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para 31.)*

2. The environmental information referred to in paragraph 1 above shall be made available 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. The applicant shall be informed of any extension and of the reasons justifying it.

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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.74)*

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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.57)*

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 [...]”.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.58)*

3. A request for environmental information may be refused if:

[...] (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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 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.

*(Moldova ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011, para.31)*

- (a) The public authority to which the request is addressed does not hold the environmental information requested;
- (b) The request is manifestly unreasonable or formulated in too general a manner; or
- (c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 31)*

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.

*(Romania ACCC/C/2005/15; ECE/MP.PP/2008/5/Add.7 16 April 2008 para. 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 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;

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 30)*

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.

*(Moldova ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011, para.38).*

- (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
- (b) International relations, national defence or public security;
- (c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
- (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

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.

*(Hungary ACCC/C/2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 10)*

(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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 30)*

- (e) Intellectual property rights;

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.

*(Romania ACCC/C/2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008 para. 28)*

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.

*(Romania ACCC/C2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008 para. 29)*

- (f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
- (g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

- (h) The environment to which the information relates, such as the breeding sites of rare species. As a result of the Commissioner’s decision that all information except the locations of the mussels should be released, the Committee’s 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.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 70)*

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 Party concerned’s submission that the mussels have been subject to illegal fishing in the past.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 71)*

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.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 72)*

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”.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 73)*

The Committee notes that article 4 of the Convention refers to the “public”, whereas article 6 of the Convention 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.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 76)*

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.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 77)*

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

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.

*(Moldova ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011, para.31).*

- 5. Where a public authority does not hold the environmental information requested, this public author-

ity shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.65)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.66)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.67)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.68)*

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

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.69)*

The Committee does not have sufficient information about the national framework for record-keeping 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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.70)*

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.
7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this

period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

[...] (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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para 31.)*

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.

*(Moldova ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011, para.39.)*

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 [...]”.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.58)*

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 33)*

In considering the issue, the Committee took note of decisions by the Court of the European Community and national courts and appeal bodies on the meaning of 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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.77)*

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 Euro per page, which seems to be generally equivalent to the standard commercial fee for copying in the UNECE countries, the Committee concludes that the charge of 2.05 Euro perpage for copying cannot be considered reasonable and constitutes non-compliance with article 4, paragraph 8, of the Convention.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.79)*

## Article 5 COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that:

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3,14 March 2005, para. 31)*

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 modeling techniques used in their preparation.

*(Romania ACCC/C2005/15; ECE/MP.PP/2008/5/Add.7 16 April 2008 para. 27)*

- (a) Public authorities possess and update environmental information which is relevant to their functions;
  - (b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;
  - (c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.
2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:
- (a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;
  - (b) Establishing and maintaining practical arrangements, such as:
    - (i) Publicly accessible lists, registers or files;
    - (ii) Requiring officials to support the public in seeking access to information under this Convention; and
    - (iii) The identification of points of contact; and

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

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.69)*

- (c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

With respect to the communicator'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 communicator has not substantiated that the elements set out in article 5, paragraph 1(c) are met in the circumstances of this case.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 78)*

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

- (a) Reports on the state of the environment, as referred to in paragraph 4 below;
  - (b) Texts of legislation on or relating to the environment;
  - (c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and
  - (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,
- provided that such information is already available in electronic form.
4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.
  5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, *inter alia*:
    - (a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;
    - (b) International treaties, conventions and agreements on environmental issues; and
    - (c) Other significant international documents on environmental issues, as appropriate.
  6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.
  7. Each Party shall:
    - (a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;
    - (b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and
    - (c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.
  8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.
  9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.
  10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

## Article 6 PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 65)*

NOTE: The two decisions the Committee referred to are the 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).

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 67)*

NOTE: Decision No 20 concerns the approval of a construction site for a thermal electric power station (TES)

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).

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 38)*

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 29)*

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.

*(Hungary ACCC/C/2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 15)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 39)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 41)*

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 neces-

sarily sufficient for the purposes of meeting the requirements of article 6 to apply the public participation procedure set out in 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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 42)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 43)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 44)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 45)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 46)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 59)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 29)*

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 39, the Committee notes that, while the Committee does not find that the Party concerned failed to comply with 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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 50)*

The Committee, however, in principle acknowledges the importance of environmental assessment, whether in the form of EIA or in the form of 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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para. 83)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para. 49)*

[...] 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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.50)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.52)*

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).

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 62)*

#### 1. Each Party:

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 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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 70)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 28)*

#### (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

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 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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 55)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 58)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 39)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 59)*

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 36)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 28)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 32)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 33)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 34)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 35)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 37)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 40)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 54)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 60)*

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 (paragraph 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 the decisions that there is no need for 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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para. 82)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para. 74)*

**NOTE:** The Committee was analyzing the EIA legislation in force as of 2009. In 2010 a completely new legal framework for EIA was introduced in Belarus.

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).

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para. 77)*

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).

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.78)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.79)*

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).

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.80)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.81)*

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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 38)*

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 kilometres 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 (paragraph 19 of Annex I).

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 80)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 44)*

- (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

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 determina-

tion 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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 40)*

- (c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. 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, inter alia, of:

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para.71)*

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 23)*

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 25)*

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 28)*

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 neighbour-

hood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 66)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 67)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 68)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 78)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 47)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 48)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 49)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 50)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 59)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 41)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 42)*

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)).

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.85)*

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 examine the project documentation, depends on the size and the complexity of the case.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.65)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.67)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.68)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.70)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.71)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.86)*

- (a) The proposed activity and the application on which a decision will be taken;  
 (b) The nature of possible decisions or the draft decision;

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 66)*

- (c) The public authority responsible for making the decision;  
 (d) The envisaged procedure, including, as and when this information can be provided:  
 (i) The commencement of the procedure;  
 (ii) The opportunities for the public to participate;  
 (iii) The time and venue of any envisaged public hearing;  
 (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

...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)...

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 78)*

- (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

... 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)...

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 78)*

- (vi) An indication of what environmental information relevant to the proposed activity is available; and  
 (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 66)*

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 28)*

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 24)*

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 25)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 69)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 70)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 43)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 44)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 45)*

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 57. 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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 66)*

The Committee considers that the present case is slightly different from the two cases mentioned above [ACCC/C/2006/16 and ACCC/C/2007/22] 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.

*(Spain ACCC/2008/24; Findings and Recommendations, advance copy, January 2010, para.90)*

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.

*(Spain ACCC/2008/24; Findings and Recommendations, advance copy, January 2010, para.91)*

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 ten 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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.92)*

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 CDROM 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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.62)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.89)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.90)*

**4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.**

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).

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 29)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 42)*

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.

*(Hungary ACCC/C/2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 11)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 71)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 72)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 73)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 74)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 51)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 52)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 53)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 54)*

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”.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 55)*

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 were open, in particular the options regarding those features that cannot realistically be altered after the construction is finalized.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 61)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 36)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 37)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 38)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 38)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 43)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 45)*



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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 55)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 56)*

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),\* 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 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.\*\*

\* See <http://www.verkehr.steiermark.at/cms/beitrag/10930541/11163579/> (last accessed 17 June 2009).

\*\* See <http://oesterreich.orf.at/steiermark/stories/272397/> (last accessed on 23 September 2009).

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 57)*

As to the possible link between the two decision-making processes (see para. 2 (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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 64)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 66)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.76)*

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, 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.”

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 81)*

In 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.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 82)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 61)*

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).

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 63)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 64)*

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 49)*

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 32)*

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.

*(Romania ACCC/C2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008 para. 29)*

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.

*(Romania ACCC/C2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008 para. 30)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 44)*

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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.95)*

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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.96)*

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).

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.92)*

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 noncompliance with the Convention.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.93)*

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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.61)*

NOTE: The information related to a proposed project was made available at two computers located in another city, without a possibility to copy it.

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 CDROM 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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.62)*

The Committee notes with some concern that the route finally selected, and the dual carriage-way 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 public participation on these aspects, the Committee can not conclude that the Party concerned is in non-compliance with article 6, paragraph 6 and 7.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 85)*

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) A description of the significant effects of the proposed activity on the environment;

The Committee notes with some concern the fact that the EE [environmental expertiza 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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 30)*

- (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) A non-technical summary of the above;
- (e) An outline of the main alternatives studied by the applicant; and

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 79)*

- (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.
7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or enquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 80)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 43)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 44)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.94)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.95)*

**8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.**

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 29)*

**NOTE:** The decision was taken seven days following publication of the environmental impact statement.

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 55)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 56)*

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),\* 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 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.\*\*

\* See <http://www.verkehr.steiermark.at/cms/beitrag/10930541/11163579/> (last accessed 17 June 2009).

\*\* See <http://oesterreich.orf.at/steiermark/stories/272397/> (last accessed on 23 September 2009).

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 57)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 66)*

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.\*

\*See paragraph 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).

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.98)*

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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.99)*

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.\*

\* See The Aarhus Convention Implementation Guide, United Nations, 2000 at 109.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.100)*

[...]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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.101)*

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. 32 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

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.96)*

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 35)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 31)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 81)*

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 is 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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 82)*



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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 84)*

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.\*

\* See The Aarhus Convention Implementation Guide, United Nations, 2000 at 109.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.100)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.98)*

**10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.**

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 an 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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.58)*

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”.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 51)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 53)*

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 recon-

sideration 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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 55)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 56)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 57)*

11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

## Article 7 PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 63)*

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 65)*

NOTE: The two decisions the Committee referred to are 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) for a thermal electric power station (TES)

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 67)*

NOTE: Decision No 20 concerns the approval of a construction site for a thermal electric power station (TES)

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). This would link it more closely with article 7.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 68)*

NOTE: Decision No 8 is the approval of the site of the proposed industrial and energy park

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 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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 70)*

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 72)*

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 73)*

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 74)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 23)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 24)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 25)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 28)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 43)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 55)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 51)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 30)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 34)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 50)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 55)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 56)*

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),\* 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 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.\*\*

\* See <http://www.verkehr.steiermark.at/cms/beitrag/10930541/11163579/> (last accessed 17 June 2009).

\*\* See <http://oesterreich.orf.at/steiermark/stories/272397/> (last accessed on 23 September 2009).

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 57)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 61)*

As to the possible link between the two decision-making processes (see para. 2 (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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 64)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 65)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 66)*

The Committee, however, in principle acknowledges the importance of environmental assessment, whether in the form of EIA or in the form of 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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para. 83)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.49)*

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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.52)*

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 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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 41)*

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 public participation on these aspects, the Committee can not conclude that the Party concerned is in non-compliance with article 6, paragraph 6 and 7.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 85)*

Having reviewed the documentation referred to by the parties, including the MTS and the AWPR Project Development 2005-2006 Consolidated Assessment Report<sup>10</sup>, 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.

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 87)*

## Article 8 PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other

generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

- (a) Time-frames sufficient for effective participation should be fixed;
- (b) Draft rules should be published or otherwise made publicly available; and
- (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 53)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 61)*

## Article 9 ACCESS TO JUSTICE

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 32)*

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 27)*

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 admin-



istrative 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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 38)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 47)*

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 69)*

The Party concerned has referred to the possibility of members of the public to request national courts to ask for a preliminary ruling of the ECJ on the basis of article 234 TEC. 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 article 234 TEC.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 89)*

While the system of judicial review in the national courts of the EU Member States and the request for preliminary ruling is a significant element for ensuring consistent application and proper implementation of EU law in the 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 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 does neither in itself meet the requirements of access to justice in article 9 of the Convention nor compensate for the strict jurisprudence of the EU Courts, examined in paragraphs 76-88 above.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 90)*

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 91)*

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 33)*

In the circumstances where a Party provides for such a review by a court of law, it shall 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.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 21)*

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 23)*

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 26)*

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.

*(Moldova ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011, para.35).*

## 2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 26)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 63)*

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 29)*

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.

*(Hungary ACCC/C/2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 13)*

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 nationwide 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.

*(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 19)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 35)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 44)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 26)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 29)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 32)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 33)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 44)*

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, 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 and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

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 for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 27)*

[...] 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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.81)*

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 56)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 59)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 28)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 58)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 62)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 123)*

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,<sup>100</sup> and the European Court of Human Rights,<sup>101</sup> of the very high threshold for review imposed by the Wednesbury test.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 125)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 126)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 127)*

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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.

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 22)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 25)*

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 it 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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 26)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 30)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 31)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 35)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 36)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 37)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 26)*

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".

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 28)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 29)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 30)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 31)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 32)*



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.”

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 34)*

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 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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, par 35)*

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.”

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 36)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 37)*

NOTE: The council of State is an administrative court in Belgium

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 38)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 39)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 40)*

**NOTE:** BBL is the communicant Bond Beter Leefmilieu Vlaanderen VZW. BBL is a federation of environment organizations in Belgium.

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 44)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 23)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 24)*

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).

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 25)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 26)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 27)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 28)*

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 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 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”.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 29)*

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.”

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 30)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 31)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 32)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 33)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 34)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 35)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 36)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 37)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 38)*

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 land-owners' 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

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 39)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 41)*

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.

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 42)*

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, 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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 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, 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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 63)*

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.

*(United Kingdom ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, October 2010, para. 44)*

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.

*(United Kingdom ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, October 2010, para. 45)*

The Committee notes that the decision challenged was made in 2003, whereas the judicial review proceedings were filed in December 2006, after the Convention came 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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 43)*

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 cover fully 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), and 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 the implementation of these obligations. The Aarhus Regulation came into effect on 28 June 2007.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 58)*

While the Committee does not rule out that some decisions, acts and omissions by the EU institutions – even if labeled “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 (i) attributed to it in its capacity as a public authority, and (ii) linked to provisions of EU law relating to the environment.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 72)*

Thus, without ruling out that also other acts and omissions by EU institutions may 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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 74)*

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)).

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 76)*

As the Committee has pointed out in its findings with regard to communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paras. 29-37) and communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4, 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 sets out the 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 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 law relating to the environment.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 77)*

In communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, para. 36), 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 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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 78)*

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” (cf. ACCC/C/2005/11, Belgium, para. 34; and ACCC/C/2006/18 Denmark, para. 30).

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 79)*

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 (cf. ACCC/C/2006/18 Denmark, para. 31).

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 80)*

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 81)*

As pointed out in paragraph 20, the judgment 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 criterion of being directly and individually concerned by a decision or a regulation, cf. 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.”

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 82)*

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, the EEB cases, to show that the ECJ has not endeavoured to alter its jurisprudence.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 83)*

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 86)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 124)*

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,<sup>100</sup> and the European Court of Human Rights,<sup>101</sup> of the very high threshold for review imposed by the Wednesbury test.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 125)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 126)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 127)*

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.



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.

*(Hungary ACCC/C/2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 14)*

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 rebutted. 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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 28)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 29)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 31)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 35)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 40)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 56)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 57)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para 59)*

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

*(Denmark ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 39)*

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 Sustain-

able 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 5, of the Convention, the Committee is not convinced that the reasoning of the Conseil d'Etat in the given case implies such a violation.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 48)*

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.

*(France ACCC/C/2007/22, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011, para. 49)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 58)*

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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.105)*

**NOTE:** The court first denied to suspend project because it was too early and further decisions were needed to allow for actual construction and, later, courts denied to suspend the construction because it was too late.

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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.108)*

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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.110)*

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 process. The Committee has already held that "if there were do 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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.112)*

The Committee notes that the present system of legal aid, as it applies to NGOs .. 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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.66)*

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.

*(United Kingdom ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, October 2010, para. 46)*

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.

*(United Kingdom ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, October 2010, para. 49)*

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.

*(United Kingdom ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, October 2010, para. 52)*

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 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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 44)*

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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 45)*

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 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, para. 40)).

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 92)*

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 93)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 128)*

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 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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 129)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 130)*

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.<sup>102</sup> The Committee endorses this recommendation.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 131)*

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”.<sup>103</sup> 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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 132)*

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.<sup>104</sup> 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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 133)*

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 environmental claims under consideration does not seem to be given sufficient consideration in the apportioning of costs by the courts.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 134)*

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",<sup>105</sup> "along with a number of other factors, such as fairness to the defendant".<sup>106</sup> The Committee in this respect notes that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 135)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 136)*

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 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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 138)*

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.

*(United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 139)*

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

The Committee notes that the present system of legal aid, as it applies to NGOs .. 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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.66)*

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 noncompliance with article 9, paragraph 4, of the Convention.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.67)*

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.

*(European Union ACCC/C/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, May 2011, para. 93)*

## Article 10 MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.
2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:
  - (a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;
  - (b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;
  - (c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

- (d) Establish any subsidiary bodies as they deem necessary;
  - (e) Prepare, where appropriate, protocols to this Convention;
  - (f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;
  - (g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;
  - (h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;
  - (i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.
3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.
  4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.
  5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.
  6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

## Article 11 RIGHT TO VOTE

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

## Article 12 SECRETARIAT

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

- (a) The convening and preparing of meetings of the Parties;
- (b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and
- (c) Such other functions as may be determined by the Parties.

## Article 13 ANNEXES

The annexes to this Convention shall constitute an integral part thereof.

## Article 14 AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to this Convention.
2. The text of any proposed amendment to this Convention shall be submitted in writing to the Execu-



tive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.
4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.
5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.
6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.
7. For the purposes of this article, «Parties present and voting» means Parties present and casting an affirmative or negative vote.

## Article 15 REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

## Article 16 SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.
2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
  - (a) Submission of the dispute to the International Court of Justice;
  - (b) Arbitration in accordance with the procedure set out in annex II.
3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

## Article 17 SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Econom-

ic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by 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.

## Article 18 DEPOSITARY

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

## Article 19 RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.
2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.
3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.
4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.
5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

## Article 20 ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.
2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.
3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

## Article 21 WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

## Article 22 AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

## Annex I LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)

### 1. Energy sector:

- Mineral oil and gas refineries;
- Installations for gasification and liquefaction;
- Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more;
- Coke ovens;
- Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors 1/ (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 44)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 58)*

- Installations for the reprocessing of irradiated nuclear fuel;
- Installations designed:
  - For the production or enrichment of nuclear fuel;
  - For the processing of irradiated nuclear fuel or high-level radioactive waste;
  - For the final disposal of irradiated nuclear fuel;
  - Solely for the final disposal of radioactive waste;

- Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.
2. Production and processing of metals:
- Metal ore (including sulphide ore) roasting or sintering installations;
  - Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
  - Installations for the processing of ferrous metals:
    - (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;
    - (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
    - (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
  - Ferrous metal foundries with a production capacity exceeding 20 tons per day;
  - Installations:
    - (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;
    - (ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;
  - Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m<sup>3</sup>.
3. Mineral industry:
- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
  - Installations for the production of asbestos and the manufacture of asbestos-based products;
  - Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
  - Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
  - Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m<sup>3</sup> and with a setting density per kiln exceeding 300 kg/m<sup>3</sup>.
4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):
- (a) Chemical installations for the production of basic organic chemicals, such as:
- (i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);
  - (ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;
  - (iii) Sulphurous hydrocarbons;
  - (iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;
  - (v) Phosphorus-containing hydrocarbons;
  - (vi) Halogenic hydrocarbons;
  - (vii) Organometallic compounds;
  - (viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);
  - (ix) Synthetic rubbers;
  - (x) Dyes and pigments;
  - (xi) Surface-active agents and surfactants;

- (b) Chemical installations for the production of basic inorganic chemicals, such as:
- (i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;
  - (ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;
  - (iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;
  - (iv) Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;
  - (v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;
- (c) Chemical installations for the production of phosphorous-, nitrogen— or potassium-based fertilizers (simple or compound fertilizers);
- (d) Chemical installations for the production of basic plant health products and of biocides;
- (e) Installations using a chemical or biological process for the production of basic pharmaceutical products;
- (f) Chemical installations for the production of explosives;
- (g) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances.
5. Waste management:
- Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;
  - Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;
  - Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;
  - Landfills receiving more than 10 tons per day or with a total capacity exceeding 25,000 tons, excluding landfills of inert waste.
6. Waste-water treatment plants with a capacity exceeding 150,000 population equivalent.
7. Industrial plants for the:
- (a) Production of pulp from timber or similar fibrous materials;
  - (b) Production of paper and board with a production capacity exceeding 20 tons per day.
8. (a) Construction of lines for long-distance railway traffic and of airports 2/ with a basic runway length of 2,100 m or more;

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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 38)*

- (b) Construction of motorways and express roads; 3/
- (c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.

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 kilometres 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 (paragraph 19 of Annex I).

*(United Kingdom ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10, April 2011, para. 80)*

9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tons;

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.

*(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 25)*

- (b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

- (b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2,000 million cubic metres/year and where the amount of water transferred exceeds 5 per cent of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500,000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. 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.

15. Installations for the intensive rearing of poultry or pigs with more than:

- (a) 40,000 places for poultry;
- (b) 2,000 places for production pigs (over 30 kg); or
- (c) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tons or more.

19. Other activities:

- Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;
- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;

- (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;

- (b) Treatment and processing intended for the production of food products from:

- (i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;

- (ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

- (c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);

- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment

- capacity exceeding 10 tons per day;
- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;
  - Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.
20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 22)*

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.

*(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 31)*

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.

*(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 42)*

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 (paragraph 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 the decisions that there is no need for 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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.82)*

[...] 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.

*(Georgia ACCC/C/2008/35, ECE/MP.PP/C.1/2010/4/Add.1, 08 February 2011, para.43)*

[...] 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.

*(Georgia ACCC/C/2008/35, ECE/MP.PP/C.1/2010/4/Add.1, 08 February 2011, para.46)*

[...] 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.

*(Georgia ACCC/C/2008/35, ECE/MP.PP/C.1/2010/4/Add.1, 08 February 2011, para.47)*

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.

*(United Kingdom ACCC/C/2008/27, ECE/MP.PP/C.1/2010/6/Add.2, November 2010, para. 39)*

21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.
22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.

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 I 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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 58)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 52)*

#### Notes

- 1/ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.
- 2/ For the purposes of this Convention, «airport» means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).
- 3/ For the purposes of this Convention, «express road» means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

## Annex II ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.
2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.
3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.
4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.
5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.
6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.
8. The tribunal may take all appropriate measures to establish the facts.
9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:
  - (a) Provide it with all relevant documents, facilities and information;
  - (b) Enable it, where necessary, to call witnesses or experts and receive their evidence.
10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.
11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.
12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.
13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.
14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.
15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.
16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.
17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.
18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

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## PART II

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# DECISION I/7 review of compliance

adopted at the first meeting of the Parties  
held in Lucca, Italy, on 21-23 October 2002

The Meeting,

*Determined* to promote and improve compliance with the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and recalling its article 15,

*Recognizing* the necessity for rigorous reporting by the Parties on their compliance with the Convention,

1. *Establishes* the Compliance Committee for the review of compliance by the Parties with their obligations under the Convention.
2. *Decides* that the structure and functions of the Compliance Committee and the procedures for the review of compliance shall be those set out in the annex to this decision.

### Annex      STRUCTURE AND FUNCTIONS OF THE COMPLIANCE COMMITTEE AND PROCEDURES FOR THE REVIEW OF COMPLIANCE

#### I. STRUCTURE

1. The Committee shall consist of eight members, who shall serve in their personal capacity.
2. The Committee shall be composed of nationals of the Parties and Signatories to the Convention who shall be persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience.
3. The Committee may not include more than one national of the same State.
4. Candidates meeting the requirements of paragraph 2 shall be nominated by Parties, Signatories and non-governmental organizations falling within the scope of article 10, paragraph 5, of the Convention and promoting environmental protection, for election pursuant to paragraph 7.
5. Unless the Meeting of the Parties, in a particular instance, decides otherwise, the procedure for the nomination of candidates for the Committee shall be the following:
  - (a) Nominations shall be sent to the secretariat in at least one of the official languages of the Convention not later than 12 weeks before the opening of the meeting of the Parties during which the election is to take place;
  - (b) Each nomination shall be accompanied by a curriculum vitae (CV) of the candidate not exceeding 600 words and may include supporting material;
  - (c) The secretariat shall distribute the nominations and the CVs, together with any supporting material, in accordance with rule 10 of the Rules of Procedure.
6. Committee members shall be elected on the basis of nominations in accordance with paragraphs 4 and 5. The Meeting of the Parties shall give due consideration to all nominations.

7. The Meeting of the Parties shall elect the members of the Committee by consensus or, failing consensus, by secret ballot.
8. In the election of the Committee, consideration should be given to the geographical distribution of membership and diversity of experience.
9. The Meeting of the Parties shall, as soon as practicable, elect four members to the Committee to serve until the end of the next ordinary meeting and four members to serve a full term of office. At each ordinary meeting thereafter, the Meeting of the Parties shall elect four members for a full term of office. Outgoing members may be re-elected once for a further full term of office, unless in a given case the Meeting of the Parties decides otherwise. A full term of office commences at the end of an ordinary meeting of the Parties and runs until the second ordinary meeting of the Parties thereafter. The Committee shall elect its own Chairperson and Vice-Chairperson.
10. If a member of the Committee can no longer perform his or her duties as member of the Committee for any reason, the Bureau of the Meeting of the Parties shall appoint another member fulfilling the criteria in this chapter to serve the remainder of the term, subject to the approval of the Committee.
11. Every member serving on the Committee shall, before taking up his or her duties, make a solemn declaration in a meeting of the Committee that he or she will perform his or her functions impartially and conscientiously.

## II. MEETINGS

12. The Committee shall, unless it decides otherwise, meet at least once a year. The secretariat shall arrange for and service the meetings of the Committee.

## III. FUNCTIONS OF THE COMMITTEE

13. The Committee shall:
  - (a) Consider any submission, referral or communication made in accordance with paragraphs 15 to 24 below;
  - (b) Prepare, at the request of the Meeting of the Parties, a report on compliance with or implementation of the provisions of the Convention; and
  - (c) Monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention; and act pursuant to paragraphs 36 and 37.
14. The Committee may examine compliance issues and make recommendations if and as appropriate.

## IV. SUBMISSION BY PARTIES

15. A submission may be brought before the Committee by one or more Parties that have reservations about another Party's compliance with its obligations under the Convention. Such a submission shall be addressed in writing to the secretariat and supported by corroborating information. The secretariat shall, within two weeks of receiving a submission, send a copy of it to the Party whose compliance is at issue. Any reply and supporting information shall be submitted to the secretariat and to the Parties involved within three months or such longer period as the circumstances of a particular case may require but in no case later than six months. The secretariat shall transmit the submission and the reply, as well as all corroborating and supporting information, to the Committee, which shall consider the matter as soon as practicable.
16. A submission may be brought before the Committee by a Party that concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligations under the Convention. Such a submission shall be addressed in writing to the secretariat and explain, in particular, the specific circumstances that the Party considers to be the cause of its noncompliance. The secretariat shall transmit the submission to the Committee, which shall consider the matter as soon as practicable.

## V. REFERRALS BY THE SECRETARIAT

17. Where the secretariat, in particular upon considering the reports submitted in accordance with the

Convention's reporting requirements, becomes aware of possible noncompliance by a Party with its obligations under the Convention, it may request the Party concerned to furnish necessary information about the matter. If there is no response or the matter is not resolved within three months, or such longer period as the circumstances of the matter may require but in no case later than six months, the secretariat shall bring the matter to the attention of the Committee, which shall consider the matter as soon as practicable.

## VI. COMMUNICATIONS FROM THE PUBLIC

18. On the expiry of twelve months from either the date of adoption of this decision or from the date of the entry into force of the Convention with respect to a Party, whichever is the later, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received. During the four-year period mentioned above, the Party may revoke its notification thereby accepting that, from that date, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention.

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 21)*

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.

*(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 14)*

The Committee does not exclude the possibility when determining issues of noncompliance to take into consideration general rules and principles of international law, including international environmental and human rights law, 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.

*(Hungary ACCC/C/2004/4 ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 18)*

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.

*(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 25)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 59)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 36)*

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.

*(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 39)*

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.

*(European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 28)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 49)*

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.

*(Austria ACCC/C/2008/26, advance copy of decision, September 2009, para. 56)*

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.

*(Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.61)*

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.

*(Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. )*

19. The communications referred to in paragraph 18 shall be addressed to the Committee through the secretariat in writing and may be in electronic form. The communications shall be supported by corroborating information.

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.

*(Poland ACCC/C/2005/14, report of the 11th meeting, ECE/MP.PP/C.1/2006/2, para. 23)*

[...]At the request of the Committee, the secretariat had conveyed to the communicant in a letter dated 8 January 2009 the Committee's concerns regarding the lack of completeness, clarity and relevance of the information in the communication, thereby providing the communicant with an opportunity to improve the presentation of the communication before the Committee would formally consider its admissibility.

*(Spain ACCC/C/2008/34; Report of the 23rd meeting, ECE/MP.PP/C.1/2009/2, para.30)*

The Committee noted that no further correspondence had been received from the communicant. It decided that the case was not admissible for the reasons that had been given do the communicant in January and due to the absence of the corroborating information required under paragraph 19 of the annex to decision I/7. The secretariat was requested to notify the communicant accordingly.

*(Spain ACCC/C/2008/34; Report of the 23rd meeting, ECE/MP.PP/C.1/2009/2, para.31)*

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

*(United Kingdom ACCC/C/2010/47, ECE/MP.PP/C.1/2010/4, 8 February 2011, para. 33)*

At its twenty-eighth meeting, the Committee had agreed to defer making any preliminary determination on the admissibility of communication ACCC/C/2010/49 (United Kingdom) until additional information had been submitted. By letter of 30 August 2010, the communicant's representative had indicated that there had been various developments which made it inappropriate to proceed with the complaint at that stage. He had asked the Committee to suspend any further consideration of the complaint until further notice. Having considered the response, the Committee determined that the communication would not be considered and the file would be closed, on the grounds that it could not proceed under paragraph 19 of the annex to decision I/7, because the communicant could not provide corroborating information.

*(United Kingdom ACC/C/2010/49, ECE/MP.PP/C.1/2010/6, 14 February 2011, para. 30)*

20. The Committee shall consider any such communication unless it determines that the communication is:

- (a) Anonymous;
- (b) An abuse of the right to make such communications;
- (c) Manifestly unreasonable;

The Committee then entered into discussion in open session on communication ACCC/C/2009/40 (United Kingdom), with the participation of representatives of the Government of United Kingdom and the communicant. The communication had been submitted by Mrs. Elizabeth Condron, represented by Richard Buxton Environmental and Public Law, and concerned compliance by the United Kingdom with article 3, paragraph 8, and article 9, paragraph 4, of the Convention. It alleged failure by the Party concerned to comply with its obligations under article 3, paragraph 8, of the Convention to ensure that she was not penalized, persecuted or harassed by the Merthyr Tydfil County Borough Council or the mining company, Miller Argent (South Wales) Ltd, in the course of asserting her right of access to justice under article 9, paragraph 4, of the Convention to challenge decisions relating to an open-cast coal mine and adjacent coal processing site. The communication alleged, inter alia, that the action of the Council in mounting a legal challenge to the granting of legal aid to the communicant constituted a form of penalisation, persecution and harassment of the communicant.

*(United Kingdom ACCC/C/2009/40, advance copy of the report of the 27th meeting, para. 26)*

At the outset, the Party concerned stated that it would be seeking to challenge the admissibility of the communication, and the Committee agreed to hear submissions from both the Party concerned and the communicant on the issue of admissibility before entering a closed session to deliberate on this point. Following its deliberations in closed session, the Committee held that the communication was not admissible, on the grounds that it was manifestly unreasonable pursuant to paragraph 20 (c) of the annex to decision I/7. The Chair explained that his personal interpretation of the Committee's discussion was that, taking into account that legal aid was ultimately granted, the communicant was not persecuted in a way that would fall within article 3, paragraph 8, of the Convention.

*(United Kingdom ACCC/C/2009/40, advance copy of the report of the 27th meeting, para. 27)*

In the hours following the discussion, the Committee received a letter from the communicant in which it was stated that whereas legal aid had been granted in April 2009, it had in fact been withdrawn in May 2009 and on 5 January 2010, the Legal Services Commission had refused to reinstate or grant further funding to continue with the proceedings in the Court of Appeal. The communicant indicated that this matter was itself the subject of an ongoing appeal, and thus it remained to be seen whether public funding would ultimately be granted for the proceedings before the Court of Appeal. Following its consideration of the letter in closed session, the Committee held that the new information provided by the communicant did not alter its decision regarding the inadmissibility of the communication. The Committee noted that relevant points made by the communicant were manifestly unreasonable, for example, the allegation that a press release by a private company acting in its own interest should be attributed to the Government.

*(United Kingdom ACCC/C/2009/40, advance copy of the report of the 27th meeting, para. 28)*

Communication ACCC/C/2010/46 (United Kingdom) had been submitted by Mr. Gareth Clubb and alleged non-compliance by the United Kingdom with the provisions of article 6 of the Convention with regard to two projects being carried out in Wales and general failure of the United Kingdom to comply with the provisions of the Convention. Following the receipt of the communication, Mr. Merab Barbakadze had been designated as curator for the case.

*(United Kingdom ACCC/C/2010/46, ECE/MP.PP/C.1/2010/2, 4 August 2010, para. 40)*

Having considered the communication and the supporting documentation, and in light of the admissibility criteria set out in paragraph 20 of the annex to decision I/7 as developed through its practice, the Committee decided that the communication did not fulfil those criteria. The Committee noted that the communicant's allegations concerning non-compliance with article 6 of the Convention only related to the fact that some documents relevant for public participation had not been available in a timely manner in the Welsh language. Specifically, the Committee found that while the principle of non-discrimination on the basis of citizenship, nationality or domicile was explicit in article 3, paragraph 9, of the Convention, the provision was silent on matters of discrimination on the basis of language. While the lack of availability of documentation in a particular language might under certain circumstances present an impediment to correct implementation of the Convention, nothing in the present communication suggested that such circumstances pertained. In addition, the Committee was not convinced that the possibility for domestic administrative and, in particular, judicial review had been adequately used by the communicant.

*(United Kingdom ACCC/C/2010/46, ECE/MP.PP/C.1/2010/2, 4 August 2010, para. 41)*

At its twenty-ninth meeting, the Committee had decided to request further clarification from the communicants on communications ACCC/C/2010/52 and ACCC/C/2010/53 (both concerning the United Kingdom) and had agreed to defer making any preliminary determination of their admissibility until the additional information had been submitted. With regard to communication ACCC/C/2010/52, the Committee took note of the letter of the communicant on 8 December 2010 informing the Committee that it had applied for and successfully obtained leave to judicially review decisions in relation to the matter of the communication and that it would revert to the Committee on completion of those proceedings. The Committee considered the communicant's letter and decided that the file would be closed.

*(United Kingdom ACCC/C/2010/52, ECE/MP.PP/C.1/2010/8, 14 February 2011, para. 25)*

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



Austria, located on the border with Hungary and close to the Municipality of Szentgotth rd.

*(Austria ACCC/C/2009/39, ECE/MP.PP/C.1/2010/4, 8 February 2011, para. 26)*

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

*(Austria ACCC/C/2009/39, ECE/MP.PP/C.1/2010/4, 8 February 2011, para. 27)*

(d) Incompatible with the provisions of this decision or with the Convention.

The Committee determined that communication ACCC/C/2004/10 was inadmissible because it did not appear to relate to the procedures and obligations regulated by the Aarhus Convention, but rather dealt with substantive environmental issues. The only provision that might have been of some relevance was article 9, paragraph 3, but the Committee considered that the communication did not relate to a denial of access to administrative or judicial procedures but rather reflected dissatisfaction with their outcome. As it was not the first time that a communicant had appealed to the Committee out of dissatisfaction with court decisions, the Committee considered that it would be worthwhile to include some examples in the information sheet on communications of cases which would not be admissible.

*(Kazakhstan ACCC/2004/10, report of the 7th meeting, ECE/MP.PP/C.1/2005/2, para. 15)*

The Committee determined on a preliminary basis that communication ACCC/C/2004/07 was inadmissible. In its view, to determine otherwise would set a precedent for the Convention’s compliance mechanism being used to review cases of unsuccessful environmental litigation, which was clearly not its purpose. It did however agree to offer the communicant the opportunity to provide additional information clearly indicating the relevance of the matter to the Convention, in which case it would consider the communication further. If no such information were provided or if, following the provision of further information, the Committee remained unconvinced, the determination of inadmissibility would be confirmed by default at its next meeting.

*(Poland ACCC/2004/7, report of the 5th meeting, MP.PP/C.1/2004/6, para. 27)*

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.

*(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 46)*

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.

*(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 56)*

With regard to communication ACCC/C/2008/25 (Albania), the Committee considered that the issues raised had already been considered by it in the course of the review of communication ACCC/C/2005/12, and would therefore also be considered by Albania in the course of implementation of recommendations of the Committee made in connection with that communica-

tion. The role of the Committee was to facilitate and advance compliance with the Convention and the Committee did not see how this could be further achieved by reviewing this matter again. Taking also into account the admissibility criteria as set out in paragraph 20 of the annex to decision I/7, the Committee therefore decided not to proceed with the review of this communication, and requested the secretariat to inform both parties concerned about its decision.

*(Albania ACCC/C/2008/25, report of the 20th meeting, ECE/MP.PP/C.1/2008/4, para.19)*

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.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 53)*

Having considered the communication and the supporting documentation and in light of the admissibility criteria set out in paragraph 20 of the annex to decision I/7 as developed through its practice, the Committee decided that the communication did not fulfil these criteria. The Committee noted that the communicant's allegations concerning non-compliance with article 6 of the Convention only related to the fact that some documents relevant for public participation had not been available in a timely manner in the Welsh language. Specifically, the Committee found that while the principle of non-discrimination on the basis of citizenship, nationality or domicile was explicit in article 3, paragraph 9, of the Convention, the provision was silent on matters of discrimination on the basis of language. While the lack of availability of documentation in a particular language might under certain circumstances present an impediment to correct implementation of the Convention, nothing in the present communication suggested that such circumstances pertained. In addition, the Committee was not convinced that the possibility for domestic administrative and, in particular, judicial review had been adequately used by the communicant.

*(United Kingdom ACCC/C/2010/46, Report of the 27th meeting, ECE/MP.PP/C.1/2010/2, para. 41)*

In respect of Modification No. 50 to the City General Plan of April 2005 (para. 20) the Committee noted 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 Murcia City Council and Joven Futura was concluded already in 2003. Bearing the above in mind, the Committee decided not to render findings on these events.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.59)*

NOTE: The Convention entered into force for Spain on 29 March 2005

21. 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 redress.

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).

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 58)*

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

er 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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 59)*

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 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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 60)*

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 61)*

With regard to communication ACCC/C/2004/09, although the Committee considered that the criteria of paragraph 20 of the annex to decision I/7 were met, it decided to exercise the discretion given to it under paragraph 21 of the annex to decision I/7 not to consider the communication further, as the matter has just been submitted for review by the domestic court of appeals. It noted, however, that if in the future the communicant still wished to bring the matter before the Committee due to the outcome or length of the review procedure, the communicant could ask for the file to be reopened.

*(Armenia ACCC/2004/09 (Armenia), report of the 5th meeting, MP.PP/C.1/2004/6, para. 28)*

With regard to communication ACCC/C/2007/19 (United Kingdom), further information had been received from the communicant, which pointed out that an inquiry on the matter in question was currently under way. The Committee therefore agreed that although it considered that the criteria of paragraph 20 of the annex to decision I/7 had been met, it would exercise the discretion given to it under paragraph 21 of the annex to decision I/7 not to consider the communication further, as the matter was subject to an ongoing inquiry. The file would therefore be closed. It noted, however, that if in the future the communicant still wished to bring the matter before the Committee due to the outcome or length of the review procedure, he could do so.

*(United Kingdom ACCC/2007/19, report of the 18th meeting, ECE/MP.PP/C.1/2007/8, para. 15)*

Given the phase of the decision-making process, the Committee concludes that the communicant has made all reasonable efforts to exhaust domestic remedies.

*(Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 52)*

With regard to communication ACCC/C/2008/28 (Denmark), the Committee considered information provided by the communicant, at the request of the Committee (ECE/MP.PP/C.1/2009/4, para. 25), concerning his intentions regarding the further use of domestic remedies in connection with the matter which was the subject of the communication. The communicant had indicated his intention to appeal the matter to the Danish Ombudsman, but had stated that he considered the option of an appeal to the courts to be beyond his capabilities in terms of the time involved and the costs.

*(Denmark ACCC/C/2008/28, advance copy of the report of the 25th meeting, para. 20)*

The Committee considered that while the communication fulfilled the requirements for admissibility, it was apparent that the communicant had not exhausted the domestic remedies available in Denmark. Without deciding on whether the Danish Ombudsman met the requirement of article 9, paragraph 1, the Committee noted that the issue raised by the communicant was currently subject to a review by the Ombudsman, and that the Ombudsman had decided to suspend

its investigation while the case was pending before the Committee. Furthermore, the Committee noted that the communicant had not at any stage brought the case to the Danish judiciary for a legal review, despite the possibility for doing so. Finally, the Committee noted that, according to the information received, various initiatives had been taken by the Danish authorities in order to accommodate, at least to some extent, the application made by the communicant.

*(Denmark ACCC/C/2008/28, advance copy of the report of the 25th meeting, para. 22)*

For these reasons, the Committee decided to postpone any further deliberation of the case until the Danish Ombudsman had carried out its review of the matter. The Committee requested the secretariat to write to the Party concerned, asking it to inform the Danish Ombudsman about the Committee's decision, in order for the Ombudsman to continue its investigation.

*(Denmark ACCC/C/2008/28, advance copy of the report of the 25th meeting, para. 23)*

Having considered the communication and the supporting documentation and in light of the admissibility criteria set out in paragraph 20 of the annex to decision I/7 as developed through its practice, the Committee decided that the communication did not fulfil these criteria. The Committee noted that the communicant's allegations concerning non-compliance with article 6 of the Convention only related to the fact that some documents relevant for public participation had not been available in a timely manner in the Welsh language. Specifically, the Committee found that while the principle of non-discrimination on the basis of citizenship, nationality or domicile was explicit in article 3, paragraph 9, of the Convention, the provision was silent on matters of discrimination on the basis of language. While the lack of availability of documentation in a particular language might under certain circumstances present an impediment to correct implementation of the Convention, nothing in the present communication suggested that such circumstances pertained. In addition, the Committee was not convinced that the possibility for domestic administrative and, in particular, judicial review had been adequately used by the communicant.

*(United Kingdom ACCC/C/2010/46, Report of the 27th meeting, ECE/MP.PP/C.1/2010/2, para. 41)*

[...] 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.

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.48)*

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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.53)*

22. Subject to the provisions of paragraph 20, the Committee shall as soon as possible bring any communications submitted to it under paragraph 18 to the attention of the Party alleged to be in non-compliance.
23. A Party shall, as soon as possible but not later than five months after any communication is brought to its attention by the Committee, submit to the Committee written explanations or statements clarifying the matter and describing any response that it may have made.

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.

*(Poland ACCC/C/2008/29, advance copy of findings and recommendations, September 2009, para. 16)*

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, 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.

*(Poland ACCC/C/2008/29, advance copy of findings and recommendations, September 2009, para. 19)*

The Party concerned had commented on the communicant's remarks and also responded to some specific questions posed by the Committee concerning, inter alia, the costs and the duration of the relevant appeals processes. Its response included a letter from the Danish Ombudsman indicating that he would suspend consideration of the complaint due to the fact that the matter was under consideration by the Committee.

*(Denmark ACCC/C/2008/28, advance copy of the report of the 25th meeting, para. 21)*

24. The Committee shall, as soon as practicable, further consider communications submitted to it pursuant to this chapter and take into account all relevant written information made available to it, and may hold hearings.

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 64)*

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 86)*

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 in 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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 88)*

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 89)*

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).

*(Poland ACCC/C/2008/29, advance copy of findings and recommendations, September 2009, para. 18)*

## VII. INFORMATION GATHERING

25. To assist the performance of its functions, the Committee may:

- (a) Request further information on matters under its consideration;

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.

*(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 16)*

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).

*(Poland ACCC/C/2008/29, advance copy of findings and recommendations, September 2009, para. 17)*

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, 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.

*(Poland ACCC/C/2008/29, advance copy of findings and recommendations, September 2009, para. 19)*

- (b) Undertake, with the consent of any Party concerned, information gathering in the territory of that Party;
- (c) Consider any relevant information submitted to it; and

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).

*(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 14)*

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.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.66)*

- (d) Seek the services of experts and advisers as appropriate.

## VIII. CONFIDENTIALITY

- 26. Save as otherwise provided for in this chapter, no information held by the Committee shall be kept confidential.
- 27. The Committee and any person involved in its work shall ensure the confidentiality of any information that falls within the scope of the exceptions provided for in article 4, paragraphs 3 (c) and 4, of the Convention and that has been provided in confidence. 28. The Committee and any person involved in its work shall ensure the confidentiality of information that has been provided to it in confidence by a Party when making a submission in respect of its own compliance in accordance with paragraph 16 above.
- 29. Information submitted to the Committee, including all information relating to the identity of the member of the public submitting the information, shall be kept confidential if submitted by a person who asks that it be kept confidential because of a concern that he or she may be penalized, persecuted or harassed.

Communication ACCC/C/2009/42 (Hungary) had been submitted with the request that the communicant's identity remain confidential. At the request of a letter from the communicant concerning the matter of confidentiality and additional time for submission of translations of documentation relating to the communication, the Committee at its twenty-sixth meeting had decided to defer any determination on the preliminary admissibility of the case and had requested the secretariat to inform the communicant urging it to submit any clarifying information by 1 March 2010.

*(Hungary ACCC/C/2009/42, advance copy of the report of the 27th meeting, para. 32)*

The Committee noted that no further correspondence had been received from the communi-

cant. It decided that the case was not admissible due to the absence of corroborating information required under paragraph 19 of the annex to decision I/7 and of collaboration from the communicant in dealing with the issue of confidentiality. It requested the secretariat to notify the communicant accordingly.

*(Hungary ACCC/C/2009/42, advance copy of the report of the 27th meeting, para. 33)*

30. If necessary to ensure the confidentiality of information in any of the above cases, the Committee shall hold closed meetings. 31. Committee reports shall not contain any information that the Committee must keep confidential under paragraphs 27 to 29 above. Information that the Committee must keep confidential under paragraph 29 shall not be made available to any Party. All other information that the Committee receives in confidence and that is related to any recommendations by the Committee to the Meeting of the Parties shall be made available to any Party upon its request; that Party shall ensure the confidentiality of the information that it has received in confidence.

#### IX. ENTITLEMENT TO PARTICIPATE

32. A Party in respect of which a submission, referral or communication is made or which makes a submission, as well as the member of the public making a communication, shall be entitled to participate in the discussions of the Committee with respect to that submission, referral or communication.
33. The Party and the member of the public shall not take part in the preparation and adoption of any findings, any measures or any recommendations of the Committee. 34. The Committee shall send a copy of its draft findings, draft measures and any draft recommendations to the Parties concerned and the member of the public who submitted the communication if applicable, and shall take into account any comments made by them in the finalization of those findings, measures and recommendations.

#### X. COMMITTEE REPORTS TO THE MEETING OF THE PARTIES

35. The Committee shall report on its activities at each ordinary meeting of the Parties and make such recommendations as it considers appropriate. Each report shall be finalized by the Committee not later than twelve weeks in advance of the meeting of the Parties at which it is to be considered. Every effort shall be made to adopt the report by consensus. Where this is not possible, the report shall reflect the views of all the Committee members. Committee reports shall be available to the public.

#### XI. CONSIDERATION BY THE COMPLIANCE COMMITTEE

36. Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Compliance Committee may:
- (a) In consultation with the Party concerned, take the measures listed in paragraph 37 (a);
  - (b) Subject to agreement with the Party concerned, take the measures listed in paragraph 37 (b), (c) and (d).

##### **Belgium:**

[...] 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.

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.

*(Belgium ACCC/2005/11; Findings and Recommendations, ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para's. 48-49)*

**Albania:**

[...] 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.

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;

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.

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

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.

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.

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.

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.

*(Albania ACCC/C/2008/25, Findings and Recommendations, report of the 20th meeting, ECE/MP.PP/C.1/2008/4, para. 95 to 102)*

**Spain:**

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 Spain:

(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 elec-



tronic means (CD/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, 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 develop an awareness raising programme on Aarhus rights for the public.

*(Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.119)*

#### Case 36(2009)

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;

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.

*(Spain ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, 08 February 2011, para.75-76.)*

#### Armenia:

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 decisionmaking 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.

*(Armenia ACCC/C/2004/08; Findings and Recommendations, Report of the 11th meeting, ECE/MP.PP/C.1/2006/2/Add.1, para.45)*

#### **Armenia (2<sup>nd</sup> review):**

[...] 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.[...]

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.84)*

#### **Moldova:**

[...] 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.

*(Moldova ACCC/C/2008/30; ECE/M.P.PP/C.1/2009/6/Add.3, 8 February 2011, para.42)*

## XII. CONSIDERATION BY THE MEETING OF THE PARTIES

37. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures:

- (a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;
- (b) Make recommendations to the Party concerned;

### **Kazakhstan:**

[...] 6. Recommends the Government of Kazakhstan, again in order to address the findings in paragraph 1, to provide officials of all the relevant public authorities on various levels of administration with training on the implementation of the Guidelines on Handling 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;

7. Also recommends the Government of Kazakhstan, in order to address the finding in paragraph 3 and with a view to fully implementing article 3, paragraph 1, of the Convention, to:

(a) 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;

(b) Ensure that public authorities at all levels, including the municipal level, are fully aware of their obligations to facilitate public participation; and

(c) 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;

*(Kazakhstan ACCC/C/2004/01 and ACCC/C/2004/02, Decision II/5a, ECE/MP.PP/2005/2/Add.7)*

### **Armenia:**

[...] 8. Requests the Party:

(a) To 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;

(b) To develop detailed procedures for public participation in decision-making on the activities referred to in article 6, paragraph 1, of the Convention;

(c) To 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;

*(Armenia, ACCC/C/2004/08; Decision III/6b, ECE/MP.PP/2008/2/Add.10, para.8)*

#### **Armenia (2<sup>nd</sup> review):**

[...] 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:

[...] (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. [...]

*(Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011, para.84)*

#### **Lithuania**

[...] 2. Recommends to the Government of Lithuania to take the necessary legislative, regulatory, administrative and other measures to ensure that:

(a) 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;

(b) 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;

(c) 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;

(d) Provision is clearly made for any comments to be submitted by any member of the public, even if the comments are not “motivated”;

(e) on which it 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 is based with the time-frame within which review procedures may be initiated under article 9, paragraph 2, of the Convention;

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

(g) All plans and programmes relating to the environment are subject to appropriate public participation;

*(Lithuania ACCC/2006/16, Decision III/6d, ECE/MP.PP/2008/2/Add.12)*

(c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;

#### **Kazakhstan:**

[...] 5. Requests the Government of Kazakhstan, in order to address the findings in paragraph 1, 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;

*(Kazakhstan ACCC/C/2004/01 and ACCC/C/2004/02, Decision II/5a, ECE/MP.PP/2005/2/Add.7)*

**Kazakhstan (2<sup>nd</sup> review):**

[...] 6. Invites the Government of Kazakhstan to thoroughly examine, with appropriate involvement of the public, the relevant environmental and procedural legislation as well as the relevant case law 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;

7. Further invites the Government of Kazakhstan to report to the Meeting of the Parties, through the Compliance Committee, six months before the fourth meeting of the Parties, on the measures taken in connection with bringing about full compliance with article 9 of the Convention and ensuring effective implementation of article 6, including, as appropriate, any further developments in the legislative framework and detailed procedures, and in particular, their practical application in connection with providing the public with various effective means of participation in decision-making, ensuring that due account is taken of the public comments and also that activities subject to article 6 of the Convention are not carried out prior to the completion of the corresponding permitting processes in which the required level of public participation has been provided for

*(Kazakhstan ACCC/C/2004/01, ACCC/C/2004/02, ACCC/C/2004/05 and ACCC/C/2007/20; Decision III/6c, ECE/MP.PP/2008/2/Add.11, para's.6-7)*

**Ukraine:**

[...] 2. Requests 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; and

3. Also requests 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.

*(Ukraine ACCC/S/2004/1 and ACCC/C/2004/03, Decision II/5b, ECE/MP.PP/2005/2/Add.8)*

**Lithuania:**

[...] 3. Requests the Government of Lithuania to draw up an action plan for implementing the above recommendations, with the involvement of the public concerned, and to submit it to the Committee by 31 December 2008;

*(Lithuania ACCC/2006/16, Decision III/6d, ECE/MP.PP/2008/2/Add.12)*

(d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;

**Turkmenistan:**

[...] 2. Requests the Government of Turkmenistan to amend the Act on Public Associations with a view to bringing all of its provisions into compliance with the Convention;

3. Recommends that the Government of Turkmenistan should immediately take appropriate interim measures with a view to ensuring that the provisions of the Act on Public Associations are implemented as far as possible in a manner which is in compliance with the requirements of the Convention;

4. Also recommends that the Government of Turkmenistan should carry out the measures referred to in paragraphs 2 and 3 above with the involvement of the public and, in particular, relevant national and international organizations, including non-governmental organizations;

5. Furthermore recommends that the Government of Turkmenistan should develop and make publicly available official guidance on the interpretation of the Act on Public Associations, taking into account the relevant provisions and standards of the Convention;

*(Turkmenistan, ACCC/C/2004/05, Decision II/5c, ECE/MP.PP/2005/2/Add.9)*

(e) Issue declarations of non-compliance;

(f) Issue cautions;

**Turkmenistan (2<sup>nd</sup> review):**

[...] 5. Decides to issue a caution to the Government of Turkmenistan, to become effective on 1 May 2009, unless the Government of Turkmenistan has fully satisfied the conditions set out in

subparagraphs (a) to (c) below and has notified the secretariat of this fact by 1 January 2009. The successful fulfilment of the conditions is to be established by the Committee:

(a) The Act on Public Associations is amended in such a way as to make clear that foreign citizens and persons without nationality can enjoy the same rights as citizens in the formation of and participation in public associations;

(b) The Act on Public Associations is amended in such a way as to make clear that members of the public may conduct activities on behalf of non-registered public associations in harmony with the requirements of the Convention, in particular, article 3, paragraph 4;

(c) Other legislation does not run counter to the above amendments;

6. Invites the Government of Turkmenistan to submit to the Committee periodically, namely in November 2008, November 2009 and November 2010, detailed information on further progress in implementing the measures referred to in paragraph 5;

7. Also invites the Government of Turkmenistan to consider accommodating an expert mission, with the involvement of Committee members and other experts, as appropriate, with a view to making available to it a wide range of expert opinion on possible ways to implement the measures referred to in decision II/5c, including any possible amendments to the Act on Public Associations;

*(Turkmenistan ACCC/C/2004/05, Decision III/6e, ECE/MP.PP/2008/2/Add.13, para's.5-7)*

#### **Ukraine (2<sup>nd</sup> review):**

5. Decides to issue a caution to the Government of Ukraine, to become effective on 1 May 2009, unless the Government of Ukraine has fully satisfied the conditions set out in subparagraphs (a) to (d) below and has notified the Secretariat of this fact by 1 January 2009. The successful fulfilment of the conditions is to be established by the Committee:

(a) The action plan incorporates clear activities to resolve the problems identified by the Committee in its findings and recommendations (ECE/MP.PP/C.1/2005/2/Add.3), and in particular in paragraphs 29 to 35 of the latter document (including with respect to issues of clear domestic regulation of time frames and procedures for public consultation, commenting and making available to the public the information on which decisions are based);

(b) The action plan also incorporates capacity-building activities, in particular training of the judiciary and of public officials involved in environmental decision-making;

(c) The action plan establishes a procedure which ensures its implementation in a transparent manner and in full consultation with civil society;

(d) The action plan is transposed through a governmental normative act ensuring its implementation by all ministries and other relevant authorities;

*(Ukraine ACCC/S/2004/1 and ACCC/C/2004/03; Decision III/6f, ECE/MP.PP/2008/2/Add.14, para.5)*

(g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;

(h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

#### **Albania:**

[...] Invites the Government of Albania to continue taking relevant measures to implement the recommendations of the Committee with a view to bringing about full compliance with the relevant provisions of the Convention, inter alia, through the implementation of the action plan developed by it, and in particular:

(a) To undertake the necessary legislative, regulatory, administrative and other measures to ensure that:

(i) 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;

(ii) Practical and/or other provisions for the public to participate during the preparation of

plans and programmes relating to the environment, not only during preparation of individual projects, are in place, including through development of detailed procedures and practical measures to implement article 25 of the Environment Impact Assessment Law of Albania;

(iii) The public which may participate is identified;

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

(v) Notification of the entire public which may participate, including non-governmental organizations 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 are kept of such notifications;

(vi) The locations where the draft environmental impact assessment documentation 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;

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

(b) 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;

(c) To take or elaborate, as appropriate, the above measures in consultation with relevant non-governmental organizations;

*(Albania ACCC/C/2005/12, Decision III/6a, ECE/MP.PP/2008/2/Add.9, para.4)*

#### **Georgia:**

The Committee [...] 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.

*(Georgia ACCC/C/2008/35, ECE/MP.PP/C.1/2010/4/Add.1, 08 February 2011, para.51)*

NOTE: The Committee did not find Georgia to be in non-compliance but still made a recommendation.

### **XIII. RELATIONSHIP BETWEEN SETTLEMENT OF DISPUTES AND THE COMPLIANCE PROCEDURE**

38. The present compliance procedure shall be without prejudice to article 16 of the Convention on the settlement of disputes.

### **XIV. ENHANCEMENT OF SYNERGIES**

39. In order to enhance synergies between this compliance procedure and compliance procedures under other agreements, the Meeting of the Parties may request the Compliance Committee to communicate as appropriate with the relevant bodies of those agreements and report back to it, including with recommendations as appropriate. The Compliance Committee may also submit a report to the Meeting of the Parties on relevant developments between the sessions of the Meeting of the Parties.

## PART III

### Summaries of cases

This section includes summaries of all cases submitted to the Compliance Committee as of May 2011 except for cases ACCC/C/2010/45 and ACCC/C/2010/47 due to unavailability of information about these communications. Note that some of these cases are pending and therefore they are not reflected in the Part I and Part II of this publication.

Cases included into Part III of this publication:

Reference number	State Concerned	Reference number	State Concerned
Case 01	Kazakhstan	Case 29	Poland
Case 02	Kazakhstan	Case 30	Moldova
Case 03	Ukraine	Case 31	Germany
Case 04	Hungary	Case 32	European Community
Case 05	Turkmenistan	Case 33	United Kingdom
Case 06	Kazakhstan	Case 34	Spain
Case 07	Poland	Case 35	Georgia
Case 08	Armenia	Case 36	Spain
Case 09	Armenia	Case 37	Belarus
Case 10	Kazakhstan	Case 38	United Kingdom
Case 11	Belgium	Case 39	Austria
Case 12	Albania	Case 40	United Kingdom
Case 13	Hungary	Case 41	Slovakia
Case 14	Poland	Case 42	Hungary
Case 15	Romania	Case 43	Armenia
Case 16	Lithuania	Case 44	Belarus
Case 17	European Community	Case 46	United Kingdom
Case 18	Denmark	Case 48	Austria
Case 19	United Kingdom	Case 49	United Kingdom
Case 20	Kazakhstan	Case 50	Czech Republic
Case 21	European Community	Case 51	Romania
Case 22	France	Case 52	United Kingdom
Case 23	United Kingdom	Case 53	United Kingdom
Case 24	Spain	Case 54	European Union
Case 25	Albania	Case 55	United Kingdom
Case 26	Austria	Case 56	United Kingdom
Case 27	United Kingdom	Case 57	Denmark
Case 28	Denmark	Case 58	Bulgaria



The titles of the summaries indicate information as explained below:

**Case 01 (2004). Kazakhstan: NGO “Green Salvation”**

*Denial of access to information and lack of access to justice*

Case 01 – number of the case. Case summaries are numbered in accordance with a official reference number given to communications from the public, except for Case 03 (Ukraine) which also includes a submission ACCC/S/2004/1.

(2004) – year when case was submitted to the Compliance Committee

Kazakhstan – party concerned by the communication

NGO “Green Salvation” – communicant

Denial of access to information and lack of access to justice – key words for the main issues addressed in the case.

**Case 01 (2004). Kazakhstan: NGO “Green Salvation”***Denial of access to information and lack of access to justice***Background**

In November 2002, Green Salvation, an environmental NGO from Kazakhstan, requested information concerning a proposal by the National Atomic (Nuclear) Company of Kazakhstan to allow import and deposit foreign radioactive waste. The company failed to reply. Green Salvation challenged the failure to provide information in numerous courts, with no success. Green Salvation filed a communication to the Compliance Committee on February 7, 2004 (by e-mail). The Committee took its final decision on February 18, 2005.

**Articles concerned**

Green Salvation alleged violation of Articles 4.1, 4.7 (due to failure to provide information), 6.6 and 9.1 (due to denial of standing).

**Committee’s findings**

The Committee found that Kazakhstan was not in compliance with:

- a) article 4.1 and 4.2 by having failed to ensure that bodies performing public functions implement them,
- b) article 9.1 due to lengthy review procedure and denial of standing to the non-governmental organization in a lawsuit on access to environmental information, and
- c) article 3.1 due to 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 9.1.

**Outcome**

The Second Meeting of the Parties (MOP) (Almaty, 2005) considered two Kazakh cases and integrated the findings of both of them (see also Case 2004/2). The MOP took a decision reflecting recommendations made by the Committee. In particular, it requested the Government of Kazakhstan to submit a strategy (by the end of 2005), 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.

A draft strategy was submitted in February 2006, and the Compliance Committee made further comments. The strategy was not adopted, though. The Government claimed that adoption of the Environmental Code in 2007 was enough to implement measures requested by MOP.

**SECOND COMPLIANCE REVIEW CIRCLE**

The Third Meeting of the Parties of the Convention (Riga, 2008) was supposed to review the implementation of its decision II/5a. For this purpose the Compliance Committee submitted a report to the 3rd MOP.

**Report by Compliance Committee**

In its report to the 3rd MOP the Committee stated that the Government of Kazakhstan has overall undertaken a number of measures to implement most of the provisions of the decision II/5a. It suggested the Government to undertake further capacity-building measures for public authorities.

**Action by MOP**

The 3rd MOP discussed the issue in detail. In its decision III/6c it stated that the Government of Kazakhstan has overall undertaken effective and comprehensive measures to implement most of the provisions of decision II/5a.

The communicant completely disagreed with the assessment by Compliance Committee and MOP of the implementation progress by the Government of Kazakhstan.

## Case 02 (2004). Kazakhstan: NGO “Green Salvation”

### *Lack of public participation in environmental impact assessment (EIA).*

#### **Background**

On March 17, 2004, Green Salvation, an environmental NGO from Kazakhstan, filed a complaint with the Compliance Committee regarding construction of a high voltage power line (110 kV). The construction started in May 2002, following a decision by the Mayor of Almaty city (2001) and two environmental impact assessments (expertisa), and it was completed by October 2002. Local residents demanded public hearings but were not invited when hearings were held. The lack of public participation was challenged by several law suits but all were unsuccessful.

#### **Articles concerned**

Articles 6.2-6.4, 6.6-6.8 and 9.3-9.4.

#### **Committee’s findings**

At 110 kV power line and 1 km long, the power line did not meet the threshold values in Annex I, paragraph 17 of the Convention (220 kV and 15 km). Yet the Committee found that the construction fell under the scope of Article 6.1 since it fell under Annex I, paragraph 20, because a public participation procedure was required by national legislation.

The Committee also said that if national legislation had not foreseen public participation procedures for this type of activity, Kazakhstan would not have been in non-compliance. However, in the opinion of the Committee that would have meant that the national system would be in less harmony with the objective of the Convention than it actually is.

Further, the Committee found that Kazakhstan was not in compliance with Article 6.2. Residents living along the proposed route of the power line were obviously among the “public concerned” but they had not been informed of the process and had not been invited to participate in it. The Committee also said that the lack of being informed violated the “sufficient time” requirement under Article 6.3 and that in practice residents did not have opportunity for early and effective participation which should have been available (Article 6.4). There was also no opportunity to provide input in accordance with paragraph 7. Therefore, whatever views residents might have had to offer could not have been taken into account as required by Article 6.8.

The Committee noted that the provision of information about a hearing and the participation of some residents therein after the construction had been started, was in violation of the requirement under Article 6.3 and 6.4 (“reasonable time frames” and “early public participation, when all options are open”). In addition, the Committee noted that such public hearings could not have been treated as “public participation” unless the hearings had genuinely involved all key groups of the public concerned.

The Committee did not find that Kazakhstan was in non-compliance with Article 6.6. and 9 since dissatisfaction with a court decision does not constitute denial of access to justice.

#### **Outcome**

The Second Meeting of the Parties (MOP) (Almaty, 2005) considered two Kazakh cases and integrated the findings of both of them (see also Case 2004/01). The MOP took a decision reflecting recommendations made by the Committee. In particular, it requested the Government of Kazakhstan to submit a strategy (by the end of 2005), 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.

A draft strategy was submitted in February 2006, and the Compliance Committee made further comments. The strategy was not adopted, though. The Government claimed that adoption of the Environmental Code in 2007 was enough to implement measures requested by MOP.

However, Kazakhstan has received a very clear instruction that it cannot ignore its own legislation even if particular thresholds specified in Annex 1 are not met. Paragraph 20 of Annex 1 acts as a safety net and ensures that “[A]ny activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation” is still subject to the Convention.

**SECOND COMPLIANCE REVIEW CIRCLE**

The Third Meeting of the Parties of the Convention (Riga, 2008) was supposed to review the implementation of its decision II/5a. For this purpose the Compliance Committee submitted a report to the 3rd MOP.

**Report by Compliance Committee**

In its report to the 3rd MOP the Committee stated that the Government of Kazakhstan has overall undertaken a number of measures to implement most of the provisions of the decision II/5a. It suggested the Government to undertake further capacity-building measures for public authorities.

**Action by MOP**

The 3rd MOP discussed the issue in detail. In its decision III/6c it stated that the Government of Kazakhstan has overall undertaken effective and comprehensive measures to implement most of the provisions of decision II/5a.

The communicant completely disagreed with the assessment by Compliance Committee and MOP of the implementation progress by the Government of Kazakhstan.

### Case 03 (2004). Ukraine: NGO 'Ecopravo-Lviv'

#### *Lack of access to information and public participation in EIA*

##### **Background**

On 6 May 2005, Ecopravo-Lviv, an environmental law NGO from Ukraine, filed a complaint with the Committee regarding lack of access to information and public participation during the construction of a shipping canal in the Danube River delta (the Danube-Black Sea canal). The construction went through a core area of the Danube biosphere reserve. Ecopravo-Lviv claimed that the Ukraine government had denied access to project documents (based on property rights and the volume of documents), had improperly informed the public about its plans (only seven days before the final decision was taken) and therefore had provided no opportunities for public participation. Several law suits were brought to national courts, most unsuccessful, and several international procedures were also used. Romania also filed a submission to the Committee on the same issue.

##### **Articles concerned**

Articles 6.2-4, 6.6-6.9 of the Convention and Article 1 (in connection with violation of Article 6).

##### **Committee's findings**

The Committee found that:

- a) by failing to provide for public participation of the kind required by Article 6 of the Convention, Ukraine was not in compliance with Article 6.1 (a), Article 6.2 to 6.8, and Article 6.9 (second sentence);
- b) by failing to ensure that information was provided by the responsible public authorities upon request, Ukraine was not in compliance with Article 4.1 of the Convention, and;
- c) the lack of clarity with regards to public participation requirements in EIA and environmental decision-making procedures for projects, such as timeframes and modalities of the public consultation process, requirements to take its outcome into account and obligations with regards to making information available in the context of Article 6, indicated the absence of a clear, transparent and consistent framework for the implementation of the Convention and constituted non-compliance with Article 3.1 of the Convention.

The Committee stated that violation of "operative" provisions of the Convention was not in conformity with the objective of the Convention as defined in Article 1, therefore leaving the question open as to the nature of obligations stemming from Article 1 of the Convention.

##### **Outcome**

The Second Meeting of the Parties (Almaty, 2005) took a decision reflecting recommendations made by the Committee (Decision II/5b). It requested that the Ukraine government 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. It also requested the Government of Ukraine to submit, not later than the end of 2005, a strategy including timeframe for transposing the Convention's provisions into national law and developing practical mechanisms and implementing legislation that set out clear procedures for their implementation. As a result of this and other efforts made at a national level, the public were finally able to access further project documents. The decisions by the Committee and MOP integrated findings on another Ukrainian case (submission by Romania).

##### SECOND COMPLIANCE REVIEW CIRCLE

The Third Meeting of the Parties of the Convention (Riga, 2008) was supposed to review the implementation of its decision II/5b. For this purpose the Compliance Committee submitted a report to the 3rd MOP.

##### **Report by Compliance Committee**

The report states that Ukraine failed to implement the measures listed in paragraphs 2 and 3 of the decision II/5b and failed to engage sufficiently with the process (i.e. lack of communication with the Committee). It noted, that the draft strategy was only submitted in 2006 (and was commented by the Committee). However, no further steps were taken up until the 3rd MOP. The

Committee also looked into the national implementation report and concluded that no steps were taken to address the decision taken by 2<sup>nd</sup> MOP in 2005. Ukraine did not provide any comments on the draft report by the Compliance Committee to the 3<sup>rd</sup> MOP. Instead, it submitted a revised strategy just a few days before MOP. The Committee recommended that MOP takes further measures under paragraph 37 of the Decision I/7. The Committee did not suggest any specific measure. Just a few weeks before 3<sup>rd</sup> MOP Ukraine faced two measures by the Espoo Convention MOP (addressing the same Danube river navigation project), which adopted a declaration of non-compliance and a conditional caution to Ukraine.

### **Action by MOP**

The 3<sup>rd</sup> MOP discussed the issue in detail. It did not follow the Espoo Convention approach and only adopted a conditional caution to Ukraine (decision III/6f). The caution would become effective on May 1, 2009, unless the Government of Ukraine satisfies four specific conditions – all related to the national strategy on implementation of the Convention. In particular, the strategy was to be adopted by a decision of the Government (referred to as “governmental normative act” in the decision III/6f) so as the strategy would be applicable to all ministries, not just the Ministry of Environment. MOP authorized the Compliance Committee to establish fulfilment of the conditions by Ukraine (since that needed to be done in the intersessional period between MOPs). In addition, the 3<sup>rd</sup> MOP requested periodic annual reporting by Ukraine to the Compliance Committee.

### **Current outcome**

The Government of Ukraine annually submitted reports on implementation as requested by decision III/6f. Ukraine indeed adopted a new strategy. Upon Ukraine’s first report, the Compliance Committee found that Ukraine has implemented key requirements of the 3<sup>rd</sup> MOP’s decision and, therefore, decided that the caution – one of the strongest measures under compliance mechanism – should not become effective. However, the subsequent letter from the UN ECE Executive Secretary to the Government of Ukraine clearly stated that this does not mean that Ukraine is now in compliance with the Convention itself.

Since 2008 several legislative and capacity-building efforts were reported by the Government of Ukraine. Implementation strategy, adopted by the Government of Ukraine, was reviewed by the Compliance Committee. It requested further clarifications and amendments to ensure that specific legislative and other failures are addressed by Ukraine. The communicant claimed that Ukraine did not take effective steps to implement decision III/6f.

In spring 2011 the Compliance Committee, while preparing for the 4<sup>th</sup> MOP, carried out its final analysis of the measures taken by Ukraine till March 2011 and found that Ukraine failed to implement the measures referred to in paragraph 5 of decision III/5f of the Meeting of the Parties entailing that Ukraine is still in a state of non-compliance with regard to decision II/5b. Draft MOP decision, developed by the Bureau, provides for issuing a caution to Ukraine and, if Ukraine fails to implement recommendations within one year, suspension of special rights and privileges granted to Ukraine under the Convention, which is the strongest measure provided by the compliance mechanism.

## Case 04 (2004). Hungary: Clean Air Action Group

### *Public participation and access to justice in federal motorway projects*

#### **Background**

In 2003 Hungary inaugurated an “Act on Public Interest and Development of the Expressway Network”. The act foresaw a specific decision-making procedure for the construction of expressways. In May 2004, the Clean Air Action Group, a Hungarian NGO, filed a communication on this act to the Compliance Committee. They alleged that certain provisions of the federal “Expressway Act” were not in compliance with the Aarhus Convention for several reasons including omission of a scoping phase with public participation, too short a timeframe for decision-making, a wrong format of decision (ministerial decree) and an invalid body of appeal. The Compliance Committee took its final decision at its 7th meeting in March 2005.

#### **Articles concerned**

Articles 6 (public participation in decisions on specific activities) and 9.2 to 9.4 (access to justice).

#### **Committee’s findings**

The Committee found that Hungary was in compliance with the Aarhus Convention, but clarified that problems in the “practical application” of the Expressway Act might occur and that Hungary should keep the matter under review. The Committee stated, with concern, that the Expressway Act reduced opportunities for public participation as well as access to justice as compared to previous legislation in Hungary. But, on the other hand, the act itself did not fall short of the standards provided for by the Aarhus Convention.

#### **Outcome**

No change in Hungarian legislation came about. But the Committee was clearly concerned about parties reducing existing public participation rights even when no breach of the Convention was occurring. They recommended that the Meeting of Parties urge Parties to refrain from this, and to ensure that any such measures were kept under review.

**Case 05 (2004). Turkmenistan: NGO “BIOTICA” (Moldova)***Inappropriate rules for NGOs and discrimination against foreigners.***Background**

On May 10, 2004, BIOTICA, an environmental NGO from Moldova, submitted a communication alleging non-compliance with the Convention by Turkmenistan. The communicant alleged that introduction of the new law “Act of Turkmenistan on Public Associations” created numerous obstacles for the operation of NGOs (including registration, membership, participation of foreigners, and liquidation by the state). It also claimed that all but one environmental NGO had been closed due to this new law. The communicant requested that parts of the communication should remain confidential.

The issue of the new law and its effects on NGOs was also raised in a letter from the Secretariat of the Convention to the Government of Turkmenistan sent on March 15, 2004.

**Articles concerned**

Article 3.4 (recognition of NGOs) and 3.9 (non-discrimination).

**Committee’s findings**

The Committee decided to consider the matter on the basis of the communication and not the basis of the referral by the Secretariat. In establishing the facts the Committee used additional information available in the public domain (via the internet). The main conclusions of the Committee concerned the conformity of the national legislation in question (the new law) with the provisions of the Convention.

The Committee respected the request for partial confidentiality of the communication, and only published a redacted version.

The Committee found that:

- a) the exclusion of foreign citizens and persons without citizenship from the possibility to found an NGO and to participate in its activities might constitute a disadvantageous discrimination against them; therefore it found non-compliance with Article 3.9.
- b) the combination of an overly difficult registration regime for NGOs and prohibition of non-registered NGOs constituted a violation of Article 3.4.
- c) by enacting a law that is not in compliance with Articles 3.4 and 3.9 Turkmenistan failed to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. Thus, it found non-compliance with Article 3.1.

**Outcome**

The Second Meeting of the Parties (Almaty, 2005) took a decision II/5c reflecting recommendations made by the Committee. It requested the Government of Turkmenistan to amend the Act on Public

Associations with a view to bringing all of its provisions into compliance with the Convention. The MOP also made several recommendations, including to immediately take appropriate interim measures with a view to ensuring that the provisions of the Act on Public Associations would be implemented as far as possible in a manner which is in compliance with the requirements of the Convention.

While the case was still in progress, Turkmenistan adopted new regulations on the registration of NGOs, as well as a new Constitution (2006). The International Center for Not-for-Profit Law (USA) reports only a very small number of NGOs registered in Turkmenistan (and none registered in 2006).

After the MOP took its decision, the Government of Turkmenistan contested findings of the Compliance Committee.

**SECOND COMPLIANCE REVIEW CIRCLE**

The Third Meeting of the Parties of the Convention (Riga, 2008) was supposed to review the implementation of its decision II/5c. For this purpose the Compliance Committee submitted a report to the 3rd MOP.



### **Report by Compliance Committee**

No meaningful report was submitted by the Government of Turkmenistan on implementation of the decision II/5c. Lack of engagement of the Government with the process (including communicating with the Compliance Committee) was an important factor for Committee's conclusions and recommendations. Unfortunately, the communicant neither informed the Compliance Committee on whether it followed implementation process, nor about its assessment of the progress made.

The Committee concluded that the Government of Turkmenistan failed to implement decision II/5c and recommended the MOP to re-confirm its original findings and adopt stricter measures.

### **Action by MOP**

The Third Meeting of the Parties adopted decision III/6e on compliance by Turkmenistan. The decision confirmed original findings of the Compliance Committee and issued a conditional caution (similar to a caution issued to Ukraine). The caution was to become effective on May 1, 2009, unless Turkmenistan:

- a) amends the Act on Public Associations in such a way as to make clear that citizens and persons without nationality can enjoy the same rights as citizens in the formation of and participation in public associations;
- b) amends the Act on Public Associations in such a way as to make clear that members of the public may conduct activities on behalf of non-registered public associations in harmony with the requirements of the Convention, in particular, article 3, paragraph 4;
- c) ensures that other legislation does not run counter to the above amendments.

Note that the decision requested very specific amendments of a particular national legislative act. This approach, which leaves the country little discretion in bringing its legislation in compliance with the Aarhus Convention, was questioned by some delegations present at MOP.

### **Current situation**

The Compliance Committee was empowered to consider whether these conditions were met. The Government sent a letter contesting its failure to implement the Convention. The European ECO Forum – a pan-European coalition of environmental NGOs – informed the Compliance Committee that the situation with Aarhus Convention implementation remains dramatic in Turkmenistan.

Upon consideration of a letter from the Ministry of Environment of Turkmenistan, the Committee decided that since Turkmenistan failed to report about taking measures requested, it did not meet conditions necessary to avoid the caution. In April 2009 the UN ECE Executive Secretary sent a letter to the Government of Turkmenistan informing that the caution would become effective on May 1, 2009.

The Compliance Committee visited Turkmenistan in April 2011 with a mission, upon invitation by the Government.

**Case 06 (2004). Kazakhstan: Gatina et al***Effective remedies, fair and timely court review***Background**

On September 4, 2004, three Kazakhstan citizens submitted a communication alleging non-compliance with the Convention by Kazakhstan. In the national courts the communicants had challenged the legality of an industrial cement storage facility located next to their houses. The facility had been polluting the air with cement dust and was operating without an environmental permit. Nevertheless their law suits had only partly been considered. The court had not considering the part which concerned the failure to act and enforce environmental standards by the governmental authority. In addition, they claimed that the court review process was unfair (due to a failure to notify them about court hearings and a lack of notification of the decision) and too long.

**Articles concerned**

Article 9.3 (failure to consider part of the lawsuit) and Article 9.4 (unfair process).

**Committee's findings**

The Committee found that Kazakhstan was not in compliance with 9.4 in conjunction with Article 9.3. In other words, the Committee first established whether any of Article 9.1, 9.2 or 9.3 could apply before it could conclude on Article 9.4.

Several failures lead to violation of Article 9.4. The Committee said that no evidence was presented to it that parties in the law suit were notified about the date, time and place of the court hearing (despite the fact that the court decision has numerous references to such notifications). In addition, the failure to communicate the court decision to the parties constitutes, in the opinion of ACCC, a lack of both fairness and timeliness of procedures. Lastly, the fact that part of the law suit (the failure to enforce national environmental legislation with respect to the polluting facility) was not considered constituted a failure to provide effective remedies as required under Article 9.4.

**Outcome**

The Government of Kazakhstan agreed to accept recommendations from the Committee. Therefore, the Committee took final findings and recommendations. In particular, the Committee recommended that the Government of Kazakhstan include in its strategy (to be developed under MOP-2 Decision II/5a) publication of the courts' decisions and statistics related to environmental cases and allocate specific significance to capacity-building activities for the judiciary.

A draft strategy was submitted in February 2006, and the Compliance Committee made further comments. The strategy was not adopted, though. The Government claimed that adoption of the Environmental Code in 2007 was enough to implement measures requested by MOP.

**SECOND COMPLIANCE REVIEW CIRCLE**

The Third Meeting of the Parties of the Convention (Riga, 2008) was supposed to review the implementation of its decision II/5a, as well as implementation of Committee's direct recommendations in this case. For this purpose the Compliance Committee submitted a report to the 3rd MOP.

**Report by Compliance Committee**

In its report to the 3rd MOP the Committee stated that the Government of Kazakhstan has overall undertaken a number of measures to implement most of the provisions of the decision II/5a. As to implementation of recommendations in this case, the Committee stated that Kazakhstan had not as yet achieved compliance with article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention, in particular with respect to practical possibilities to appeal against a failure to act by public authorities.

**Action by MOP**

The 3rd MOP discussed the issue in detail. In its decision III/6c it stated that the Government of Kazakhstan has overall undertaken effective and comprehensive measures to implement most of the provisions of decision II/5a.

As to implementation of recommendations with regard to this case (in relation to Article 9), the MOP agreed with Committee's considerations and invited the Government of Kazakhstan to thoroughly examine, with appropriate involvement of the public, the relevant environmental and procedural legislation as well as the relevant case law 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.

#### THIRD COMPLIANCE REVIEW CIRCLE

In 2011 the Compliance Committee found that Kazakhstan demonstrated the lack of response in the course of follow up with decision III/6c and the apparent failure to take the measures to implement decision III/6c (para.5). It recommended the 4th MOP to issue a conditional caution to Kazakhstan.

**Case 07 (2004). Poland: Mr Antoni Zawislak***Illegal waste disposal; compensation claim***Background**

In 1998 a company established a chemical waste storage site in the Polish town of Olsztyn, allegedly without any permit and adjacent to a lake. In 2003, the communicant alleged that another person was illegally disposing of waste that should have been incinerated. As a land owner, the communicant, Mr. Antoni Zawislak, appeared to have incurred considerable costs surveying and excavating his land and in taking on court cases in Poland. In September 2004, he filed a communication to the Committee. The communication stated that he had lost all court cases and could neither get compensation for the damage to his land nor for the costs. The Committee decided on the admissibility at its 4th meeting.

**Articles concerned**

Articles 3 (general provisions) and 9 (access to justice).

**Committee's findings**

The Committee decided in the 4th meeting in September 2004 that the communication was inadmissible since it did not relate sufficiently to the subject matter of the Aarhus Convention. The Committee found that the case related to the issue of compensation for damages and unsuccessful environmental litigation and can thus not be seen as relevant to the Convention. However, the Committee stated that most of the documents provided by the communicant were in Polish only and so could not be considered. The Committee asked the communicant to provide more specific information in English if he wants the communication to be further discussed at the Committee. Since the communicant did not send any additional supporting information that would enable the Committee to discuss the case in more detail, the communication was determined inadmissible.

**Outcome**

To date, no more documents have been filed, thus the case is deemed inadmissible at this point. It would still be possible for the communicant to re-start correspondence with the Committee though and provide relevant documents translated into English.

It is important to note that the working language of the Committee is English. Any communication has to be supported by documents that prove evidence on the claims referred to in the communication. If the Committee asks the communicant for clarification and additional information and the communicant does not reply, the Committee has to reject the case.

**Case 08 (2004). Armenia: Center for Regional Development (Transparency International Armenia), The A.D.Sakharov Armenian Human Rights Protection Center NGO, and the Armenian Botanical Society**

*Public participation in plans; access to justice*

**Background**

On 20 September 2004, three Armenian non-governmental organizations complained to the Compliance Committee about access to information and public participation in the decision-making on the modification of land-use designation and zoning as well as on the leasing of certain plots in an agricultural area of Dalma Orchards. In particular, they claimed that the public had not receive complete, if any, answers to their requests for information, and had had no possibility to participate in the development of land use plans, programs and projects. Changes to the land-use plans were introduced by several decrees by the municipality and the Government which had not taken into account the opinion of the public concerned. The communicants' law suit had been declined by the court on jurisdictional grounds (the lack of jurisdiction to consider conformity of legislation with the Constitution).

**Articles concerned**

The communicants claimed violation of Article 4.1 (no or incomplete answers to requests for information about the area), Article 4.2 (some answers took longer than the one month period), Article 6.2-6.5, 6.7-6.9 (the lack of any possibility of public participation in adoption of decrees), Article 7 (no public participation in the urban development project/plan), Article 8 (no public participation in the development of decrees), and Article 9 (access to justice).

**Committee's findings**

The Committee found that a decision to change designated use of lands and land zoning plan falls under the term "plans" used in Article 7. Moreover, the Committee said that Article 7 puts obligations on Parties to ensure public participation in preparation of plans according to procedures set out in Article 6. It therefore found violation of Article 7.

As to decisions (decrees) allowing specific activities, the Committee established that public participation procedures available did not allow the public to participate at a time when all options were still open. In addition, in the opinion of the Committee, Armenia had not promptly informed the public of the decision taken despite the fact the decrees were available in electronic form. It therefore found a violation of Article 6.1 (b) and, in conjunction with it, Articles 6.2-6.6 and 6.7-6.9.

The Committee also said the fact that the decisions were taken in the form of a "decree" does not necessarily mean that those decisions fall under "legally binding rules" in the understanding of Article 8. The Committee decided that the decrees actually had more the character of a form of adopting decisions on plans for designation of land (Article 7) and to some extent the form of decisions mandating specific activities (Article 6). In other words, the Committee looks into the substantive meaning of the decision rather than at its legal form (decree, act, etc).

Lastly, the Committee found that the lack of jurisdiction by first instance courts to consider constitutionality of decrees should not have prevented the communicants from challenging public participation issues. It therefore found a violation of Article 9.2-9.4.

**Outcome**

The Government of Armenia had agreed to receive recommendations directly from the Committee. Therefore, the Committee took the final findings and recommendations. In particular, the Committee recommended that the Government of Armenia ensures practical application of Article 7, as well as use of appropriate forms of the decisions under Articles 6 and 7 to allow public participation.

**SECOND COMPLIANCE REVIEW CIRCLE**

The Third Meeting of the Parties of the Convention (Riga, 2008) was supposed to review the implementation the Compliance Committee recommendations upon its report to the 3rd MOP.

**Report by Compliance Committee**

Upon consideration of the report by Armenia and information from the communicant, the

Compliance Committee decided that it could not conclude whether Armenian legislation was already in compliance with the Convention. This conclusion was partly based on information from the communicant claiming that national practice in access to environmental information and public participation had not yet changed. The Committee recommended the MOP to endorse its original findings and recommendations, as well as to request annual reporting by the Government of Armenia.

#### **Action by MOP**

The MOP took decision III/6b endorsing original findings of the Committee. It also requested Armenia to:

- (a) To 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;
- (b) To develop detailed procedures for public participation in decision-making on the activities referred to in article 6, paragraph 1, of the Convention;
- (c) To undertake appropriate practical measures to ensure effective access to justice, including the availability of adequate and effective remedies do challenge the legality of decisions on matters regulated by articles 6 and 7 of the Convention.

It also requested annual reporting by Armenia on implementation of these measures.

#### **THIRD COMPLIANCE REVIEW CIRCLE**

The Compliance Committee noted progress made but also stressed that old legislation is not adequate which is demonstrated by another case (43 (2009) Armenia). It also noted slow progress with the new EIA law. In light of findings of that case, the Compliance Committee:

- (a) Urge Armenia to take into consideration the recommendations of the Committee for ACCC/C/2009/43, including in the finalization of the draft law on environmental impact assessment;
- (b) Request Armenia to provide a draft of the new law to the Committee as soon as possible.

There will be no separate decision by MOP-4 on this case, see also Case 43 (2009) Armenia.

## Case 09 (2004). Armenia: NGO Investigative Journalists

### *Admissibility; exhaustion of domestic remedies*

#### **Background**

On September 22, 2004, an Armenian NGO, “Investigative Journalists”, submitted a communication alleging non-compliance with the Convention by Armenia. They claimed their request for environmental information about land siting permits had been unlawfully denied. At the time that they filed their communication, they had lost their lawsuit in the courts of first instance and appeal, and were intending to further challenge the decision of the appeal court in a higher court.

#### **Articles concerned**

Articles 1 (the objective), 4 (access to environmental information), 5 (collection and dissemination of environmental information), 2 (definitions) in conjunction with 3.3 (on promoting environmental education and awareness, especially on how to access information, participate in decision-making and obtain access to justice).

#### **Committee’s findings**

The Committee found that communicants had not exhausted the available national remedies and decided not to consider the substance of the communication. It seems the Committee took such a decision to a large degree due to the fact that the communicants expressed their intention to further challenge the issue in a higher court.

#### **Outcome**

Whilst the case was declared inadmissible, it was also noted that the case could be re-opened once national remedies were exhausted or if the review procedure in the higher court was unreasonably slow. Afterwards, national procedures used led to no positive outcomes.

**Case 10 (2004). Kazakhstan: NGO Green Salvation***Admissibility***Background**

On October 12, 2004, Green Salvation submitted a communication alleging non-compliance with the Convention by Kazakhstan. In national courts the communicants had challenged the legality of changes in the status of a protected area (related to the Medeo area). In particular, they challenged the failure of the Ministry of Environment to act regarding decisions by Almaty city council. All national courts had rejected their claims.

**Articles concerned**

The communicants claimed violation of numerous Articles — 1, 3.2, 3.4, 3.9, 6.1(b), 6.8, 6.9, 9.3, 9.4 and 9.5.

**Committee's findings**

The Committee found the communication inadmissible.

The Committee found that the communication was more about the interpretation of national laws than procedural rights under the Convention. This was the way the Committee interpreted and applied paragraph 20 (d) of the Decision I/7 which established the compliance mechanism ("Incompatible with the provisions of this decision or with the Convention"). In addition, in the view of the Committee the communication was about re-considering decisions of national courts that were unsatisfactory to the communicant.



## Case 11 (2005). Belgium: Bond Beter Leefmilieu Vlaanderen VZW

### *Access to justice for NGOs with respect to environmental decisions in Belgium*

#### **Background**

Belgium is a federal state. Hence the implementation of the Aarhus Convention is necessary not only at a federal level, but also in the regions of the federation. Environmental and planning laws are part of the region's competency in the federal state. The regions, among others, decide on administrative appeals against various forms of environmental and construction permits. All three regions (Brussels, Flanders and Wallonia) provide for administrative appeal against environmental permits for natural and legal persons who can show an interest in the case. But there is no corresponding administrative appeal procedure for construction permits in any of the regions available to third parties. This means that decisions can only be appealed if parties fulfil the criteria for standing.

As a consequence Belgian NGOs in the Wallonian region were, alongside many other kinds of decisions, not able to appeal against town planning permits and area plans. This limitation in access to justice was mainly caused by very restrictive Belgian legislation as well as the respective court practice. In January 2005, a Belgian umbrella NGO, Bond Beter Leefmilieu Vlaanderen VZW, filed a complaint to the Compliance Committee alleging non-compliance with Articles 2 and 9 of the Convention. The communicant had drawn up a list of cases with concrete examples on the application of the existing legal position to show the consequences and application of the existing legislation. However, the communication basically referred to case law that was decided before the Convention entered into force for Belgium.

The Committee adopted its findings and recommendations at the 12th meeting in June 2006.

#### **Articles concerned**

Article 9 (access to justice), and Article 2.5 (the definition of "public concerned" and the status of NGOs).

#### **Committee's findings**

After lengthy consideration, the Committee found that Belgium would be in non-compliance with the Convention if its legislation and/or jurisprudence did not change. The reason for this formulation was that the cases listed by the communicant had been initiated before the Convention entered into force for Belgium. Therefore this could not constitute an issue of non-compliance for formal reasons.

Nevertheless the Committee took a thorough look at the Belgian court practice. The Committee stated that town planning permits and area plans are "acts of public authorities" that fall under Article 9.3 of the Aarhus Convention. Furthermore the Committee found that Articles 9.2 – 9.4 cannot be interpreted in such a way that almost all environmental organizations are effectively blocked from access to justice with respect to town planning permits and area plans.

It is interesting to note that the Committee stated that Belgium is a Member State of the European Union and thus bound by European Community law. Hence, the Committee argued, with reference to recent judgments of the European Court of Justice, that under certain conditions a provision of an international agreement concluded by the EC is directly applicable in the Member States.

#### **Outcome**

The case has increased pressure on Belgium to solve the problem. While the discussions in the Committee were ongoing, Belgium had already started several activities to improve the situation. Belgium informed the Committee that a multi-stakeholder round table had been held, training for judges was planned, consultations between ministers and regions had taken place and working groups were set up to work on access to justice to implement the recommendations of the Committee.

Following the decision of the Compliance Committee, new legislation was proposed to the parliament. However, since then Belgium has been into various political and thus legislative crises with various changing governments. The legislative process was interrupted many times and new legislation has not been adopted yet in all regions. The courts case law has not changed significantly. NGOs could submit a new communication to the Compliance Committee if they still consider Belgium to be in non-compliance with the Convention.

This case brought crucial interpretations with regard to Article 9 par 3 of the Convention. The Committee has been referring to this case in many of its following decisions.

## Case 12 (2005): Albania: Alliance for the Protection of the Vlora Gulf

### *Construction of industrial park in Albania – access to information and public participation*

#### **Background**

On 27 April 2005, the Albanian NGO, Alliance for the Protection of the Vlora Gulf, submitted a communication to the Compliance Committee alleging non compliance with Articles 3.2, 6.2 and 7 of the Convention. They claim that the public concerned was neither properly notified nor consulted in the decision-making on planning of an industrial park comprising of, inter alia, oil and gas pipelines, storage of petroleum, thermal power plants and a refinery on a site of 560 ha inside the Protected National Park.

The Committee remarked that the preparation of these findings took unusually long due to the lack of the engagement of the Party concerned in the process – the Party did not accept the invitation to participate in the discussion at the 11th meeting of the ACCC. The Committee finally adopted its findings at the 16th meeting in June 2007.

#### **Articles concerned**

Article 3 par 1 (clear, transparent and consistent framework to implement Convention);

Article 6 par 2 (provision on information for effective public participation);

Article 6 par 3 (reasonable time-frames for preparation and participation);

Article 6 par 4 (early public participation when all options are still open);

Article 6 par 8 (due account of the outcome of the public participation);

Article 7 (public participation concerning plans, programmes and policies)

#### **Committee's findings**

The Committee found that the decisions by the Council of Territorial Adjustment of the Republic of Albania concerning the allocation of territory for the construction of the industrial park fall within the scope of Article 7 and are therefore all subject to the requirements of Article 6.3, 6.4 and 6.8. Albania failed to implement these requirements in the relevant decision-making process and was therefore in non-compliance with these provisions.

With respect to the proposed thermal electric power station the decision by the Council of Territorial Adjustment on the siting is subject to the requirements contained in Articles 6.3, 6.4 and 6.8. Although some efforts were made to provide for public participation, these took place after the decision on the siting and were subject to some qualitative deficiencies. Albania therefore failed to comply fully with the requirements in question.

By failing to establish a clear, transparent and consistent framework to implement the provisions of the Convention in Albanian legislation, Albania was not in compliance with Article 3.1 of the Convention.

#### **Outcome**

The Committee took its decision in June 2007, in its 16th meeting. In the beginning Albania had not shown much effort to participate the ACCC-proceeding of this case. However, in March 2008 at its 19th meeting the Committee prepared a new document to be presented to the MOP which amends the original findings and recommendations. Before that the communicant had informed the Committee that after the adoption of the findings and recommendations it had several meetings with the Albanian MoE. There it had the possibility to put forward suggestions on an improvement of the situation in Albania. Following these discussions Albania forwarded an action plan and a report to the Committee. This was welcomed by the Committee, in particular because of the included time-specific action plan and the initiation of the development of a government regulation on public participation procedures, including consultations with NGOs.

The Committee noted that there was progress made by Albania towards compliance with Articles 3 par 1, 6 and 7 of the Convention, it would be too early to conclude that Albania was no longer not in compliance because the planned measures were still in an early stage of implementation. It therefore upheld its earlier findings but included the recommendation to the MOP to welcome the progress made.

The case was discussed by the MoP on its third meeting in Riga (11-13 June 2008). The MoP approved the findings of the Compliance Committee as regards Albania's failure to comply with Articles 6.3, 6.4, 6.8 and 3.1 of the Convention. Albania was requested to submit progress reports to the Compliance Committee with regard the implementation of the Committee's recommendations in November 2008, 2009 and 2010. Albania has been late in reporting, but finally submitted its reports. Regarding the substance of Albania's measures the Committee has been satisfied until now.

This case illustrates how the compliance mechanism of the Convention works and what could be the outcome. Firstly, the procedures raised awareness in the Albanian government that there is a problem that needs to be solved. Whereas Albania ignored the procedure in the beginning, it started to react quickly after the Committee took its draft decision. The pressure was raised even more after the MoP decided on non compliance and requested Albania to take the recommended measures to bring the party under compliance. Since then Albania has to report on an annual base to the Committee what progress was done. If the report is submitted late or the reported progress is not sufficient, the Committee asks the country for more effective steps. Finally, the next MoP will decide whether Albania had solved its compliance problems or not.

## Case 13 (2005). Hungary: Clean Air Action Group

### *Access to Justice with regard to exploitation areas next to motorways*

#### **Background**

This case relates to an earlier communication from the Clean Air Action Group to the Committee (Case 4 (2004), Hungary). The previous case concerned public participation and access to justice in cases related to the national Expressway Act. The Committee decided at its 7th meeting in 2005 that Hungary was in compliance with the Aarhus Convention even though the act in question reduced public participation and access to justice as compared to previous Hungarian legislation. The Committee stated, with concern, that the Act did not fall short of the standards of the Aarhus Convention, but that problems might occur in practice. In addition the Committee recommended that the MOP would urge Parties to refrain from cutting down rights that are the subject of the Aarhus Convention and to keep the issue under review.

In May 2005, only a few weeks after the Committee's decision in Case 4, the Action Group filed another communication. An amendment to the Expressway Act in 2005 had introduced a simplified procedure for the building of extraction areas along expressway tracks. In addition the competent authority had been shifted from the regional level to the federal mining authority. The communicant claimed that the amendment would further limit public participation and access to justice since the scoping phase was eliminated, the timeframe for decision-making was reduced to 30 days and access to justice was declared only by an uncertain judicial practice and not by a written law. In addition the communicant claimed that the amendment led to the situation that the ministerial decree on expressway tracks can be issued even before the final administrative decision had been issued by the transport authority and thus public participation would not be possible at all.

The Committee discussed and decided the case in its 11th meeting in March 2006. In that meeting the communicant and the Party were present. However, the Committee did not, with agreement by the communicant and the Party, issue a formal paper with evaluation of case and decision, but stated the findings would be reflected sufficiently in the report of the 11th meeting only.

#### **Articles concerned**

Article 6.4 and 6.7 (public participation in decisions on specific activities)

Article 9.2 and 9.4 (access to justice with regard to Article 6).

#### **Committee's findings**

The Committee found that the changes made to the Expressway Act since its decision on case 4 had not altered the possibilities for the public to exercise its rights under the Convention so that Hungary was still in compliance with the Aarhus Convention. As in the decision on case 4 the Committee acknowledged that problems might occur in the practical application of the Act. In addition the Committee stated that projects with regard to special extraction sites were subject to EIA-procedure as was clarified in the response of the Hungarian government. The Committee recommended to keep the matter under review with regard to its application in practice.

#### **Outcome**

The Committee has a strict view with regard to the application of the Convention: if it is still uncertain how some provisions are applied and if it is possible that the provisions could be applied in compliance with the Convention, the Committee does not interpret this as non-compliance with the Convention. However it is still possible that these same provisions could be subject to non-compliance cases in future. In Hungary the public concerned has to go through the proceedings and see how the provisions are being applied in practice. After that they could still submit another communication to the Committee if they believe that the practice is in breach of the Convention.

## Case 14 (2005). Poland: Mr Antoni Zawislak

*Access to documents with regard to hazardous waste; suffering negative consequences by executing the rights provided by the Convention*

### **Background**

This communication is related to an issue that was already subject to discussion at the Compliance Committee (Case ACCC/C/2004/07) by the same communicant from Poland in 2004. The latter communication had been determined inadmissible by the Committee since it did not sufficiently relate to the subject matter of the Convention.

The new communication of July 2005 relates to access to protocols of inspections carried out by the Environmental Protection Inspector and copies of related decisions as to hazardous waste which had been dumped on the communicant's land. The communicant requested information from the Environmental Inspector, but access to information was denied. In addition the communicant stated that he had been sentenced by a court because he had pursued his rights.

The communication was submitted in English together with one appendix document that was translated into English (decision for denial of access to information by the Environmental Protection Inspector). The Committee denied admissibility of the case at its 11th meeting in December 2005.

### **Articles concerned**

Article 3.8 (suffering negative consequences from the authorities as a result of exercising your right in conformity with the provisions of the Aarhus Convention), and Article 4 (access to environmental information).

### **Committee's findings**

The Committee determined that the communication was inadmissible because it had not been supported by sufficient corroborating information with regard to the rules of procedure of the Committee.

The Committee sent a letter to the communicant indicating that the Committee needed more information to decide admissibility of the case. But the communicant did not provide evidence of the allegations. In particular there was no information on whether the communicant had used the possibility to appeal against the decision within 14 days. Thus it was unclear if all domestic remedies had been used, an important condition for the admissibility for cases at the Committee. In addition there was no additional information on the judgement with regard to Article 3.8 (suffering negative consequences from the authorities as a result of exercising your right in conformity with the provisions of the Aarhus Convention). Since the communicant did not provide any additional information the Committee determined it was inadmissible.

### **Outcome**

The case shows that it is important to support claims in a communication with proper supporting documentation. The communicant must provide evidence on the most important and legally relevant issues. The language of the Committee is English and respective documents and decisions have to be translated into English, otherwise the Committee cannot take the case.

**Case 15 (2005): Romania: NGO Alburnus Maior***Public Participation in decision-making on Environmental Impact Assessment regarding the Rosia Montana open-cast gold mine***Background**

The case concerns the Rosia Montana open-cast gold mine proposal. The Romanian Ministry for the Environment and Water Management (MMGA) failed to provide for public participation with respect to decision-making on the Environmental Impact Assessment (EIA), in particular at the scoping stage of the procedure. A significant number of concerned NGOs and citizens were registered as 'consulted parties' for the EIA procedure and thus would have had a right to be notified and consulted about each step of the EIA procedure. Nevertheless, the MMGA announced the finalization of the scoping list for the EIA in a complete lack of transparency and without having enabled any form of public participation. The Romanian NGO Alburnus Maior submitted the communication in July 2005 after having – until then unsuccessfully – initiated legal procedures against the MMGA. In 2007 the permitting procedure was interrupted.

An important issue raised in the communication was the alleged failure of the party to ensure access to information contained in the EIA documentation. The party concerned argued that EIA studies were scientific studies protected by copyright law and could thus only be made publicly available with the express consent of the author who could also demand payment of copyright fees. Therefore, in order to balance the interests protected by the copyright law and the need of the relevant authorities and the public to be aware of potential environmental effects of the activity in question, only the outcome, but not the whole study had to be provided. The Committee decided to separately address the issue of confidentiality of EIA studies; the findings and recommendations thus only concern this part of the communication.

**Articles concerned**

Regarding the entire communication

Article 6 par 3 (reasonable time-frames for preparation and participation);

Article 6 par 4 (early public participation when all options are still open);

Article 6 par 6 (access for examination to all relevant information);

Article 6 par 7 (procedures for public participation);

Article 6 par 8 (due account of the outcome of the public participation)

Regarding the confidentiality of EIA studies

Article 4 (access to environmental information);

Article 6 par 6 (access for examination to all relevant information);

**Committee's findings**

The preliminary admissibility of the communication was determined at the 9th meeting of the Committee and confirmed at the 12th. Having considered the information presented by the parties concerned, the Committee agreed in its 12th and 15th meeting not to proceed with the development of findings and recommendations on the communication until the environmental agreement procedure had been completed. Finally this permitting procedure was interrupted and therefore there was no need to further assess the allegations of the communicant.

Nevertheless, in view of the uncertainties regarding the timetable for the licensing procedure for the plant, the Committee decided at its 16th meeting to address specific issues, namely regarding the confidentiality of EIA studies at its 18th meeting. It agreed to return to the other issues concerning the decision-making process, which were raised in the communication, at a later stage. The final findings and recommendations were finally submitted following the 19th meeting of the Committee in March 2008.

The committee found Romania to be in non-compliance with article 4 par 1 in conjunction with article 4 par 4 and article 6 par 6, in conjunction with article 4 par 4 of the Convention. It stated that EIA studies are prepared for the purpose of public file in an administrative procedure and thus the author should not be entitled to hold this information back on the grounds of intellectual property law. The public availability of EIA studies in their entirety should be the rule with the possibility to exempt parts being the exception to the rule. The exceptions should be

based on the list of exemptions contained in article 4 par 4 of the Convention and be decided on a case-to-case basis. This application should happen in a restrictive way taking into account the public interest served by the disclosure. The reasons for the application of the exemptions should be clear and transparent.

### **Outcome**

In the comments to the draft findings Romania referred to a new letter sent by the national Environmental protection Agency to its regional and local offices. The letter stated that the EIA report, the environmental report and the environmental balance report represented public documentation which should be made publicly available. Data for which confidentiality had been requested by the project proponent and granted by the Ministry of Environment and Sustainable Development could still remain undisclosed.

Taking this into account the Committee found that Romania was no longer in non-compliance with article 4 par 1. Nevertheless the Committee imposed conditions: The restrictive application of the possibilities for exemption, a limitation to the list contained in article 4 par 4 of the Convention, the clarity and transparency of reasons for exemptions and that the documents referred to in the letter cover the full EIA study and any other document referred to in article 6 par 6 of the Convention.

This communication had the positive effect that Romania immediately changed its application of Article 6 in conjunction with Article 4 of the Convention regarding EIA documentation. The EIA permitting procedure was interrupted, therefore there was no need to assess respective allegations.

The Committee continued to ask the communicant and the party concerned regarding new facts and progress as to the EIA procedure. Since there were not changes the Committee closed the case in June 2009. The Committee informed the communicant that it could submit a new communication in case there are new developments.

## Case 16 (2006). Lithuania: Association Kazokiskes Community

### *Public participation as to the establishment of a landfill*

#### **Background:**

This communication 2006/16 (Lithuania) is closely related to communication 2006/17 (European communities). In the first communication regarding Lithuania the communicant claims that Lithuania breaches the Aarhus Convention. In the second communication as to EC the communicant claims that the EC is in non compliance, among others, since Lithuania breaches the Convention and the European Commission should therefore have taken measures against Lithuania, and that the EU legal framework itself is in non compliance with the Convention.

Both communications concern a landfill with a capacity of 6.8 million tons over the next 20 years, which was to be established in the village of Kazokiskes. According to Lithuanian law several consecutive procedures have to be carried out before the establishment of a landfill. These concern: a waste management plan, a detailed plan, an EIA decision, approval of the technical project and construction permit, an IPPC permit.

The communicant claims that the Lithuanian authorities had failed to comply with Article 6 of the Convention as regards five procedures (a waste management plan, a detailed plan, an EIA decision, an approval of the technical project and construction permit and an IPPC permit) within the decision-making for the establishment of the landfill in Kazokiskes. In addition the communicant alleged a violation of Article 9 par 2 because there was no possibility to challenge the decision over the establishment of the landfill, in particular because the relevant decisions were not accessible.

The case was discussed in a public hearing at the 16th meeting of the Compliance Committee. In this meeting the communicant extended its allegations to cover Article 7 of the convention. Draft findings and recommendations were prepared at the 18th meeting. After receiving comments by the party concerned and the communicant these were finalized at the 19th meeting in March 2008.

#### **Articles concerned:**

Article 6 par 2: early notification of the public

Article 6 par 3: reasonable time-frames for public participation

Article 6 par 4: early participation when all options are still open

Article 6 par 5: encouraging applicants to enter into discussions with the public

Article 6 par 6: information to be made available by competent authorities

Article 6 par 9: information about the decision

Article 7: public participation in the preparation of plans (relevant in the present case: Vilnius county waste management plan)

Access to justice: Communicant alleges that due to the fact that no information about the relevant decisions was received, there had been no possibility to challenge them before the courts within the time period prescribed in Lithuanian law.

#### **Committee's findings:**

The landfill concerned belongs to activities covered by Article 6 in conjunction with Annex I par 5 of the Convention. The Vilnius county waste management plan is a plan covered by Article 7 of the Convention. The Committee stressed by referring to former cases (e.g. Belgium) that the national label is not decisive whether an activity falls under Article 6 or Article 7, but it is the subject matter it deals with.

As mentioned above the communication refers to several consecutive decision-making procedures. The Committee determined in such cases it is possible that more than one decision amount to a permit decision as envisaged by Article 6 of the Convention. For this determination context and legal effects of each decision have to be taken into account. Furthermore the Committee stated that the requirement for "early public participation when all options are open" in Article 6 par 4 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. 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. By the same time each party has some discretion how it guarantees effective participation in different stages.

The Committee also interpreted the extent of discretion a country has with regard to the assessment of alternatives: 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.

Furthermore the Committee found that Lithuania failed to inform the public in an adequate, timely and effective manner about the possibility to participate in the EIA decision and provided a too short a time for inspection of the documents and submitting comments. As regards the EIA proceeding Lithuania has thus failed to comply with Articles 6 par 2 and 6 par 3 of the Convention.

The following features of the Lithuanian legal framework were considered not to be in compliance with Article 6 of the Convention:

- lack of a clear requirement to inform the public in an adequate, timely and effective manner (violation of Article 6 par 2);
- setting a fixed 10 day period for inspection of documents and submitting comments (violation of Article 6 par 3);
- making developers instead of public authorities responsible for organizing public participation (violation of Articles 6 par 2 (d) (iv) and (v) and 6 par 6);
- demanding comments to be “motivated” and restricting right to comment to the “public concerned” (violation of Article 6 par 7).

### **Outcome**

The case brought little for the landfill concerned, but will eventually improve to significant legislative changes to bring Lithuania under compliance with the Convention. This is typical for the compliance mechanism. It is not a legal remedy for a concrete case, but it aims to bring improvements of the legal system for future cases.

This case brought important interpretations of the Convention in particular for EU countries that apply European secondary legislation such as the EIA and IPPC directives (transposing Article 6 of the Convention into national law). The Committee made clear that the public must effectively have the right to participate in permitting procedures falling under Article 6 and 7 of the Convention, before crucial decisions, such as location and technology are decided. Furthermore the Committee clarified it is decisive that other alternatives should be open not only in theory, but also in fact, meaning political and commercial pressure would be too change alternatives at a certain stage.

Furthermore the Committee made clear that information for the public on decision-making processes is essential. When the relevant information is provided, the public has to be given a sufficient amount of time to get a general idea of the issues at stake and to develop their position. This is the responsibility of the competent authorities, it is thus not sufficient to rely solely on the developer of the project to take care for the public participation process.

### **Action by MoP**

The third MoP followed the opinion of the Committee as presented in its report on the case. It decided that Lithuania was in non-compliance with the Articles of the Convention mentioned above and made recommendations as regards further legislative steps necessary to achieve a state of compliance with the Convention.

### **Current outcome**

Lithuania had to develop and implement an action plan in order to overcome the non compliance issues as recommended by the Compliance Committee and the MoP. The action plan has been assessed by the Compliance Committee and questions for clarification were raised. The next MoP will decide whether Lithuania is in compliance with the Convention or if further measures are needed.

**Case 17 (2006). European Community: Association Kazokiskes community**  
*EU legal framework on public participation as to landfills and access to justice*

**Background**

This case concerns the Lithuanian landfill site discussed in Case 16, but this time the communication is levelled at the European Community<sup>1</sup>. With regard to the construction of the landfill in Kazokiskes, the competent authorities of Lithuania defended the lack of public participation in the decision-making by arguing that the public is able to participate concerning the Integrated Pollution Prevention and Control (IPPC) permit (Directive 96/61 as amended by Directive 2003/35). However, the IPPC permit would be issued only after the construction of the landfill is finalised, thus too late for effective public participation at construction phase. The European Commission has stated that the Lithuanian authorities are not infringing EU law, because the relevant provisions of EU environmental law only require that no installation is operated without an IPPC permit. Therefore it would not constitute a violation if the landfill is built without permission.

In June 2006, the communicant filed a communication to the Compliance Committee stating that the EU had failed to implement the Convention given that no public participation is required before an installation is constructed neither under the IPPC Directive, nor under the EIA Directive (Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC). Furthermore, the communicant claimed a violation of Article 9 of the Convention demonstrating, firstly, that the possibility of a review procedure is necessary before the construction takes place and secondly, that the EC Treaty does not provide for legal remedy for non-fulfilment of international obligations. Furthermore the communicant alleged that EU institutions had failed to comply with certain provisions of Article 6 of the Convention regarding decision-making over the co-financing of the landfill in question.

**Articles concerned**

Article 6 par 2 ((timely and effective manner to inform the public concerned)

Article 6 par 4 (early public participation when all options are still open)

Article 9 (effective access to review procedures)

**Committee's findings**

Regarding the application of Article 6 of the convention on the decision of co-financing, the Committee decided not to consider the allegation because the decision had been taken before the entry into force of the Convention for the EU and because the general matter of decision on funding would be considered in another communication (ACC/C/2007/21).

The Committee noted that 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. 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.

On the issue of notification of the public according to Article 6 par 2 of the Convention the Committee determined that the IPPC Directive obliges the Member States of the EU to ensure early and effective public participation. Regarding the EIA Directive it stated that the EC Member States are obliged to ensure early information for the public in environmental decision making procedures. The Committee concluded that the relevant Community legislation would provide for sufficient provisions regulating access to public participation. The fact that the terms "adequate, timely and effective manner" are not explicitly used in the directives in question does not by itself amount to non-compliance with the Convention.

Regarding the issue of early participation while all options are still open according to Article 6 par 4 of the Convention, the Committee stated that, at least for activities involving construction, the EIA Directive would provide for public participation before the actual construction starts. Concerning the IPPC Directive the situation is more complex: That an IPPC procedure starts only after the construction has been finalized is not necessarily in conflict with Article 6 par 4.

<sup>1</sup> The European Communities have ratified the Convention. In December 2009 the Lisbon treaty entered into force and the European Union is the subject that deals with international treaties as well.

Nevertheless it might be if public participation would take place only at a stage where there is no realistic possibility for certain options to be chosen. The “effects on the ground” must therefore not have effectively eliminated alternative options as the Committee decided with regard to Lithuania (Case 16).

The Committee reached the conclusion that the provisions on public participation contained in the two directives are in line with Article 6 of the Convention, among other because EU Member States (and its parties to the Convention respectively) have the obligation to interpret EU legislation in accordance with international law. The latter has a superior level to secondary legislation such as the EU directives.

Also on the issue of access to justice the Committee did not determine non-compliance with the Convention. It stated that both directives lacked clear provisions providing the public with effective remedies including injunctive relief. However, because the Committee lacked further information on the question whether issues relating to remedies are part of the EC's competence, it could not conclude a failure to comply with Article 9 par 4 of the Convention.

Under the headline “General issues of Transposition” the Committee dealt specifically with the impact of international agreements concluded by the EC on the member states. It stated that the fact that community law was, due to the superior rank of such an international agreement, to be interpreted in accordance therewith, should not be used as an excuse for not transposing the Convention through a clear, transparent and consistent framework into EC legislation.

Nevertheless the Committee was not convinced that this amounts to a failure to comply with Article 3 par 1 of the Convention, but it stated that the implementation of Article 6 might be adversely affected for the following reasons:

- (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.

The matters examined did not lead the Committee to the conclusion that the EC failed to comply with the provisions of the Convention concerning their transposition into the EIA and IPPC Directives. It has to be noted however, that the results of the Committee's general examinations are only relevant for the specific activity of landfills.

### **Outcome**

This case brought crucial interpretations as to the division of competences between the European Union and its Member States with regard to the Convention. Both the EU and all Member States (apart from Ireland) are parties to the Convention. Therefore, in theory, any breach of the Convention by a Member State could be seen as a breach of the Convention by the EU as well. Such a solution is not very practical. The Committee therefore made clear, that the EU is responsible to establish a legal framework that enables Member States to correctly apply the Convention. On the other hand Member States are obliged to apply EU legislation in accordance with international law.

Even though the Committee agreed there are deficiencies in EU legislation and transposition is not complete, the Committee found that Member States still have sufficient discretion to correctly apply the Convention, meaning to interpret the EU directives in accordance with the Convention. This is one of the reasons why Lithuania was in non compliance with the Convention, but not the EU, even though Lithuanian legislation more or less correctly transposed the EU directives (however, without considering the Aarhus Convention).

Therefore EU Member States are legally obliged to go beyond the pure wording of the EU directives when applying its public participation and access to justice provisions. What the Committee did not say, but can be derived from the EU Treaty is that the European Commission as the guardian of the treaties is obliged take legal actions against Member States that do incorrectly apply EU directives. Incorrect application of EU directives (including international agreements concluded by the EU) constitute an infringement of the EU treaty by respective EU Member State.

**Case 18 (2006). Denmark: Søren Wium-Andersen***Access to justice with respect to non-compliance of national legislation with EU law***Background**

According to the communicant, more than 2.9 million rooks, *Corvus frugilegus*, have been culled in Denmark since the EU Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds entered into force. In spring 2006 the municipality of Hillerød acting as the landowner (and not as public authority) implemented a decision on extensive culling of juvenile rooks in order to reduce vocal noise resulting from the breeding behaviour of the birds.

The communicant alleges that this decision was not in compliance with the Wild Birds Directive. Rooks are listed in Annex II of the Directive and can be hunted only under special conditions which, according to the communicant, had not been fulfilled. However, the local police, the office of the public prosecutor and the Nature Protection Board of Appeals did not consider the reports of the communicant. The Forest and Nature Agency, which had been informed by the Nature Protection Board of Appeals, did not contact the communicant at all. The communicant did not contact the Ombudsman and did not use private law remedies due to expected high costs.

Thus, according to the communicant, he did not have proper access to review and appeal procedures concerning the alleged non-compliance of Denmark with the wild birds Directive. The communication was filed in December 2006.

**Articles concerned**

Article 9 par 3 (access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national environmental law)

**Committee's findings**

The preliminary admissibility of the communication was determined on the 15th meeting of the Committee. The main discussion took place at the 18th meeting. The findings and recommendations were prepared following the 19th meeting of the Committee. The examination of the case focused on the question if Denmark had failed to comply with the Convention because there had been no possibility for the communicant to challenge the alleged failure of Denmark to correctly implement the Wild Birds Directive.

In its general considerations the Committee determined that the even though the municipality of Hillerød acted as landowner regarding the culling, Article 9 par 3 of the Convention remained applicable. It also stated that the right of the public to challenge acts and omissions regarding wildlife as far as these contravene national law relating to the environment is covered by this Article. In this respect the question arises whether an EC Directive can be considered as national law of the member states. The Committee supported this view; therefore it was possible to consider the Wild Birds Directive in the light of article 9 par 3 of the Convention.

Parties to the convention are generally not obliged to introduce a system of popular action ("actio popularis") to ensure that anyone can challenge any act and omission related to the environment. On the other hand the criteria applied to limit access to justice should not be too strict, there has to be at least some room for challenging acts and omissions related to the environment. The assessment of the case therefore has to include an analysis of the general situation. The Committee therefore considered to what extent other members of the public have access to administrative or judicial procedures where they could invoke the public environmental interests at stake in order to challenge the culling of the birds.

The committee criticized that the communicant had not exploited all means on a national level to achieve a prevention of the culling. Nevertheless he would also not have had a realistic possibility to enter a judicial review procedure in the concrete case. On the other hand according to available case-law, this possibility would most likely have existed for certain NGOs. Therefore the fact that it was not possible for the communicant to launch a penal procedure in the concrete case is not considered sufficient for Denmark to be in non-compliance with Article 9 par 3 of the Convention. The Committee nonetheless declared that the standards for access to justice for NGOs as determined in the case-law would have to be considered a minimum standard for the compliance of Denmark.

**Outcome**

The committee notes that already during the proceedings before the national authorities Den-

mark changed its law on the culling of birds. Now a prior permit is needed for the culling of rooks. It is not clear whether this change in legislation was due to the communicant's efforts, but it could be. The Forest and Nature Agency has to take action in case of unauthorized culling. If such a request by an environmental NGO is turned down, this NGO would have access to a judicial review procedure. The Committee also recommends installing, apart from the review procedure in front of courts, an administrative review procedure before the Nature Protection Board of Appeal. It is not yet clear if Denmark will seize this suggestion.

**Case 19 (2007). United Kingdom: Mr. John D. Hall***Effective public participation with respect to a road construction project***Background**

The case concerns approval of a by-pass road which the communicant believed would add to congestion and pollution in a particular area. The communicant stresses that he was not given sufficient opportunity to participate effectively in the meeting of the Council "Speakers Panel" discussing an application for the road construction project. His written comments were not reflected in the minutes of the meeting leading eventually to the decision of the Council. The communication was filed in April 2007.

**Articles concerned**

Article 6 (effective participation in public meetings).

The Committee decided that this communication is not admissible.

The Committee, having considered the communication at its sixteenth meeting (13-15 June 2007), noted that the information contained in the communication indicated that the decision in question was now subject to an independent inquiry and as such was still pending. It also noted that although the communication might meet the formal admissibility criteria set out in paragraph 20 of the annex to decision I/7 of the Meeting of the Parties, it provided no information on the use of available domestic.

**Outcome**

This case made clear that national legal remedies should be used before the Committee is approached. The Committee requested the communicant to provide further information on this issue, but it did not receive this.

## Case 20 (2007). Kazakhstan: NGO Green Salvation

### *Locus standi, failure to act, Committee's effectiveness in dealing with Communication*

#### **Background**

On May 10, 2007, Green Salvation, a Kazakh environmental NGO, submitted a communication alleging non-compliance with the Convention by Kazakhstan. They claimed the Government of Kazakhstan had failed to adopt public participation procedures for environmental impact assessment (EIA), even though required to do so. In addition, they were not granted locus standi to challenge this failure in court.

#### **Articles concerned**

Articles 3.1 (implementation of the Convention) and 9.3 (access to justice).

#### **Committee's findings**

The Committee did not even take a decision on admissibility. Instead, the Committee decided that it has to find a balance between its obligation to deal with communication in expeditious manner with its duty to apply its limited resources in the most effective way so as to promote compliance with the Convention by all parties in a balanced way.

The Committee suggested that issues raised by the communicant could be dealt with in the context of the strategy to be developed by the Government of Kazakhstan under decision II/5a of MOP-2 (see cases 1 and 6). This has been done by a letter addressed to the Government of Kazakhstan and the communicant.

#### **Outcome**

The issue was raised in the Committee's report to the Third Meeting of the Parties (2008). In considering the implementation by Kazakhstan of the Committee's recommendations made in connection with communication ACCC/C/2004/06, the Committee took note of the strong link between the implementation of these recommendations and the implementation of the recommendations contained in decision II/5a of the Meeting of the Parties. Since it already found Kazakhstan to be in non-compliance with its obligations under Article 9.3 of the Convention, it did not take a separate decision on this case.

The MOP took a decision III/6c endorsing findings of the Committee (see also cases 1 and 6). It invited the Government of Kazakhstan to thoroughly examine, with appropriate involvement of the public, the relevant environmental and procedural legislation as well as the relevant case law 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.

Kazakhstan will submit a report to the next MOP on fulfillment of these measures.

**Case 21 (2007) European Community: Civic Alliance for the Bay of Vlora**  
*Financing of a Thermo-Power plant by the European Investment Bank (EIB)*

**Background**

This communication is related to case ACCC/C/2005/15 which had been submitted earlier by the same communicant regarding non-compliance of Albania with the Convention.

The communicant (Civic Alliance for the Bay of Vlora, CAPBV) alleged a violation of Article 6 of the Convention by the EC through the European Investment Bank (EIB). According to the communicant the decision to finance the construction of the plant had been taken without ensuring that public participation was made possible in the process. No public participation had, according to the communicant, been carried out prior, during or after the signing of the financing contract.

The second alleged violation of the convention concerned the refusal of the EIB to provide for information (copy of the terms of the loan agreement) requested by the communicant. Another request for information regarding the copy of the Framework Agreement between the EIB and Albania of 1998 was satisfied by the EIB after the Albanian authorities had authorized its disclosure.

**Articles concerned**

Arts 4, 5, 6

**Committee's findings**

There was no dispute about the question whether the provisions of the Aarhus Convention are applicable to the EIB. This means it is clear that the Aarhus Convention also applies to EU institutions such as the EIB.

The Committee identified the question whether EIB had complied with the Convention as regards the disclosure of information (Art.4) and as regards public participation in the decision making process (Art. 6) as main issues of concern in this case.

Regarding the environmental information request for the finance agreement the Committee concluded that a broad interpretation of the term "environmental information" was demanded. Even though "financing agreements" are not explicitly listed in Article 2 par 3 defining environmental information they could be covered by the Convention since the wording of Article 2 par 2 is not exhaustive and refers to measures that could "likely affect the environment". However, this has to be interpreted on case by case base. In contrast to that the exceptions regarding environmental information requests regulated in Article 4 par 4 have to be interpreted restrictively and may not be read in a way that public authorities are only required to release information where no harm to these interests is identified.

Regarding the Framework Agreement the Committee found that the necessity of authorisation of the release of information by a third party (namely the Albanian authorities) was no valid reason for refusal. Furthermore the EIB did not provide information on available remedies in case the requested information is not provided. Because the requested documents were eventually provided, the Committee did not go into the contents of the documents to consider which parts constituted environmental information. The same counts for the assessment whether the EIB complied with all procedural provisions regarding environmental information. It also noted that not every erroneous decision regarding the requirements of Article 4 could lead to the adoption of a finding of non-compliance, as long as an appropriate review procedure (in accordance with Article 9 par 1 of the Convention) is in place.

The EIB defended itself that the information request was not labeled as such. The Committee conceded that in case of environmental information requests there is no need to refer to the Convention or transposing legislation and that such requests do not have to be labeled as environmental information requests, but that this would facilitate the handling of such requests.

Regarding the alleged non-compliance with Article 6 the Committee stated that the decisions in question are decisions concerning the financing of a specific project. The decision to permit the project was taken by Albania, where, regarding communication ACCC/C/2005/12, the Committee had decided that the EIA procedure that had been undertaken had not met the requirements of Article 6 of the Convention. The EIB on the other hand has no legal authority of its own to carry out an EIA and has to rely on the authorities of the state to carry out the respective pro-



cedures. The general decision to finance a project can thus legally not be seen as a decision to permit an activity in the sense of Article 6 of the Convention.

The Committee thus concluded that neither regarding Article 4 nor regarding Article 6 of the Convention the European Community is in non-compliance with the Convention.

**Outcome**

The case showed that the EIB is bound to the Convention and brought some clarifications as to how information requests should be handled. It also showed some deficiencies in the EIB procedures. Since the information was finally provided and the issue thus solved there was no need to further assess respective compliance. We are not aware whether this was an indirect outcome of the compliance procedure. Regarding Article 6 the Committee made clear that financing decisions of the EIB are not permitting decisions in the sense of the Convention and do not need to be subject to public participation procedures.

## Case 22 (2007). France: L'Association L'Association de Défense et de Protection du Littoral du Golfe de Fos-sur and others

### *Non effective public participation as to a waste disposal incinerator*

#### **Background**

This communication was submitted in December 2007.

The communicant (L'Association de Défense et de Protection du Littoral du Golfe de Fos-sur-Mer and Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhône and Fédération d'Action Régionale pour l'Environnement (FARE Sud)) alleges a violation of various articles of the Aarhus Convention in the decision-making process (in particular article 6, but also article 9) for a waste disposal plant located in Fos-sur-Mer in the South of France.

According to the communicant two fundamental decisions over the installation were made without involvement of the public: the choice of incineration as a method of waste disposal and the location of the facility, both in the year 2003. Another decision of the year 2005 where the concessionaire for the waste treatment public service was chosen and further modalities of processing the waste were contracted also took place without public participation.

Some public participation was possible with regard to the decision making procedure that led to the authorization of the waste treatment centre in 2006 by the Prefect. In this respect the communicant claims that public participation was too late since not all options were open at this stage. Furthermore the communication claimed that the public had not been informed on time. No public debate, but only a public inquiry was held on the issue. For large scale projects in France a public debate procedure is carried out and this is seen as compatible with the Convention by the communicant and FoE France, whereas the public inquiry procedure not.

The communicant also alleges that the attempt to challenge the authorities' decisions was unsuccessful and that the jurisprudence of the Conseil d'Etat on the issue violated provisions of the Convention.

The NGO Friends of the Earth France intervened with an amicus brief substantively opposing the draft findings of the Committee in July 2009.

#### **Articles concerned**

Article 3 par. 1

Article 6 par. 1, 2, 3, 4, 5 and 8

Article 9 par. 2 and 5

#### **Committee's findings**

The admissibility of the communication was confirmed by the Committee at its nineteenth meeting in March 2008. The public hearing took place in December 2008. The final decision was taken at the 24th meeting in July 2009.

The Committee put down any claim invoked by the communicant and found France to be in full compliance with the Convention. According to the Committee only the 2006 authorization of the project by the Prefect constituted a permitting procedure that falls under Article 6 of the Convention. In this respect the Committee found that public participation was provided in an effective manner, all deadlines were sufficient and all options were open. Furthermore the Committee argued that Access to Justice was provided in a sufficient manner.

With regard to the other decisions invoked by the communicant the Committee assessed that those procedures are not permitting procedures in the sense of article 6 of the Convention and therefore public participation at this stage was not a legal obligation. The Committee conceded that those decisions might narrow down the scope and options of later permitting decisions, but that in this case they found all options were still open when the Prefect authorized the project in 2006. One of the main arguments was that in fact 50 decisions per year were put down by Prefects and this shows the Prefect is really in the position to decide on the subject matter of the case.

#### **Outcome**

In this case the Committee found that all options are open when the Prefect authorizes the project at the end of a longer planning and decision making process. The findings of the Committee

are in contradiction to the prevailing public opinion in France. This was illustrated by the intervention of Friends of the Earth France at the very end of the procedure. Most and major French lawyers, politicians and institutions claim that the public inquiry in the context of the permitting procedure at the Prefect is too late in the decision making process and by the some time insufficient and therefore not compatible with Article 6 of the Convention. The “Fors sur Mer” case is even used in legal literature for demonstrating that the public participation procedure is too late in the decision making procedure.

However, the communicant failed to provide sufficient evidence and arguments showing the shortcomings of the French legal system. The intervention of Friends of the Earth France came far too late in the procedure and could thus not be considered by the Committee. However, the Committee raised concerns in the conclusions of its findings that some of the decisions the communicant referred to “may de facto affect the scope of options to be considered in a permitting decision under Article 6 of the Convention.” French environmental organizations or other members of the public are free to submit a new communication on the Article 6 related permitting framework in France if they consider this was not sufficiently reflected in this decision of the Committee.

**Case 23 (2008). United Kingdom: Mr Morgan, Mrs Baker of Keynsham***Costs of remedies***Background**

This communication was submitted in February 2008 to the Committee. The public hearing took place in July 2009 at the 24th meeting of the Committee.

The communicants allege a violation of Article 9 par. 4 of the Convention caused by an order to pay approx. £25,000 following the discharge of an injunction demanded and obtained by them in private nuisance proceedings against (odour) emissions from a waste composting site. They see the breach of the Convention in the fact that the cost order was made by the court in circumstances where one month before it had agreed and made an order that there was a serious issue to be tried and that the claimants should enjoy injunctive relief. The communicants also claim that this order made the proceedings prohibitively expensive prohibiting further injunction applications. The communicants allege that the judicial procedures for private nuisance were unfair, inequitable and prohibitively expensive, in breach of article 9, paragraph 4, of the Convention.

During the public hearing in this case the communicant raised allegation an additional allegation not contained in the communication. The communicant argued that the Agency and the Council, by pursuing their costs from the communicants rather than from the operator or awaiting the outcome of the costs position at final trial, had penalized the communicants for seeking interim injunction relief and this is seen as an infringement of Article 3 par 8.

**Articles concerned**

Article 9 paragraph 3; article 9 paragraph 4; Article 3 paragraph 8

**Committee's findings**

This case as to costs for remedies is closely related to other cases pending against the UK on this, in particular cases 27 and 33.

The Committee had to decide whether the procedures referred to fall within the scope of Article 9 par 3 before it can decide if the Party concerned has complied with Article 9 par 4. The communicants allege that the operator is in breach of the United Kingdom's private nuisance law. The Committee therefore had to decide if a breach of this law can be considered a contravention of the UK's national law relating to the environment. This was confirmed within the context of the present case, therefore also Article 9 par 4 is applicable.

The alleged breach of Article 9 par 4 was confirmed by the Committee. It stated that a cost order of £5,130 plus interest was not prohibitively expensive in this case. However the Committee states that the Court of Appeal's subsequent order that the communicants pay all legal expenses incurred by the Council and Agency without demanding the operator to contribute was unfair and inequitable and constitutes non-compliance with article 9, paragraph 4, of the Convention. However, the Committee also stated that since no evidence was presented to substantiate that the non-compliance in the concrete case was caused by a systemic error, it does not present recommendations.

With regard to the allegations made with regard to Article 3 par 8 of the Convention the Committee states that the seeking of the costs by the Environmental Agency alone can not be considered a penalization in the sense of Article 3 par 8. However the Committee states that pursuing costs in certain contexts may be unreasonable and amount to penalization or harassment.

The Committee also considered the UK's compliance with Article 3 par 8 even though it had not been raised by the communicant. Even though it does not go as far as to state that the UK was in non-compliance with this provision the Committee still expressed doubt that the behaviour of the Party concerned in the underlying case meets its obligation to endeavour to ensure that officials and authorities assist the public in seeking access to justice in environmental matters.

## Case 24 (2008). Spain: Association for Environmental Justice (AJA)

*Access to information fees; public participation in EIA and land planning; remedies; court costs*

### Background

On May 13, 2008, a Spanish non-governmental environmental law organization Association for Environmental Justice submitted communication alleging non-compliance with the Convention by Spain. The communication addressed an urbanization project developed in Murcia city, Spain. The project approval went through complicated and lengthy procedure, which basically covers two major issues: land and urbanization (construction) issues. The project was about development of a residential area to construct houses for young families (Joven Futura project). Some facts raised in the communication took place before Convention's entry in force for Spain. The communicant made several allegations, including: (a) violation of Article 4.4 and Article 6.6 by imposing a fee on environmental information requested from public authorities and related to decision-making having environmental impacts; (b) violation of public participation obligations under Article 6 during land planning and project permitting; (c) violation of Article 9.4 due to denial by the courts to suspend decisions taken by local authority in the court law suit, where the merits of the case relate to lack of EIA in decision making process, as well as length of the procedure on granting suspension, and (d) violation of Article 9.2-9.3 by imposing of costs in a court proceeding related to suspension measure (of the governmental decision challenged) on a non-profit organization, while no assistance mechanisms were available to affected public.

### Articles concerned

Article 4, paragraph 8; article 6, paragraph 1 a), paragraph 2 a) and b), paragraph 4; article 9, paragraphs 2, 3, 4 and 5.

### Committee's findings

Spain did not send any reply until actual discussion of the case, and it was only after the public hearing that information was submitted by the Government. It took the Committee two meetings to adopt draft findings and recommendations and it used electronic decision-making procedure to finalize them in January 2010. Spain agreed to have direct recommendations by the Committee under paragraph 36(b) of the Decision I/7.

### The Committee found that:

- a) 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;
- b) 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;
- c) the failure of Spanish system of access to justice to provide adequate and effective remedies as shown in this case constituted non-compliance with article 9, paragraph 4, of the Convention;
- d) if this had been a general practice of court of appeals in Spain regarding costs (when costs are put on appellant if it loses in an appeal case against public authority, as in this case), this would also constitute non-compliance with article 9, paragraph 4;

The Committee did not agree with all allegations made by the communicant. However, some issues were put back on Committee's agenda by subsequent cases related to Spain (see, e.g., case 2009/36).

### Outcome

Acting on the basis of paragraph 36(b) of the Decision I/7 the Committee made detailed recommendations. The key elements were:

- (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/DVD) are charged for providing access to environmental information;

(ii) Clear requirements be established for the public to be informed of decision-making processes, 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;

(iii) 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;

(iv) Public participation procedures include reasonable time-frames for the different phases allowing for sufficient time for the public to prepare and participate effectively; land use legislation be reviewed to expand the existing time frame of 20 days;

(v) 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;

(b) To develop capacity building and awareness raising program for various state authorities and the public.

Recommendation a), ii) is particularly interesting as it is built on allegation made by the communicant about an agreement that city administration signed with the proponent about proposed project. The communicant claimed that the agreement foreclosed several options for the development. The Committee did not adopt any findings on this issue since the agreement was signed before the Convention entered into force, but reflected its concern in the recommendations.

**Case 25 (2008). Albania**

*Decision-making on an oil-storage terminal and port infrastructure*

**Background**

The communication concerns the reconsideration of an issue already brought before the Committee under communication ACCC/C/2005/12 regarding oil-storage terminal and port infrastructure in Vlora, Albania. The communicant alleges, that Albanian EIA legislation and therefore also provisions of the Aarhus Conventions were violated in the course of decision-making over an oil-storage terminal and port infrastructure.

In its findings and recommendations with regard to the abovementioned communication, the Committee had already addressed the issue of public participation in decision-making on the oil storage terminal. No specific findings were reached on this issue due to lack of information and because the issues raised resembled very closely those related to the Vlora Power Plant for which the Committee had reached findings.

**Articles concerned**

Article 5

Article 6 par 1 (a)

Article 7

**Committee's findings**

The Committee decided not to proceed with the review of the communication because the issues raised therein had already been considered by it under the review of communication ACCC/C/2005/12. Albania is also expected to consider them during the implementation of the recommendations the Committee made with respect to this communication.

**Case 26 (2008): Austria: NETT***Public participation in motorway project planning case***Background**

This communication was submitted in July 2008 and concerns a motorway project that had been under legal and political dispute since almost 40 years. The planned motorway would go through the Ennstal-valley in the Alps. There has been strong public resistance against this project ever since. In the 1980s the project was put down by political and legal means at different occasions. Permitting procedures and studies had proved that the project would lead to serious environmental impacts, in particular water courses and the alpine region.

However, the Austrian province Styria (Steiermark) has made a further attempt to get the project through in the last years. Different planning procedures were launched. A planning council was set up, the public was excluded from that. Finally the province Styria preferred a four lane motorway through the valley, based on the recommendation of this planning council.

The communicant alleged that no or a non sufficient public participation procedure was foreseen in the planning process. The arguments of the public were not taken into account. The communicant aimed at assessing alternatives such as two lane motorway and a ban of heavy lorries from the motorway. As for the latter the communicant aimed to initiate and participate in the procedure that ends in a regulation banning heavy lorries. Furthermore the communicant claimed there was no possibility to legally review the decisions in question.

The communicant claims Austria breached Article 7 in conjunction with Article 6 par 3, 4 and 8 as well as Article 8 and 9 par 2, 3 and 4 by not providing for public participation and access to justice in the before mentioned planning procedures.

It has to be noted that the abovementioned facts refer to a period in time that is in advance to the formal start of the Austrian EIA permitting procedure. Furthermore an SEA under the federal transport act would still follow. The decisions of the province Styria have political, but formally no direct legal value in the Austrian legal system. However, the communicant claims that in practice the decision of Styria pre-determines the further planning process.

**Articles concerned**

Articles 6 par 3, 4 and 8  
Article 7  
Article 8  
Article 9 par 2, 3 and 4

**Committee's findings**

The Committee noted that regarding the assessment of alternatives the most relevant procedures were initiated well before the Convention entered into force. Other procedures and decisions appeared to be of non binding character, such as those of the Regional Planning Council and public participation would still follow in the framework of SEA and EIA procedures. The procedure to regulate lorry bans are also not considered as procedures falling under Article 6, 7 or 8 of the Convention. The allegations regarding access to justice were either not sufficiently substantiated or not relevant since the decisions in question did not fall under the public participation provisions of the Convention.

„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 57. 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.“

Furthermore the Committee made clear that had not assessed compliance of the Austrian legislation regarding EIA and SEA procedure in this case since this issue was not at stake.



### **The Outcome**

This case illustrates it is difficult to legally argue against decisions and procedures that are of high political and factual significance, but can hardly be touched by legal means since the decisions are taken outside formal legal procedures. The allegations of the communicant are serious and it might well be the case that the actual decision for a certain variant of the motorway had been taken already now, before the formal planning and permitting procedures start. However, since this political decision are of no "legal" value and were not issued in a legal decision respectively it was not possible for the Compliance Committee to find Austria to be in non compliance. A strong argument raised by the party concerned is that the official, formal planning and permitting procedure have not started yet and that an SEA and EIA with public participation and access to justice possibilities would follow.

However, the Committee raised concerns that the following procedures could only be of formal nature and in fact the decision was taken already before, meaning that not all options are open any more. But this is something that can only be assessed after those procedures were carried out.

This case might have risen pressure on Austria to carry out a meaningful SEA procedure in this case. The communicant could submit a new communication if the following SEA procedures proves to be provide for non effective public participation.

**Case 27 (2008). United Kingdom: Cultra Residents' Association***Decision-making on the expansion of the city airport in Belfast***Background**

This communication concerns the decision-making procedure on the expansion of the city airport in Belfast and the judicial review of the decisions taken therein. It was submitted to the Committee in August 2008. The public hearing took place in July 2008 at the 24th meeting of the Committee.

First, the communicant alleges a breach of Art. 7 concerning the decision-making process on the expansion of the airport. The rights of the public are alleged to have been restricted by the decision of the Department of Environment not to hold a public hearing on the expansion of the city airport in Belfast but an "Examination-in-public hearing" where the rights of the public are more restricted. At the same time the Department sought to control the operations at the airport by a private agreement between itself and the airport operator. The communicant alleges that this type of agreement was chosen to further restrict the possibilities for the public to take part in the decision-making process.

The last allegation revolves around the question if the rights of the public under Art. 9 of the Convention are violated when the communicant has to pay the full cost of the Department of Environment for Northern Ireland in a court case. What is problematic is that the costs (GBP 39,454) were ordered upon the communicant after its attempt to seek judicial review was dismissed, even though the court had granted a leave (after formal inspection) to file the case before. The communicant considers those costs, claimed in full by the Department, together with its own costs for legal representation, are of a prohibitive nature.

The admissibility of the communication was confirmed by the Committee at its 21st meeting on 19 September 2008.

**Articles concerned**

Articles 3, 7, 9

**Committee's findings**

The Committee did not consider the amended planning agreement an activity falling under Article 6 par 1a of the Convention because it does not fit with any of the activities contained in Annex I. It is, according to the Committee also not subject to Article 6 par 1b. However, because the planning agreement constitutes a decision over a specific activity it does also not fall within the scope of Art. 7.

Before considering whether the Party concerned was in breach of Article 9 par 4 of the Convention, the Committee determined that the communicant's judicial review proceedings were within the scope of article 9, paragraph 3. Therefore the proceedings are subject to the requirements under Article 9 par 4. The Committee states that the amount of costs awarded in this case, £39,454, was prohibitively expensive and thus constitutes non-compliance with Article 9 par 4. Within the decision over the allocation of costs, the fact that the public is pursuing environmental concerns that involve the public interest should be taken into account.

The Committee found no breach of the Arts 3 par 1 and 3 par 8.

**Outcome**

The Committee recommended that the Party concerned reviews its system for allocating costs in applications for judicial review within the scope of the Convention, and undertakes practical and legislative measures to ensure that the allocations of costs in such cases is fair and not prohibitively expensive.

## Case 28 (2008): Denmark: Knud Haugmark

### *Access to information on the administration of antibiotics to livestock*

#### **Background**

This communication was submitted in September 2009.

Information concerning the distribution of antibiotics to livestock in Denmark is contained in a database called "VetStat". The database was established to monitor the level of bacterial resistance to antibiotics which can also have an influence on human health. The communication was filed more than four years after the communicant first tried to obtain the relevant information. The communicant alleges that the Danish authorities failed to comply with the Convention by denying him access to this database because the information contained is considered environmental information in the sense of Article 4 of the Convention. In addition the communicant believes that the type of information contained in the VetStat should be actively disseminated by the competent authorities. Because the authorities are not behaving correspondingly the communicant alleges a violation of Article 5 par 1(c) of the Convention. Because there was no possibility for access to a review procedure the communicant considers Denmark to be in non-compliance with Article 9 par 1 of the Convention.

The Committee found out that the communicant had not used available remedies at national courts. By the same time the Ombudsman is dealing with this issue.

#### **Articles concerned**

Article 4; Article 5; Article 9

#### **Committee's findings**

No findings and recommendations have been published yet.

To Committee decided not proceed with this case until the Ombudsman has finalized its investigations.

#### **Outcome**

Even though the case is still open it illustrates that the Committee should only be approached when all national legal remedies were used. The Convention provides for access to justice with regard to the rights it provides to the public. Therefore the access to justice procedures could cure the alleged breach of the Convention and there is no need to refer to the Committee.

**Case 29 (2008). Poland: Zabianka Housing Cooperative***Public participation as to the construction of a sports hall***Background**

This communication was submitted in October 2008.

The communication concerns the construction of a multifunctional sports hall relatively close to the coast of Gdanska Bay and to some residential areas. The communicant describes in detail the potential environmental impacts and what environmental laws would be infringed by this project.

The communicant alleges that the project is constructed without public participation in the EIA procedure. Furthermore the latter ignored various environmental impacts and legislation. A court instructed the developer to better elaborate the EIA report, but the developer did not do so. In June 2008 the communicant was granted the status of a “party concerned” that would allow them to reopen the case.

The communicant alleges a violation of the Convention because the public had been deprived of the right to decide on the final form and plan of the investment. The articles allegedly breached according to the communication are Article 1 in association with Article 4c, Article 6.2 lit a and b and Article 6.8.

The Committee followed the regular procedure and asked various questions to both the party concerned and the communicant and invited them to the public hearing. Neither of them showed up at the meeting. The communicant did not answer the questions asked by the Committee.

**Articles concerned**

Article 4; Article 6.2 (a) and (b); Article 6.8

**Committee’s findings**

“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, 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.”

**Outcome**

The allegations of the communicant were strong, but not sufficiently substantiated. In its communication the communicant focus very much on the environmental impacts of the project (that are not legally relevant for the Convention), but less on the procedural issues that are regulated by the Convention. Furthermore the communicant did not further participate in the procedure it initiated and the party concerned showed little interest as well. Therefore the case was closed without any decision in the substance.

## Case 30 (2008). Moldova: NGO Eco-TIRAS

### *Access to information*

#### **Background**

On November 11, 2008, a non-governmental organization Eco-TIRAS, International Environmental Association of River Keepers, submitted a communication alleging non-compliance with the Aarhus Convention by Moldova. The case raised two related issues: (a) refusal to provide copies of the land forest rent contracts, which were signed by a governmental agency managing forests (State Forestry Fund) in Moldova because of the volume of such information and (b) a recently introduced national regulation, which prohibited public access to the forest land contracts signed by the governmental agencies and subsequent refusal to provide information on its basis. The communicant appealed refusal in a court of appeal, which granted them access to information requested. The court decision was not executed by the public authority.

#### **Articles concerned**

Article 3, paragraphs 1 and 2; article 4, paragraphs 1 and 4.

#### **Committee's findings**

The Compliance Committee found that:

(a) the failure of the public authority 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.

(b) 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.

(c) the failure of the public authority to state lawful grounds for refusal of access to information 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.

(d) the failure of the public authority to respond in writing and in a timely manner to the last request for information submitted by the communicant constitutes a failure by the Party concerned to comply with article 4, paragraph 7, of the Convention.

(e) the failure of the public authority to fully execute the final decision of the Civil chamber of Chisinau Court of Appeal implies non compliance of the Party concerned with article 9, paragraph 1, of the Convention.

The Government did not participate in a public hearing on this case, but sent a written agreement with findings and agreement to have recommendations made by the Committee.

#### **Outcome**

Acting on the basis of paragraph 36(b) of the Decision I/7 the Committee made detailed recommendations. The key recommendations to the Government were:

(a) to ensure full execution of the final court decision obliging state authority to provide the communicant with the copies of the requested contacts;

(b) to 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) to take effective measures for enhanced monitoring of the implementation by public authorities of the Convention and of the Moldovan legislation with regard to transparency of information;

(d) to 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) to take effective measures, such as training activities, publications and conferences, with the

objective of raising awareness of public servants, as well as the members of the judiciary, about requirements of the Convention;

(f) to 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;

(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) to 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.

The last recommendation is probably based on the Government's intention to develop such a strategy, as expressed in its letter to the Compliance Committee. As of early 2011, the Government indeed carried out an independent analysis of its legislative framework and developed draft strategy for implementation of the Aarhus Convention in Moldova for 2010-2014.

Copies of rent contracts were provided by the Government to the communicant.

## Case 31 (2008). Germany: ClientEarth

### *Limited standing for the public concerned*

#### **Background**

This communication was submitted by the NGO ClientEarth in December 2008. It does not relate to a concrete case. It is the legal position, namely the alleged failure by Germany to (correctly) transpose Arts. 9.2 and 9.3, that has led to the communication.

The communicant alleges that by restricting the rights of environmental organisations as regards the review of decisions, acts and omissions by public authorities as well as the review of provisions Germany has failed to implement Art. 9.2 of the Convention. In addition procedural and substantive review of decisions, acts and omissions of public authorities by members of the public is not ensured.

German law establishes criteria for the standing of environmental organizations before courts which are so narrow, that in most cases these organizations will not be able to challenge the decision, act or omission of the public authority neither in administrative nor in judicial proceedings. Standing requirements are linked to the organizations statutory objectives. The provisions open to review are restricted to those concerning the protection of the environment, those relevant to the decision of the public authority or to provisions which establish personal rights for individuals where those individuals could also bring the case.

According to the communicant also Article 9.3 has not been fully transposed by Germany because environmental organisations are not allowed to challenge acts and omissions by private persons, which are in breach of German environmental laws.

#### **Articles concerned**

Article 9.2, 9.3

#### **Committee's findings**

The admissibility of the communication was confirmed by the Committee at its 22<sup>nd</sup> meeting on 17 December 2008. In May 2009 the further handling of this case was suspended on request of the party concerned due to a preliminary ruling request of a German court to the European Court of Justice (ECJ) with legal questions that are highly relevant for this case. The Committee set a two months deadline for the parties to comment after the ECJ issued its ruling.

**Case 32 (2008). European Community: ClientEarth***Access to the European Court of Justice***Background**

This communication was submitted in December 2008. WWF UK joined as amicus in June 2009.

The European Community adopted a Regulation (No 1367/2006) for the application of the Aarhus Convention on Community level. The latter has to be distinguished from the European Directives adopted to implement the Convention in EU Member States. Directives are addressed to the Member States of the EU and have to be implemented into the national legal system. In contrast, the before mentioned "Regulation" is addressed to the institutions of the EU such as the European Commission, the Council, the European Investment Bank etc.

According to the prevailing case law of the European Court of Justice (ECJ) – most of it decided before the Convention entered into force for the EU – individuals or NGOs do not have the right to challenge decisions of EU institutions at the European Court of Justice (ECJ) in environmental matters. The communicant criticises that the Access to Justice provision in Regulation 1367/2006 only grants access to justice with a reference to the legal position under the EC treaty (that in fact prohibits the public concerned' access to justice). The communicant used the major access to justice related judgements of the ECJ and assessed whether these decisions would have been in non-compliance with the Convention if the Convention would have been in force at the time respective were decided. Furthermore the communicant demonstrates that European Court of First Instance had not altered the interpretation of the EC treaty in two recent cases that refer to a legal position after the Convention had entered into force.

The communicant wants the Committee to consider whether the Regulation is in compliance with the Convention and if the EU would be in breach of the Convention (similar to the Case 11 Belgium) if the ECJ would maintain the existing access to justice in environmental matters jurisprudence in cases where Regulation 1367/2006 is applicable.

**Articles concerned**

Article 6 paragraph 1; Article 7; Article 9 paragraph 2; Article 9 paragraph 3

**Committee's findings**

The public hearing with the party concerned, the communicant and the amicus took place at 25<sup>th</sup> meeting of the Committee in September 2009. Before that the party concerned requested to defer the case until the European Court of Justice (ECJ) ruled a pending case regarding the Aarhus regulation. The Committee agreed to not deal with issues relating to the Aarhus regulation, but would further discuss issues relating to the ECJs case law. It did so at its 32<sup>nd</sup> meeting in April 2011.

The Committee decided to concentrate on the main allegation of the communicant and examined the jurisprudence of the EU courts on access to justice matters in general. It wishes to consider and evaluate the established court practice of the EU Courts in light of the principles on access to justice in the Convention in order to reveal whether the general jurisprudence of the EU courts is in line with the Convention.

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. For the examination of the jurisprudence the Committee decided not to go into the details of the question which activities by EU institutions are covered by Article 9 par 3. Rather it acts on the assumption that at least some decisions, acts and omissions by EU institutions fall within the scope of this Article.

The Committee criticises the Plaumann test, which is used by the EU courts to determine if the public is granted standing in a specific case. The strict interpretation of the criteria of direct and individual concern by the courts leads the Committee to the conclusion that the jurisprudence is too strict to meet the criteria established by the Convention. This was the situation before the entry into force of the Convention. The Committee therefore concluded 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.



The Committee continued with an examination of the possibility for the public to request national courts to ask the ECJ for a preliminary ruling according to Article 234 TEC. Such a procedure however requires that a member of the public is granted standing in the EU member state concerned. Also, the national court has to decide to bring the issue before the ECJ. The Committee concludes that this possibility 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.

The entry into force of the Treaty of Lisbon changed the wording of the legal basis for the jurisprudence (instead of Article 230 par 4 TEC now Article 263 par 4 TFEU). The Committee considers this a possible means for ensuring compliance with article 9 of the Convention but refrains from speculations about possible changes in the jurisprudence.

As regards the question if adequate and effective remedies in accordance with Article 9 par 4 of the Convention are provided, the Committee states that if the jurisprudence of the EU Courts as examined were to continue, unless fully compensated for by adequate administrative review procedures, the EC would also fail to comply with article 9, paragraph 4. As regards the allegations regarding prohibitive costs incurred on the losing party before the EU courts, the Committee finds that the allegations were not sufficiently substantiated by the communicant.

### **Outcome**

The Committee decided not to determine non-compliance of the EC with the Convention regarding access to justice by members of the public. However it considers that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention. Thus it recommends 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.

**Case 33 (2008). UK: ClientEarth.***Costs and other barriers on access to justice in the UK***Background**

This communication was filed by the NGO ClientEarth and was supported by the Marine Conservation Society and an individual claimant. It was submitted in December 2008. The Coalition for Access to Justice for the Environment (CAJE) joined as amicus in May 2009.

The communicants allege a general failure of England and Wales (E&W) to correctly implement Art. 9 of the Convention. Four claims are established, three of them are related to a concrete case concerning the disposal and protective capping of highly contaminated port dredging at an existing marine disposal site (Port of Tyne case). Two of the communicants (MCS and the individual claimant, below: the claimants) have been involved in this case:

1. The communicants allege a breach of Articles 9.2 and 9.3 of the Convention caused by the courts restrictive jurisprudence as regards judicial review of public authorities' acts and decisions. According to the communication the claimants have been denied access to justice in the Port of Tyne case because they did not have the possibility to demand a substantive review of the authority's actions and decisions.
2. The second claim revolves around the alleged prohibitively high costs for access to justice. The communicants claim that Articles 9.4 and 9.5 of the Convention have been violated and that in the Port of Tyne case the claimants were prevented from challenging the authority's acts and decisions by the risk of having to bear high costs.
3. Allegedly the public is being denied access to justice in breach of Article 9.3 of the Convention because there are no effective means to challenge breaches of environmental law by private individuals.
4. The communicants claim a violation of Article 9.4 of the convention due to short time period in which actions for judicial review are accepted by the courts. In the case of the Port of Tyne the three month period would not have been enough to prepare a judicial review action due to the complexity of the case.

The admissibility of the communication was confirmed by the Committee at its 22<sup>nd</sup> meeting on 17 December 2008.

**Articles concerned**

Arts. 9.2, 9.3, 9.4, 9.5 and 3.1

**Committee's findings**

The public hearing to this case took place at the 25th meeting of the Committee in September 2009. The UK disagreed with all allegations. Most disputed is the cost issue. The latter was already claimed in other communications against the UK, namely cases No 23 and 27.

As regards Article 9 par 2 of the Convention, the Parties have 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. The Committee finds that even though there are some challengeable aspects the Committee was not convinced that the Party concerned meets the standards for review required by the Convention as regards substantive legality. This is particularly due to the so-called Wednesbury test. The Committee expressed concern as regards the possibility for the public to make use of appropriate judicial or administrative procedures, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review. However it does not find the Party to be in non-compliance with Arts 9 par 2 and 3.

As regards Article 9 par 4 the Committee comes to a different conclusion. It states that the measures available to address prohibitive costs in England and Wales, together they do not guarantee that the costs remain at a level which meets the requirements under the Convention. Courts have considerable discretion in deciding the costs which leads to a high degree of legal uncertainty for claimants.

The Committee did not consider the Party concerned in non-compliance with the provision of Article 9 par 3 regarding the possibility to challenge acts of private persons that breach environ-

mental law. This claim was not sufficiently substantiated.

Looking at the rules on timing in judicial review procedures in relation with Article 9 par 4, the Committee states that courts in England and Wales have considerable discretion in reducing the time for the application for a judicial review. This causes, as with regard to the costs, a considerable uncertainty for the claimant. The Committee finds that, in the interest of clarity and fairness, a minimum time limit within which a claim can be brought should be introduced. The time limit should start to run from the point when the claimant has or should have known about the act or omission at stake. By failing to establish such clear time limits the Party concerned has failed to comply with the requirement in Article 9 par 4, that procedures subject to Article 9 be fair and equitable. Consequently the Party concerned fails to comply with Article 3 par 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.

### **Outcome**

The Committee recommended the Party concerned to:

(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 (as identified in Committee's findings) to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework.

**Case 34 (2008). Spain: NGO Abogados para la Defensa Ambiental (RADA)**

C/34

*Access to information***Background**

On December 10, 2008, Spanish NGO Abogados para la Defensa Ambiental (RADA) submitted a communication alleging non-compliance with the Aarhus Convention by Spain. The communicant claimed that by failing to provide information in the requested form Spain failed to comply with article 4, paragraph 1 (b), of the Convention. In addition, they claimed that by allocating general priority to the protection of intellectual property rights when deciding on confidentiality of environmental information, Spain failed to comply with article 4, paragraph 4, of the Convention, and that by failing to provide schedules of charges for supplying information, Spain was not in compliance with article 4, paragraph 8, of the Convention. The communication also alleged that by failing to provide for timely and effective public consultations and to ensure access to information in the course of decision-making on environmental matters, Spain was not in compliance with article 6 of the Convention.

**Articles concerned**

Article 4, paragraphs 1(b), 4 and 8; article 5; article 6.

**Committee's findings**

The Committee found the communication inadmissible.

The Committee was concerned with the lack of completeness, clarity and relevance of the information in the communication. To address this, it suggested that communicant provides more information in relation to the issues raised by the communication. However, no reply was given by the communication.

In inadmissibility of the communication was justified on two grounds: (a) on the basis of paragraph 19 of the Decision I/7, requiring that communication shall be supported by corroborating information, and (b) that communication did not meet certain standards of clarity and logic required for communication to be admissible.

**Case 35 (2008). Georgia: Caucasus Environmental NGO Network (CENN)**

*Access to information; public participation in forest use licensing procedures (auctions)*

**Background**

On 16 December 2008 Georgian NGO the Caucasus Environmental NGO Network (CENN) submitted a communication alleging non-compliance with the Aarhus Convention by Georgia. The communication was related to the issue of holding “auctions” for long-term forest use (in 2007 and 2008) in Georgia, as well as general failure of national legislation on forest use licensing to comply with the requirements of the Aarhus Convention. In particular, the communicant argued that long term forest use licensing shall be considered as permitting procedure in the meaning of Article 6 of the Convention. The communicant argued that licensing procedures in 2007 and 2008 did not allow local population to be informed about that decision-making, and to participate effectively at an early stage. National NGOs challenged forest use licenses auctions in courts, losing at all stages. They also successfully appealed to Ombudsman office; however Ombudsman’s recommendations were not put in practice by the Government.

**Articles concerned**

Article 6, paragraphs 2 and 4.

**Committee’s findings**

On 2 March 2009, after Committee’s initial questions (before a decision on preliminary admissibility was taken), the communicant submitted a new version of the communication with clarification on the issues raised by the Committee. The Committee had a public discussion on the case at its 26th meeting (15-18 December, 2009).

The Committee did not find Georgia to be in non-compliance since the decisions at issue do not fall within the ambit of article 6, paragraph 1. While the Committee did not find that Georgia failed to comply with the Convention, it found 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 and, with agreement from the Government, issues a recommendation on this.

**Case 36 (2009). Spain: NGO Plataforma Contra la Contaminación de Almendralejo***Access to information, public participation in decision-making, EIA, financial barriers in access to justice, harassment of activists***Background**

On March 2, 2009 a Spanish NGO Plataforma Contra la Contaminación de Almendralejo submitted a communication alleging non-compliance with the Aarhus Convention by Spain (original communication was submitted on February 18, 2009, in Spanish, which is not official language of UN ECE). The communicants alleged general failure to implement several articles of the Convention, supported by case studies. In particular, the communication addressed waste disposal issues, Vinibasa distillery in Almendralejo town, and oil refinery in Extremadura community. The communicants claimed that failure to provide information in a prompt manner and without stating interest. They also claimed that local public had little time and restricted access to project documentation. In addition, they alleged that current court system puts barriers, including financial, for small NGOs to challenge acts of public authorities (because of the need to be presented by two lawyers in second instance administrative court proceedings and obstacles to get financial support for this). Lastly, they claimed that local activists were publicly harassed and insulted by the Mayor of Almendralejo on the mass media.

**Articles concerned**

Article 3, paragraph 8; Article 4, paragraphs 1 and 2; Article 6, paragraphs 4 and 5; and Article 9, paragraph 1

**Committee's findings**

The Committee found, in particular, that:

- as a result of public authorities not making the requested information available unless an interest be stated on the part of the requester, Spain failed to comply with article 4, paragraph 1, of the Convention;
- as a result of public authorities not responding or delaying response to requests for environmental information, Spain was not in compliance with article 4, paragraph 2, of the Convention;
- Spanish authorities did not allow for access to information in the form requested (to copy information on CD), and as a result Spain failed to comply with article 4, paragraph 1(b), in conjunction with article 6, paragraph 6, of the Convention;
- Spanish authorities set inhibitive conditions for public participation (need to travel 30-200 km to read project information on two computers), and as a result Spain failed to comply with article 6, paragraphs 3 and 6, of the Convention;
- local authority officials insulted the communicant publicly in the local mass media for its interest in activities with potential negative effects on the environment, and thus that Spain failed to comply with article 3, paragraph 8 of the Convention;
- by failing to provide appropriate assistance mechanisms to remove or reduce financial barriers to access to justice to a small NGO, Spain 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; 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.

There are at least two important issues in the draft findings to be noted. First, Spain is going to be the first country found to be in non-compliance with paragraph 8 of the Article 3 by insulting local activists through mass media. Second, the Committee commented on dual representation system in Spain (obligatory representation by *abogado* and *procurador*) in administrative court proceedings in the context of financial barriers in light of the existing system of financial aid which prevents small NGOs from getting such aid.

**Outcome**

As of May 2011, the Committee reviewed steps already taken by Spain to address issues identified by the Committee. The Committee recognized some of the steps taken, such as new fees regulation in Murcia city for provision of environmental information (first 20 pages free, 50 cent/page for longer documents). Yet, many areas of concern are still present, such as access to urban planning information, legal aid, injunctive relief and dual representation. MOP-4 is expected to take a decision reflecting both Spanish cases (Case 24 and Case 36) addressing these remaining issues.

## Case 37 (2009). Belarus: Confidential communicant

### *Access to information, public participation in decision-making, confidentiality*

#### **Background**

On March 13, 2009, a confidential communication was submitted alleging non-compliance with the Aarhus Convention by Republic of Belarus. The communication was related to the construction of series of hydro power plants (HPP) on Neman river in Belarus. In particular, it addressed the decision-making in relation to the first HPP planned. While the communication was being considered the construction of the HPP started. The communicant claimed that the Government ignored its requests for information about planned project, did not publish public notice about planned decision to authorize HPP (environmental impact statement as also required by national legislation on EIA) and did not carry out any public consultations. In turn, the Government claimed that it was sufficient to hold public debate on the issue through newspapers and TV. Final decision on the project was not provided upon request. The communicant requested full confidentiality of as to any information, in particular the names of individuals and their addresses mentioned, which can

be used to identify the communicant. Therefore, original communication, including annexes, is not publicly available.

#### **Articles concerned**

Article 4, paragraph 1; Article 6, paragraphs 2, 3, 6, 7, 8, and 9

#### **Committee's findings**

Some procedural issues are worthwhile noting. It was the first time when full confidentiality as to communicant's identity was requested (so far confidentiality – full or partial was requested only in 3 cases). The communication addressed specific facts (HPP construction) which complicated the procedure for dealing with a communication under confidentiality restrictions. In case a general failure to implement the Convention had been claimed it would have been easier to ensure confidentiality while keeping a possibility to have a discussion with the government on the substance. Since this communication was about a specific project, the Committee needed to develop an approach which would obey confidentiality request, but at the same time would enable meaningful discussion with the Government of Belarus. For example, for the sake of consideration and public discussion of the case an abridged version of the communication was developed (and accessible through Committee's web-site) which served as a basis for all correspondence with the Government and public hearing.

The Government of Belarus did not come to the public hearings on the case in December 2009. The communicant did not attend the hearing for confidentiality reasons; it was represented by a lawyer from European ECO Forum at the public hearing which took place without Government's representative.

The Committee distinguished findings on project related issues and general issues. As to hydro power plant project, the Committee found that Belarus:

- (a) By failing to provide the requested information, it failed to comply with article 4, paragraph 1, of the Convention;
- (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;
- (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;
- (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.

As to general issues, the Committee found 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).

[...]

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.

### **Outcome**

Draft decision to be adopted by MOP-4 includes the following recommendations suggested by the Compliance Committee:

[...]

Recommends to the Party concerned in the process of its reform to reach compliance with the Convention to take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(a) 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;

(b) 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;

(c) There are clear requirements regarding the form and content of the public notice, as required under article 6, paragraph 2, of the Convention;

(d) 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;

(e) 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);

(f) 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;

(g) 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;

(h) There is a clear responsibility of the relevant public authorities to:

(i) Inform promptly the public of the decisions taken by them and their accessibility;



(ii) 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;

(iii) Establish relevant publicly accessible lists or registers of the decisions held by them;

(i) 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;

Also, Belarus will be invited to draw up an action plan for implementing the above recommendations.

**Case 38 (2009). UK: Road Sense***Breach of the three Aarhus pillars with respect to the planning and implementation of the Aberdeen Western Peripheral Route (AWPR)***Background**

This communication was submitted in May 2009. The communicant is an organisation (“Road Sense”) representing the interests of those affected by the proposed Aberdeen Western Peripheral Route (AWPR). Allegations concern a failure of the Scottish government and its agents with regards to all three pillars of the Convention.

According to the communicant by refusing to provide information on the state of the environment the Scottish government breaches Arts. 1 and 4 and fails to take into account Article 3 of the Convention. The information requested concerned a report relating to the state of the local populations of freshwater pearl mussels and of badgers, both possibly affected by the construction of the AWPR. The access to the reports was refused on the grounds that the release of the information contained therein could possibly increase the risk of persecution of the mussels and the badgers, even though road sense agreed to sign an undertaking not to release any of the information. It was noted that the information had before been provided to independent consultants employed by transport Scotland. According to the communicant the refusal of access to information on the freshwater mussels prevented her from querying the adequacy of measures taken by the Scottish government and its agents to prevent a deterioration of its habitats and generally impaired her ability to effectively oppose the AWPR.

The communicant alleges a breach of various provisions contained in Art. 6 of the Convention. According to the communicant the Scottish government had not allowed Road Sense and other parties affected by the AWPR to comment on the route and on its effects on the environment. The public was, according to the communicant, not informed in advance on the particular route option chosen and was not invited to comment. Also the reasons for the change to a new route for the AWPR were not communicated to the public in advance, only retrospectively. In addition the communicant alleges a breach of Art. 7 of the Convention by not involving the public in the procedure for introducing a new objective into the strategic transport plan for the region.

Road Sense also alleges a failure of the Scottish Government and its agents to comply with the Convention’s provisions on access to justice by not providing for possibilities for the public to question the decision to build the AWPR. Only a public inquiry was carried out which was, according to the communicant, very restricted in scope. The communicant also alleges that the Scottish legal system in general does not provide for a possibility for courts to decide over the actual merits of an environmental decisions brought before them. Additionally the high cost of judicial review in Scotland is, according to the communicant, prohibitive, in particular for individuals and small organisations.

**Articles concerned**

Arts. 1, 3, 4, 5.1, 6.2, 6.4, 6.5, 6.7, 6.9, 7, 9.2, 9.3

**Committee’s findings**

The admissibility of the communication was confirmed by the Committee at its 24th meeting on 30 June – 3 July 2009. The case was discussed in the public hearing at 27th meeting of the Committee in March 2010.

As regards the allegations that the Report to Inform an Appropriate Assessment was not fit for purpose the Committee did not conclude that the Party concerned was in non-compliance with the Convention.

The committee considered whether the withholding of information on the location of freshwater mussels was in compliance with Article 4 par 4h of the Convention. The Committee stated that the redacted information relates to the “breeding sites of rare species” as mentioned in this article. However the grounds for refusal to be interpreted in a restrictive way, taking into account the public interest served by disclosure. The Committee stated that disclosing the redacted information to the communicant would mean that all members of the public concerned would be entitled to enjoy this right. This might in turn result in adverse effects on the breeding sites of the mussels. Therefore the Committee found that the Party concerned was not in non-compliance with article 4 by withholding the redacted information in the circumstances of this case.

With regards to the communicant’s allegations under Article 5 par 1c the Committee found that

the communicant had not substantiated that the conditions of this article have not been met by the Party concerned.

The Committee did not confirm the alleged non-compliance with Article 6 par 4 of the Convention as regards the Aberdeen Western Peripheral Route (AWPR). The public had had an opportunities to make submissions that the AWPR should not be built and to have those submissions taken into account at several stages.

With regard to alleged non-compliance with Article 6 par 6 and 7 as regards the decision making over the "Fast Link" the Committee could not conclude that the Party concerned is in non-compliance.

The communicant further alleged non-compliance with regards to Article 7 of the Convention. He stated that the reason given by the Party concerned for the new route was in order to comply with a new transport objective of the Modern Transport System for the North East (MTS). The Committee stated that the objective referred to by the communicant is to be found in the AWPR only. This document however is not a plan subject to Article 7 but rather a document related to a specific activity falling within the scope of Article 6 of the Convention. The allegations were already considered under this article, the Committee therefore decided not to consider them further.

The committee left open the decision over the alleged non-compliance with Article 9 of the Convention and awaits further clarification from the communicant.

**Case 39 (2009). Austria: Hungarian Municipality of Szentgotthard**

*Failure to ensure the possibility for participation and access to review procedures for the public by a waste incinerator close to the Austrian/Hungarian border*

**Background**

This communication was submitted in June 2009 and concerns a waste incinerator to be built in the municipality of Heiligenkreuz, located close to the Hungarian border. It mainly concerns the question who is to be considered to be “public concerned” according to Article 2.5 of the Convention. The communicant, the municipality of Szentgotthard, alleges a failure to comply with Art. 6 of the Aarhus Convention by only allowing Hungarian natural persons (“neighbours”) and NGOs as described in the Austrian EIA act to participate in the proceedings but not the communicant and other Hungarian municipalities or district authorities. By doing so Austria has, according to the communicant, failed to comply with the requirements of Art.6.4 of the Convention, to provide for early and effective public participation. The fact that participation possibilities were not granted leads to the infringement of Art. 9 of the Convention, as the communicant is not able to appeal against a decision without being recognised as party to the proceedings according to Austrian law.

**Articles concerned**

Arts. 2.5, 6.4 and 9

**Committee’s findings**

The Committee had doubts whether the communicant is a member of the public in the sense of the Convention and asked the communicant for clarification as to the legal position in Hungarian law. Only after that the Committee confirmed the admissibility at its 25th meeting in September 2009. At the public hearing in 2010 the Committee determined that the communication was not admissible as manifestly unreasonable because the communicant had been awarded the status of “neighbor” under Austrian law and had been given the possibility to submit its comments.

**Case 40 (2009). UK: Mrs. Elizabeth Condron**

*Failure to prevent the communicant to be penalized, prosecuted and harassed when exercising her rights under the Convention against an opencast coal mine*

**Background**

The communication concerns the permission granted by the Merthyr Tydfil County Borough Council to the operator of the UK's largest opencast coal mine located 500 meters from the communicant's home. The communicant states that a challenge of the failure of the Council to comply with the obligations contained in its EIA permit of the mine has led to a breach of Article 3.8 of the Convention. Allegations concern pressure on local residents to back down from participating in proceedings. Also the communicant was allegedly pressured personally by the Council, the mining company and another public body, which made representations objecting to a decision which granted the communicant public funding to participate in the proceedings. The challenging of the public funding was, according to the communicant, accompanied by attacks on the communicant by means of the local press. Therefore the communicant alleges that there has been a breach of Art. 3.8 of the Convention, which should prevent penalization, persecution and harassment of persons for their involvement, in the concrete case the exercise of the communicant of her rights under Article 9.4 of the Convention.

**Articles concerned**

Arts. 3.8 and 9.4

**Committee's findings**

The admissibility of the communication was confirmed by the Committee at its 24th meeting in June 2009. The case was discussed in the public hearing at the 27th meeting in March 2010.

After the hearing the Committee concluded that the case was inadmissible on the grounds that it was manifestly unreasonable pursuant to paragraph 20 (c) of the annex to decision I/7. The Chair explained that his personal interpretation of the Committee's discussion was that, taking into account that legal aid was ultimately granted, the communicant was not persecuted in a way that would fall within article 3, paragraph 8, of the Convention

**Outcome**

This case demonstrates that the admissibility decision after a case was submitted is only on a preliminary basis. Even after the public hearing the Committee can find a case inadmissible. The communicant did not sufficiently substantiate its allegations.

**Case 41 (2009). Slovak Republic: GLOBAL 2000/FoE Austria***Early and effective public participation with regard to the Mochovce nuclear power plant permitting procedures***Background**

This communication was submitted in June 2009. The communication is supported by number of Slovak NGOs, including Greenpeace.

In the year 2008 the Slovak Republic conducted different permitting procedures (and soon after this) constructions in order to build two additional reactor blocks of a nuclear power plant (NPP) in the Slovak town Mochovce. The current plant has two reactors in operation (Mochovce 1 and 2). The other two reactors (Mochovce 3 and 4) were originally permitted in 1986, but construction was not finished in the 1990s due to lack of finances and the economic breakdown after the fall of the iron curtain. The 1986 permitted reactors are based on Soviet technology of the 1970s.

Because the Slovak Republic is a member of the EU since 2004 and has to comply with European legislation, including technological and nuclear safety standards, a number of different permitting decisions were issued since 2008, including building permits, nuclear safety requirements and technological updates in order to comply to some extent with international standards. According to the operator Mochovce 3 and 4 will be designed in a way that fully complies with today's safety requirements.

Article 6 in conjunction with Annex I of the Convention provide for public participation with regard to permitting procedures of nuclear power plants. It was not disputed by Slovakia concerned that the public did have no possibility to participate in the permitting procedures in question. Slovakia claims that the permitting procedures in question are of minor importance and in fact the 1986 permits are still legally valid, therefore the Aarhus Convention is not applicable. This is disputed by the communicant since the changes are fundamental and there is neither a legal nor a factual continuity between the 1986 and the 2008 permits, among others since it is not possible at all to build a NPP with 1970s technological standards today.

The Slovak Republic initiated an EIA procedure in 2009, but construction started already in 2008 and should be final in 2011. The communicant argues that it is meaningless to have an EIA procedure including public participation that finishes only after the construction is almost done. Fundamental changes are not possible any more at this stage.

The communicant therefore claims that the Slovak Republic failed to comply in particular with Article 6 par 4 of the Convention with regard to early and effective public participation when all options are still open.

**Articles concerned**

Article 6 (in particular 6.1, 6.4, 6.10); Article 9, par 2, par 3 and par 4 ; Annex I par 1, par 20, par 22

**Committee's findings**

The admissibility of the communication was confirmed by the Committee at its 24th meeting on 30 June – 3 July 2009. The case was discussed in the public hearing at the 27th meeting in March 2010.

First, the Committee concluded that Slovakia was obliged to guarantee public participation processes leading to the decisions relevant for the NPP Mochovce ("UJD decisions"). Therefore it was in the position to evaluate the alleged non-compliance with, in particular Article 6 par 4 of the Convention. While there was no possibility for the public to participate in the processes leading to the UJD decisions, the Committee had to evaluate whether the EIA procedure provided for effective public participation at an early stage when all options are still open. The Committee stated that the Parties to the Convention have a certain discretion to design decision-making procedures falling within the scope of Article 6.

However, 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. This will in most cases not be the case after the construction of an installation since political and commercial pressure as well as

the interest in legal certainty will not allow for significant changes at this point. The Committee did conclude with regards to the specific project, that the Party concerned failed to comply with the requirements of Article 6 par 4 of the Convention. It sees a considerable risk that once the installation is constructed it is no longer an option to block the operation of the facility on the basis of issues related to construction, technology or infrastructure. It is also not sufficient to provide for public participation only at the stage of the EIA unless it is also part of the permitting procedure.

The next issue the Committee examined concerns the question whether there was a systemic problem in the Slovak legal system or whether the detected non-compliance refers only to the particular case in question. The Slovak legal system provides for public participation within the EIA usually before the permit is issued. The NPP Mochovce case is considered as special case, thus the Committee could not conclude that there is a systemic flaw in the Slovak legal system as regards compliance with Article 6 par 4.

### **Outcome**

The Committee recommended Slovakia 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. It also invited Slovakia to submit a progress report by 1 December 2011 and an implementation report by 1 December 2012.

In its response to draft findings of the Committee, Slovakia was the first country to challenge Committee's competence and expertise. This did not change the final decision of the Committee, though.

**Case 42 (2009). Hungary: Communicant requested confidentiality***Penalization and harassment when exercising the Conventions rights***Background**

This communication was submitted in August 2009. The communication contains allegations that public authorities have acted in a manner penalizing and harassing persons exercising their rights deriving from the Convention, and for this reason the communication alleges that the Party concerned failed to comply with article 3, paragraph 8, of the Convention.

**Articles concerned**

Article 3 paragraph 8

**Committee's findings**

The Committee was not convinced whether confidentiality is justified in this case and asked the communicant for clarifications. For this purpose it set a final deadline until 1. March 2010. The communicant did not respond to this deadline.

At the request of the communicant, at CC-26 the Committee decided to agree to defer a preliminary determination on the admissibility of the case until a public version of the communication and English translations of the documentation relating to the communication be transmitted. At CC-27, the Committee noted that no further correspondence had been received from the communicant. Due to the absence of corroborating information required under paragraph 19 of the annex to decision I/7 and of collaboration from the communicant in dealing with the issue of confidentiality, the Committee decided that the communication was not admissible.

**Outcome**

This case demonstrates that confidentiality can only be requested in very exceptional cases. The communicant has to argue in detail why it requests confidentiality.



**Case 43 (2009). Armenia: NGO Transparency International Anti-corruption Center**  
*Public participation in licensing of mining projects; access to justice*

**Background**

On September 23, 2009, an Armenian NGO Transparency International Anti-corruption Center submitted a communication alleging non-compliance with the Aarhus Convention by Armenia. The communication was related to licensing of copper and molybdenum mining in the Lori region, Armenia. In particular, the communicant raised the issue of effective public notice and early public participation (since some public consultation took place), taking the outcomes of the consultations in the final decision. In addition, the communication alleged violation of access to justice obligations due to administrative courts' decisions to grant standing (in particular to communicant itself based on the fact that its statute did not provide for environmental protection as objective of its activities).

**Articles concerned**

Article 6, paragraphs 2, 4, 8, 9, and 10; Article 9, paragraph 2

**Committee's findings**

The Committee's consideration of this case was linked to follow-up on MOP-3 decision III/6b (see Case 08 (2004) Armenia).

The Committee found that, despite continuous efforts of Armenia in implementing decision III/6b, there are still shortcomings in Armenian law and practice and, due to these shortcomings, in the case of communication ACCC/C/2009/43, the Party concerned failed to comply with article 3, paragraph 1, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, and article 6, paragraphs 2, 4 and 9, of the Convention

**Outcome**

Draft decision to be adopted by MOP-4 confirms findings of the Compliance Committee and invites Armenia to take various legislative, regulatory and administrative measures to ensure that:

- (a) thresholds for activities subject to an EIA procedure, including public participation, are set in a clear manner;
- (b) 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;
- (c) the responsibilities of different actors (public authorities, local authorities, developer) in the organization of public participation procedures are defined as clearly as possible;
- (d) 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.

It also recommended that Armenia takes these issues into account when finalizing its new law on EIA.

Armenia is to develop an action plan for implementation of these recommendations and to report annually on implementation progress.

**Case 44 (2009). Belarus: European ECO Forum Legal Focal Points**

*Access to information; public participation in nuclear decision-making; harassment of activities; failure to adopt adequate national legislation*

**Background**

On December 10, 2009, two NGOs from Austria and Ukraine, acting as legal focal points of European ECO Forum, a coalition of European environmental NGOs, filed a communication alleging non-compliance with the Aarhus Convention by Republic of Belarus. The communication was related to planning and authorizing construction of a nuclear power plant (NPP) in Belarus. Most of the allegations were previously made in form of an amicus curiae memorandum within case 2009/37. Since the issue was distinct from case 2009/37, a separate communication was filed starting case 2009/44. The communicants alleged that the public was not aware of and had no possibility to participate or express its views on policy decision to introduce nuclear energy and planning decisions to start construction of a nuclear power plant in Belarus, as well as lacked access to information about planned project for NPP construction and had no adequate possibility to express its views. The communication also alleged that national legislation in nuclear energy use and public participation in this area was adopted without proper consultation process and contradicts the requirements of the Aarhus Convention. The communication further alleged that local activists were persecuted by the Government because of their alternative views on the project.

**Articles concerned**

Article 3, paragraphs 1 and 8; Article 4, paragraph 1; Article 6, paragraphs 2, 4,6, and 7; Article 7; Article 8.

**Committee's findings**

As of beginning of May 2011 the Committee did not finalize its findings.

Case 46( 2009). United Kingdom: Mr. Gareth Clubb and others

*Welsh language and public participation*

**Background**

This communication was submitted in February 2010.

The communication alleges that the Party concerned failed to provide for public participation rights according to the provisions of article 6 of the Convention in carrying out two projects in Wales. The communication also alleges a general failure of the Party concerned to comply with the provisions of the Convention.

**Articles concerned**

6.3, 6.6, 6.7, 6.8

**Committee's findings**

The Committee denied the admissibility of this case in its 27th meeting in March 2010.

In light of the admissibility criteria set out in paragraph 20 of the annex to decision I/7 as developed through its practice, the Committee considered that the communication was not admissible, because the communicant's allegations concerning non-compliance with article 6 of the Convention only related to the fact that some documents relevant for public participation had not been available in a timely manner in the Welsh language. Specifically, the Committee found that while the principle of non-discrimination on the basis of citizenship, nationality or domicile was explicit in article 3, paragraph 9, of the Convention, the provision was silent on matters of discrimination on the basis of language. While the lack of availability of documentation in a particular language might under certain circumstances present an impediment to correct implementation of the Convention, nothing in the present communication suggested that such circumstances pertained. In addition, the Committee was not convinced that the possibility for domestic administrative and, in particular, judicial review had been adequately used by the communicant.

**Case 48(2010). Austria: OEKOBUERO***Access to Justice in Austria***Background**

This communication was submitted in March 2010 by OEKOBUERO – Coordination Office of Austrian Environmental Organizations on behalf of FoE Austria, Greenpeace CEE and WWF Austria. On request of the Committee the communication was sent in a revised version clarifying some issues raised by the Committee later.

The communicant claims Austria failed to establish a clear, consistent and transparent framework that provides for effective enforcement measures in the field of law relating to the environment. Apart from certain permitting decisions falling under Article 6 of the Convention, environmental organizations are not entitled to initiate any appeal procedure against acts and omissions of public authorities contravening environmental law.

In a limited number of permitting procedures, including procedures falling under Article 6 of the Convention, neighbours have access to remedies protecting their private well such as health, property or from nuisance. But they can not claim the protection of the environment and compliance with environmental law as such.

According to the communicant a key problem in Austria is that EIA screening decisions are not subject to legal review. 81 % of screening decisions decide that an EIA is not necessary and this can not be invoked any more in the further permitting process. This is seen as both an infringement of Article 9 par 2 and 3.

Furthermore the communicant claims that access to justice is not effective, fair and equitable since no injunctions are granted at major courts and in there is an imbalance between access to justice rights of environmental organizations and other parties to procedure.

**Articles concerned**

Article 9 par 1, par 2, par 3, par 4, par 5

Article 1, Article 3 par 9, Article 4 par 2

**Committee's findings**

The Committee found the case admissible on a preliminary base in its 27th meeting in March 2010.

**Case 49 (2010). United Kingdom: R.M. Buxton**

*Access to justice and prohibitive cost in UK*

**Background**

The case concerned non-compliance with Arts 9 par 4 and 3 par 8 of the Convention as well as the question of prohibitive costs. The communicant illustrated his allegations with reference to the Rugby Cement case.

**Articles concerned**

Article 9.4 and Article 3.8

**Committee's findings**

The Committee denied the admissibility of this case in its 29th meeting in September 2010 due to the lack of corroborating information, as required by paragraph 19 of decision I/7. The communicant had indicated that there had been developments which made it inappropriate to deal with the complaint at this stage until further notice. Since no information was received the Committee decided to close the file.

**Case 50 (2010). Czech Republic: Ekologický právní servis**

*Access to Justice in the Czech Republic, exclusion from procedures, lack of possibility to challenge omissions, strict interpretation of impairment of rights doctrine, effective and timely remedies*

**Background**

The case concerned non-compliance with Arts 9 par 2 in relation to Arts 6 par 3 and 6 par 8 as well as Arts 9 par 3, 2 par 5 and 3 par 1 of the Convention. The communicant alleges that in various environmental procedures there is no or only limited possibility for the public to participate and, subsequently, to demand a review of the corresponding decisions. This is the case, at least as regards individuals which are not property owners affected by the procedures, in land use permitting and building procedures, and the adoption of land use plans (in this case also NGOs can not access review procedures). From some special procedures the public is excluded completely, this is for example the case in procedures under the Nuclear Act. Therefore the communicant alleges non-compliance with Article 9 par 2 with respect to Activities listed in Annex I and Article 9 par 3 with regard to other activities.

Another issue concerns the lack of judicial remedies for members of the public in cases where an authority fails to commence a procedure in spite of a legal obligation to do so. This, according to the communicant also constitutes non-compliance with Arts 9 par 2 and 9 par 3.

With regard to court practice the communicant alleges that the prevailing interpretation of the impairment of rights doctrine prevents the Czech courts from fully implementing the Aarhus Convention. The main problem in this context is the “scope of permissible arguments” in NGO lawsuits. NGOs are not allowed to challenge the substantive legality of environmental decisions and are thus forced to concentrate on infringements of their procedural rights. The communicant in this context alleges non-compliance with Arts 9 par 2 and 9 par 3 in decisions subject to Article 6 of the Convention.

The communicant further alleges non-compliance with Article 9 par 4 of the Convention regarding the requirements for effective and timely remedies. The reasons stated are the restrictive handling of requests for injunctive relief in combination with lengthy court procedures which may lead to a situation where the permitted activity is finalized before the court decision over the permit. On the other hand there is also no access to judicial review of EIA final statements and screening decisions.

**Articles concerned**

Article 9.2 (in relation to Article 6.3 and Article 6.8), Article 9.3 and Article 9.4, Article 2.5, Article 3.1

**Committee’s findings**

The communication has been determined preliminarily admissible by the Committee at its 29th meeting in September 2010. The public hearing took place in April 2011. As of May 2011, the Committee did not finalize its findings yet.

## Case 51 (2010). Romania: Greenpeace CEE Romania

### *Access to information and public participation in Romania, NPP and Energy Strategy*

#### **Background**

The communication concerns the procedure leading to the construction of a nuclear power plant (NPP) in Romania as well as the approval of the Romanian Energy Strategy. The communicant alleges that, as regards the procedure leading to the construction of the NPP, Romania has failed to comply with various provisions of the Convention as regards access to information, public participation and access to justice. In addition Romania allegedly failed to comply with the obligation to ensure that the authorities guide and support the public in accordance with Article 3 par 2 of the Convention.

With a view to the Energy Strategy the communicant alleges a failure of Romania to comply with Article 3 par 9 by discriminating against the public not residing in Romania by not providing the relevant information in English. Furthermore the communicant argues that the Energy Strategy falls within the scope of Article 7 of the Convention which was not applied by Romania in this case.

#### **Articles concerned**

Article 3.2, Article 3.9, Article 4.1, Article 4.4, Article 4.6, Article 6.1a, Article 6.2, Article 6.3, Article 6.4, Article 6.6, Article 6.7, Article 6.8, Article 6.9, Article 7 and Article 9.4

#### **Committee's findings**

The Committee determined the preliminary admissibility of this communication at its 29th meeting in September 2010.

Findings and Recommendations have not been issued yet.

Case 52 (2010). United Kingdom: Communities Against the Lough Neagh Incinerator  
*Access to information and public participation in UK*

C/52

**Background**

The communicant alleges violations of access to information and public participation provisions with regard to the planned construction of a poultry litter and meat and bone meal incinerator close to Lough Neagh in Northern Ireland.

**Articles concerned**

Article 4 and Article 6

**Committee's findings**

The Committee determined the communication inadmissible at its 30th meeting in December 2010 following a letter from the communicant informing the Committee that it had successfully obtained the possibility for judicially review of the decisions related to the matter of the communication.



**Case 53 (2010). United Kingdom: The Moray Feu Traffic Subcommittee of Lord Moray's Feuars Committee**

*Access to information, public participation and access to justice in UK, Edinburgh tram and traffic*

**Background**

The communicant alleges a failure to comply with access to information, public participation and access to justice with regards to a decision-making procedure related to a proposal for a Light Rapid Transit (LRT) system and the displacement of the main Edinburgh city traffic route to the residential area Moray Feu, which was brought to effect by means of a private Act of Parliament. This approach, according to the communicant, does not allow for adequate public participation and access to justice to challenge the corresponding decisions and therefore failed to meet the requirements of the Convention.

The third part of the communication concerns the failure of the City of Edinburgh Council (CEC) to collect appropriate environmental data and to provide the data it already possessed to the public upon request.

**Articles concerned**

Article 4, Article 6 and Article 9

**Committee's findings**

The communication was determined preliminarily admissible by the Committee at its 31st meeting in February 2011. However, at the same meeting the Committee decided to suspend any further deliberation until further information is provided on the progress of the complaint before the Scottish Public Services Ombudsman.

**Case 54 (2010). European Union: Pat Swords BE CEng FIChemE CEnv MIEMA**  
*Access to information and public participation in the EU and Ireland, renewable energy programme.*

**Background**

The republic of Ireland is progressing a renewable energy programme, which predominantly builds upon wind power. The EU is supporting the programme, according to the communicant by means of direct funding and by approving state aid. However, the communicant alleges that the decision making process over the programme has failed to comply with the provisions of the Aarhus Convention under Pillar I and II. In particular, the communicant alleges that only insufficient information about the programme has been disseminated, both by the EU and the Republic of Ireland.

The communication is directed towards the EU because in spite of the alleged shortcomings of the programme the EU is providing financial support. Also, according to the communicant the European Commission failed to comply with Article 5 of the Convention as regards the Renewable Energy Action Plans. The communicant complains that these plans do not provide any details about the environmental benefits or alternatives considered.

**Articles concerned**

Article 5 and Article 7

**Committee's findings**

The communication was preliminarily determined admissible by the Committee at its 30th meeting in December 2010.

**Case 55 (2010). United Kingdom: Fish Legal**

*Access to information and public participation in the EU and Ireland, definition of public authorities*

**Background**

The communication revolves around a decision by the Upper Tribunal (Administrative Appeals Chamber) about the status of water and sewage companies (WASCs) and water only companies (WOCs). The Tribunal declared that these bodies were not public authorities for the purpose of the Environmental Information Regulations 2004.

The communicant alleges that this interpretation excludes WASCs and WOCs from public scrutiny and might create a situation where those companies might impede and prevent access to justice for the public.

**Articles concerned**

Article 2.2 and Article 4

**Committee's findings**

The communication was preliminarily determined admissible by the Committee at its 30th meeting in December 2010.

**Case 56 (2010). United Kingdom: Mr T Ewing***Access to information and public participation in the EU and Ireland***Background**

The communication alleges a failure to comply with the Convention as regards the limiting of the rights of appeal for third parties and members of the public with regard to planning processes

**Articles concerned**

Article 9.2-5

**Committee's findings**

The Committee found that the information submitted was not sufficient and there were no clear allegations of non-compliance with specific provisions of the Convention. The Committee determined the communication inadmissible, as incompatible with the provisions of the annex to decision I/7 that require a communication to be supported by corroborating information (paragraph 20 (d) in conjunction with paragraph 19 of the annex to decision I/7)"

**Case 57 (2011). Denmark: Dansk Ornitologisk Forening – BirdLife Denmark (DOF)**

*Access to justice in Denmark, costs of appeals*

**Background**

The communicant alleges that the party concerned by implementing a new act on differentiated fees for appeals to the Nature and Environment Appeal Board (Act no. 1608). This act takes effect from January 1st, 2011 and imposes fees for NGOs which wish to appeal public authority decisions in the area of nature and environmental affairs. The fees are differentiated. According to the new act NGOs must pay 403€ for every appeal sent to the Appeal Board. In comparison, individuals, according to the communicant only have to pay one sixth of this amount. Before January 1st 2011 appeals had been, according to the communicant, free of charge in most areas.

The communicant alleges that this fee has been introduced to effectively set up a barrier for NGO appeals in the area of nature and environment protection. This is considered a violation of Arts 9 par 2 to 9 par 5 of the Convention.

**Articles concerned**

9.2, 9.3, 9.4 and 9.5

**Committee's findings**

The communication has been determined preliminarily admissible by the Committee at its 31st meeting in February 2011.

**Case 58 (2011). Bulgaria: Balkani Wildlife Society***Limited access to justice in Bulgaria***Background**

The communication addresses the alleged general failure of Bulgaria to implement the Arts 9 par 2 and 9 par 3 of the Convention. This situation would not allow NGOs to challenge acts which may contravene national environmental legislation.

According to the communicant the Spatial Planning Act restricts the access for the general public (except for neighbours and investors) to a review procedure (except for the investor and the neighbors) to challenge orders for the adoption of spatial plans as well as construction permits and exploitation permits (concerning Annex I activities) issued under the SPA when these acts are considered to be contravening EU or national environmental law.

**Articles concerned**

Article 9.2 and Article 9.3

**Committee's findings**

The communication has been determined preliminarily admissible by the Committee at its 31st meeting in February 2011.

## CASES OVERVIEW (general)

Region	Nr	Status	Submission	Public/NGO	Country	Reference No	Articles
EECCA	1	Closed	07/02/2004	NGO Green Salvation	Kazakhstan	ACCC/C/2004/01	4.1, 4.7, 6.6, 9.1
EECCA	2	Closed	17 Mar 2004	NGO Green Salvation	Kazakhstan	ACCC/C/2004/02	6.2, 6.3, 6.4, 6.7, 6.8, 9.3, 9.4
EECCA	3	Closed	06/05/2004	Charitable Foundation Eco-pravo-Lviv	Ukraine	ACCC/C/2004/03	1, 6.2, 6.3, 6.4, 6.6, 6.7, 6.8, 6.9
EU	4	Closed	07/05/2004	Clean Air Action Group	Hungary	ACCC/C/2004/04	6.9, 9.2, 9.3, 9.4
EECCA	5	Closed	10/05/2004	BIOTICA Ecological Society	Turkmenistan	ACCC/C/2004/05	3.4, 3.9
EECCA	6	Closed	03/09/2004	Lubov Anatoljevna Gatina et al.	Kazakhstan	ACCC/C/2004/06	9.3, 9.4
EU	7	Closed	06/09/2004	Antoni Zawislak	Poland	ACCC/C/2004/07	3, 9
EECCA	8	Closed	20/09/2004	Center for Regional Development et al.	Armenia	ACCC/C/2004/08	4.1, 4.2, 6.1-6.5, 6.7-6.9, 7, 9.2
EECCA	9	Closed	22/09/2004	Edik Baghdasaryan, Investigative Journalists	Armenia	ACCC/C/2004/09	1, 2.3, 2.5, 3, 4, 5
EECCA	10	Closed	12/10/2004	NGO Green Salvation	Kazakhstan	ACCC/C/2004/10	1, 3.2, 3.9, 6.1(b), 6.8, 6.9, 9.3, 9.4, 9.5
EU	11	Closed	03 Jan 2005	Bond Beter Leefmilieu Vlaanderen VZW	Belgium	ACCC/C/2005/11	2.5, 9
SEE	12	Closed	26/04/2005	Civil Society Development Center of Vlora	Albania	ACCC/C/2005/12	3.2, 6.2, 7
EU	13	Closed	18/05/2005	Clean Air Action Group	Hungary	ACCC/C/2005/13	6.4, 6.7, 9.2, 9.3
EU	14	Closed	04/07/2005	Antoni Zawislak	Poland	ACCC/C/2005/14	4
EU	15	Closed	05/07/2005	Eugen David, Alburnus Maior	Romania	ACCC/C/2005/15	6.3, 6.4, 6.6, 6.7, 6.8
EU	16	Closed	13 Mar 2006	Association Kazokiskes Community	Lithuania	ACCC/C/2006/16	6, 9.2
EU	17	Closed	12/06/2005	Association Kazokiskes Community	European Community	ACCC/C/2006/17	6, 9.2
EU	18	Closed	26/06/2006	Søren Wium-Andersen	Denmark	ACCC/C/2006/18	9.3
EU	19	Closed	24/04/2007	John D Hall	UK	ACCC/C/2007/19	6
EECCA	20	Closed	10/05/2007	Green Salvation	Kazakhstan	ACCC/C/2007/20	3.1, 9.3
EU	21	Closed	14/08/2007	Civic Alliance for the Protection of the Bay of Vlora	EC	ACCC/C/2007/21	6
EU	22	Closed	21/12/2007	L'Association de Défense et de Protection du littoral du Golfe de Fos-sur-Mer and Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhone and Fédération d'Action Régionale pour l'Environnement	France	ACCC/C/2007/22	3.1, 6.1, 6.2, 6.3, 6.4, 6.5, 6.8, 9.2, 9.5

<b>Preliminary admissibility</b>	<b>Public hearing</b>	<b>ACCC findings/ recommendations</b>	<b>Compliance/ Non-compliance</b>
Yes, at the 4 <sup>th</sup> meeting (13-14 May 2004)	6 <sup>th</sup> meeting (15-17 Dec. 2004)	7 <sup>th</sup> meeting (16-18 Feb 2005)	Non-compliance
Yes, at the 4 <sup>th</sup> meeting (13-14 May 2004)	6 <sup>th</sup> meeting (15-17 Dec. 2004)	7 <sup>th</sup> meeting (16-18 Feb 2005)	Non-compliance
Yes, at the 4 <sup>th</sup> meeting (13-14 May 2004)	6 <sup>th</sup> meeting (15-17 Dec. 2004)	7 <sup>th</sup> meeting (16-18 Feb 2005)	Non-compliance
Yes, at the 4 <sup>th</sup> meeting (13-14 May 2004)	6 <sup>th</sup> meeting (15-17 Dec. 2004)	7 <sup>th</sup> meeting (16-18 Feb 2005)	Compliance
Yes, at the 4 <sup>th</sup> meeting (13-14 May 2004)	6 <sup>th</sup> meeting (15-17 Dec. 2004)	7 <sup>th</sup> meeting (16-18 Feb 2005)	Non-compliance
Yes, 5 <sup>th</sup> meeting (23 to 24 Sept 2004)	8 <sup>th</sup> meeting (22-24 May 2005)	12 <sup>th</sup> meeting (14-16 Jun 2006)	Non-compliance
Not admissible, 5 <sup>th</sup> meeting (23-24 Sept. 2004)	n.a.	n.a.	n.a.
Yes, 5 <sup>th</sup> meeting (23 to 24 Sept 2004)	8 <sup>th</sup> meeting (22-24 May 2005)	11 <sup>th</sup> meeting (31 March 2006)	Non-compliance
Not to be further considered, because no sufficient use of available domestic remedies has been made	n.a.	n.a.	n.a.
Not admissible, 7 <sup>th</sup> meeting (16-18 March 2005)	n.a.	n.a.	n.a.
Yes, at the 7 <sup>th</sup> meeting (16 - 18 February 2005)	9 <sup>th</sup> meeting (12-14 Oct 2005)	12 <sup>th</sup> meeting (14-16 Jun 2006)	Compliance (but only due to late entry into force of the Convention)
Yes, at the 8 <sup>th</sup> meeting (22-25 May 2005)	10 <sup>th</sup> meeting, re-scheduled for 11 <sup>th</sup> , 12 <sup>th</sup> and 14 <sup>th</sup> meeting (13-15 Dec 2006)	16 <sup>th</sup> meeting (13-15 Jun 2007)	Non-compliance
Yes, at the 7 <sup>th</sup> meeting (22-25 May 2005)	11 <sup>th</sup> meeting (29-31 March 2006)	No formal decision; report 11 <sup>th</sup> meeting;	n.a.
Not admissible, at the 11 <sup>th</sup> meeting	n.a.	n.a.	n.a.
Yes, on 14 October 2005	12 <sup>th</sup> meeting (14-16 June 2006)	19 <sup>th</sup> meeting (5-7 Mar 2008)	Compliance (since issue was solved on national level)
Yes, at the 11 <sup>th</sup> meeting (31 March 2006)	16 <sup>th</sup> meeting (13-15 June 2007)	19 <sup>th</sup> meeting (5-7 Mar 2008)	Non-compliance
Yes, at the 12 <sup>th</sup> meeting (16 June 2006)	17 <sup>th</sup> meeting (26-28 Sept 2007)	19 <sup>th</sup> meeting (5-7 Mar 2008)	Compliance
Preliminary determined admissible at the 15 <sup>th</sup> meeting	18 <sup>th</sup> meeting (28-30 November 2007)	19 <sup>th</sup> meeting (5-7 Mar 2008)	Compliance
Not admissible, at the 18 <sup>th</sup> meeting	n.a.	n.a.	n.a.
n.a.	n.a.	n.a.	n.a.
Yes, at the 19 <sup>th</sup> meeting (28-30 Nov 2007)	21 <sup>st</sup> meeting (17-19 September 2008)	Advance copy sent on 18 May 2009 to both parties	Compliance
Yes, at the 19 <sup>th</sup> meeting (7 March 2008)	22 <sup>nd</sup> meeting (18 December 2008)	Draft findings to parties concerned on 15 May 2009	Compliance



Case Law of the Aarhus Convention Compliance Committee (2004-2011)

Region	Nr	Status	Submission	Public/NGO	Country	Reference No	Articles
EU	23	Closed	21/02/2008	Mr Morgan, Mrs Baker of Keynsham, UK	UK	ACCC/C/2008/23	9.4
EU	24	Closed	13/05/2008	Ms. Fe Sanchis-Moreno, Mr Eduardo Salazar Ortuño Association for Environmental Justice	Spain	ACCC/C/2008/24	4.1, 4.2, 4.8, 6.1 (a), 6.2 (a and b), 6.4, 9.2, 9.3, 9.4, 9.5
EU	25	closed	02/06/2008	Dr. Ardian Klosi Member of the Board of AQMGJV (Civic Alliance for the Protection of Vlora Bay) and Sinan Hibro Member of the Board of AQMGJV	Albania	ACCC/C/2008/25	5, 6.1 (a), 7
EU	26	Closed	15/07/2008	Nein Ennstal Transit-Trassel Verein fur menschen- und umweltgerechte Verkehrspolitik (NETT) Represented by: Mmag. Johannes Pfeifer	Austria	ACCC/C/2008/26	7, 8, 9.2
EU	27	Closed	18/08/2008	Cultra Residents' Association	UK	ACCC/C/2008/27	3, 7, 9
EU	28	Closed	07/09/2008	Knud Haugmark	Denmark	ACCC/C/2008/28	4, 5, 9
EU	29	Closed	20/10/2008	Zabianka Housing Cooperative	Poland	ACCC/C/2008/29	1, 4, 6.2 (a), 6.2 (b), 6.8
ECCA	30	Closed	03/11/2008	International Environmental Association of Riverkeepers	Rep. Of Moldova	ACCC/C/2008/30	3.1, 3.2, 4.1, 4.4, 4.2, 4.7, 9.1
EU	31	Suspended	01/12/2008	James Thornton (Client Earth)	Germany	ACCC/C/2008/31	9.2, 9.3
EU	32	Closed	01/12/2008	Anais Berthier (Client Earth)	EC	ACCC/C/2008/32	9.2, 9.3, 9.4, 9.5
EU	33	Closed	02/12/2008	James Thornton (Client Earth), Simon Brockington (MCS), Robert Latimer	UK	ACCC/C/2008/33	9.2, 9.3, 9.4, 9.5
EU	34	Closed	10/12/2008		Spain	ACCC/C/2008/34	
EU	35	Decision pending	02/03/2009	Nana Janashia, Caucasus Environmental NGO Network (CENN)	Georgia	ACCC/C/2009/35	6.2, 6.4
EU	36	Decision pending	02/03/2009	Felix Lorenzo Donoso (Platforma contra la Contaminacion Almendralejo)	Spain	ACCC/C/2009/36	4.1, 4.2, 6.4, 6.5, 9.1
ECCA	37	Decision pending	14/03/2009	Confidentiality requested	Belarus	ACCC/C/2009/37	4.1, 6.2, 6.3, 6.6, 6.7, 6.8, 6.9
EU	38	Closed	07/05/2009	Dr. A D Hawkins, Road Sense	UK	ACCC/C/2009/38	1, 3, 4, 5.1, 6.2, 6.4, 6.5, 6.7, 6.9, 7, 9.2, 9.3
EU	39	Closed	03/06/2009	Municipality of Szentgotthard, Hungary	Austria	ACCC/C/2009/39	2.5, 6.4, 9
EU	40	Closed	11/06/2009	Elizabeth Condron, representative: Paul Stookes (Richard Buxton Environmental & Public Law)	UK	ACCC/C/2009/40	3.8, 9.4

Preliminary admissibility	Public hearing	ACCC findings/ recommendations	Compliance/ Non-compliance
Yes, on 7 March 2008	24 <sup>th</sup> meeting (30 June – 3 July 2009)	Final 24 September 2010	Non-compliance
Yes, at the 20 <sup>th</sup> meeting (8-10 June 2008)	23 <sup>rd</sup> meeting (31 March - 3 April 2009)	Communicated to the parties on 21 January 2010	Non-compliance
No proceeding with review: issues raised already considered under the review of communication ACCC/C/2005/12	n/a	n/a	n/a
Yes, at CC-21 (19 September 2008)	23 <sup>rd</sup> meeting (31 March - 3 April 2009)	25 <sup>th</sup> meeting (22-25 September 2009)	Compliance
Yes, at 21 <sup>th</sup> meeting (19 September 2008)	24 <sup>th</sup> meeting (30 June – 3 July 2009)	Final 24 September 2010	Compliance
Yes, at 21 <sup>th</sup> meeting (19 September 2008)	Deliberation postponed until decision of Danish Ombudsman at 25 <sup>th</sup> meeting (22-25 September 2009)	n.a.	n.a.
Yes, at 22 <sup>nd</sup> meeting (17-19 December 2008)	24 <sup>th</sup> meeting (30 June – 3 July 2009)	25 <sup>th</sup> meeting (22-25 September 2009)	No substantive decision
Yes, at 22 <sup>nd</sup> meeting (17-19 December 2008)	24 <sup>th</sup> meeting (30 June – 3 July 2009)	Communicated to the parties concerned on 29 October 2009	Non compliance
Yes, at 22 <sup>nd</sup> meeting (17-19 December 2008)	case suspended until ECJ decision in pending case	n.a.	n.a.
Yes, at 22 <sup>nd</sup> meeting (17-19 December 2008)	25 <sup>th</sup> meeting (22-25 September 2009)	Advance copy sent on 20 May 2011 to both parties	Compliance
Yes, at 22 <sup>nd</sup> meeting (17-19 December 2008)	25 <sup>th</sup> meeting (22-25 September 2009)	Final 24 September 2010	Non-compliance
Not admissible, at 23 <sup>rd</sup> meeting (March 2009)	n.a.	n.a.	n.a.
Yes, at the 23 <sup>rd</sup> meeting (March 2009)	26 <sup>th</sup> meeting (15-18 December 2009)	18 June 2010	Compliance
Yes, at the 23 <sup>rd</sup> meeting (March 2009)	26 <sup>th</sup> meeting (15-18 December 2009)	18 June 2010	Non-compliance
Yes, at the 23 <sup>rd</sup> meeting (March 2009)	26 <sup>th</sup> meeting (15-18 December 2009)	24 September 2010	Non-compliance
Yes, at the 24 <sup>th</sup> meeting (30 June - 3 July 2009)	27 <sup>th</sup> meeting (16-18 March 2010)	Advance copy sent on 19 May 2011 to both parties	Compliance
Yes, at the 25 <sup>th</sup> meeting (22-25 September 2009)	28 <sup>th</sup> meeting (June 2010)	Not admissible at 28 <sup>th</sup> meeting (15-18 June 2010)	n.a.
Yes, at the 24 <sup>th</sup> meeting (30 June - 3 July 2009)	27 <sup>th</sup> meeting (16-18 March 2010)	Not admissible after public hearing (27 <sup>th</sup> meeting, 16-18 March 2010)	n.a.

Region	Nr	Status	Submission	Public/NGO	Country	Reference No	Articles
EU	41	Closed	01/07/2009	Dr. Klaus Kastenhofer (Global 2000/Friends of the Earth Austria)	Slovak Republic	ACCC/C/2009/41	6 (in particular 6.1, 6.4, 6.10), Annex I par 1, par 20, par 22
EU	42	Closed	07/08/2009	Confidentiality requested	Hungary	ACCC/C/2009/42	3.8
ECCA	43	Pending	23/09/2009	Varuzhan Hochtanyan (Org. Transparency International), Hrayr Savzyan (Org. Ecodar), Arthur Sakunts (Org. Helsinki Citizens), Sona Ayvazyan (expert)	Armenia	ACCC/C/2009/43	6.2, 6.4, 6.8, 6.9, 6.10, 9.2
ECCA	44	Public hearing	10/12/2009	European ECO Forum Legal Focal Points	Belarus	ACCC/C/2009/44	3.1, 3.8, 4.1, 6.2, 6.4, 6.6, 6.7, 7, 8
EU	45	Pending	15/01/2010	The Kent Environment and Community Network ('KECN')	UK	ACCC/C/2010/45	9.2(b), 9.3, 9.4, 9.5
EU	46	Closed	21/02/2010	Mr. Gareth Clubb and others	UK	ACCC/C/2010/46	6.3, 6.6, 6.7, 6.8
EU	47	Closed	01/03/2010	Frances McCartney on behalf of Mary Buchan Forbes	UK	ACCC/C/2010/47	9.2, 9.4
EU	48	Public hearing	13/03/2010	OEKOBUERO – Coordination Office of Austrian Environmental Organizations	Austria	ACCC/C/2010/48	3.1, 3.3, 3.9, 4.2, 9 (9.1, 9.2, 9.3, 9.4, 9.5)
EU	49	Closed	12/03/2010	R.M. Buxton	UK	ACCC/C/2010/49	9.4, 3.8
EU	50	Pending	14/06/2010	Ekologický právní servis	CZ	ACCC/C/2010/50	9.2 (in relation to 6.3 and 6.8), 9.3 and 9.4, 2.5, 3.1
EU	51	Pending	02/09/2010	Greenpeace CEE Romania	Romania	ACCC/C/2010/51	3.2, 3.9, 4.1, 4.4, 4.6, 6.1a, 6.2, 6.3, 6.4, 6.6, 6.7, 6.8, 6.9, 7 and 9.4
EU	52	Closed	01/09/2010	Communities Against the Lough Neagh Incinerator	UK	ACCC/C/2010/52	4, 6
EU	53	Pending	17.08.2020, resubmission 26.11.2010	The Moray Feu Traffic Subcommittee of Lord Moray's Feuars Committee	UK	ACCC/C/2010/53	4, 6, 9
EU	54	Pending	15/10/2010	Pat Swords BE CEng FICChemE CEnv MIEMA	EU	ACCC/C/2010/54	5, 7
EU	55	Pending	03/12/2010	Fish Legal	UK	ACCC/C/2010/55	2.2, 4
EU	56	Closed	20/12/2010	Mr T Ewing	UK	ACCC/C/2010/56	9
EU	57	Pending	26/01/2011	Dansk Ornitologisk Forening – BirdLife Denmark (DOF)	Denmark	ACCC/C/2011/57	9.2, 9.3, 9.4, 9.5
EU	58	Pending	09/02/2011	Balkani Wildlife Society	Bulgaria	ACCC/C/2011/58	9.2, 9.3

Preliminary admissibility	Public hearing	ACCC findings/ recommendations	Compliance/ Non-compliance
Yes, at the 24 <sup>th</sup> meeting (30 June - 3 July 2009)	27 <sup>th</sup> meeting (16-18 March 2010)	Final 17 December 2010	Non-compliance
Not admissible, at 27 <sup>th</sup> meeting (16-19 March 2010)	n.a.	n.a.	n.a.
Yes, at the 25 <sup>th</sup> meeting (22-25 September 2009).	27 <sup>th</sup> meeting (16-18 March 2010)	17 December 2010	Non-compliance
Yes at the 26 <sup>th</sup> meeting (15-18 December 2009).	29 <sup>th</sup> meeting (21-24 September 2010)	Draft findings to parties concerned on 24 May 2011	
Yes at the 29 <sup>th</sup> meeting (21-24 September 2010).			
Not admissible, at the 27 <sup>th</sup> meeting (16-19 March 2010)	n.a.	n.a.	n.a.
Not admissible, at the 28 <sup>th</sup> meeting (15-18 June 2010)	n.a.	n.a.	n.a.
Yes, at the 27 <sup>th</sup> meeting (16-19 March 2010)	30 <sup>th</sup> meeting (14-17 December 2010)		
Not admissible, at the 29 <sup>th</sup> meeting (21-24 September 2010)	n.a.	n.a.	n.a.
Yes, at the 29 <sup>th</sup> meeting (21-24 September 2010)	32 <sup>nd</sup> meeting (11-14 April 2011)		
Yes, at the 29 <sup>th</sup> meeting (21-24 September 2010)			
Not admissible, at the 30 <sup>th</sup> meeting (14-17 December 2010)	n.a.	n.a.	n.a.
Yes, at the 31 <sup>st</sup> meeting (22-25 February 2010)			
Yes, at the 30 <sup>th</sup> meeting (14-17 December 2010)			
Yes, at the 30 <sup>th</sup> meeting (14-17 December 2010)			
Not admissible, at the 31 <sup>st</sup> meeting (22-25 February 2011)	n.a.	n.a.	n.a.
Yes, at the 31 <sup>st</sup> meeting (22-25 February 2010)			
Yes, at the 31 <sup>st</sup> meeting (22-25 February 2010)			

**CASES OVERVIEW (per article concerned)**

Reference No. Cases	Country	Art. 1	Art. 2	Art. 3	Art. 4	Art. 5	Art. 6	Art. 7	Art. 8	Art. 9
ACCC/C/2004/01	Kazakhstan				4.1, 4.7		6.6			9.1
ACCC/C/2004/02	Kazakhstan						6.2, 6.3, 6.4, 6.7, 6.8			9.3, 9.4
ACCC/C/2004/03	Ukraine	1					6.2, 6.3, 6.4, 6.6, 6.7, 6.8, 6.9			
ACCC/C/2004/04	Hungary						6			9.2, 9.3, 9.4
ACCC/C/2004/05	Turkmenistan			3.4, 3.9						
ACCC/C/2004/06	Kazakhstan									9.3, 9.4
ACCC/C/2004/07	Poland			3						9
ACCC/C/2004/08	Armenia				4.1, 4.2		6.1-6.5, 6.7-6.9	7		9.2
ACCC/C/2004/09	Armenia	1	2.3, 2.5	3	4	5				
ACCC/C/2004/10	Kazakhstan	1		3.2, 3.9			6.1(b), 6.8, 6.9			9.3, 9.4, 9.5
ACCC/C/2005/11	Belgium		2.5							9
ACCC/C/2005/12	Albania			3.2			6.2	7		
ACCC/C/2005/13	Hungary						6.4, 6.7			9.2, 9.3
ACCC/C/2005/14	Poland				4					
ACCC/C/2005/15	Romania						6.3, 6.4, 6.6, 6.7, 6.8			9.2
ACCC/C/2006/16	Lithuania						6			9.2
ACCC/C/2006/17	European Community						6			9.2
ACCC/C/2006/18	Denmark									9.3
ACCC/C/2007/19	United Kingdom						6			
ACCC/C/2007/20	Kazakhstan									9.1, 9.3
ACCC/C/2007/21	European Community				4		6			
ACCC/C/2007/22	France			3.1			6.1, 6.2, 6.3, 6.4, 6.5, 6.8			9.2, 9.5

Reference No. Cases	Country	Art. 1	Art. 2	Art. 3	Art. 4	Art. 5	Art. 6	Art. 7	Art. 8	Art. 9
ACCC/C/2008/23	United Kingdom			3.8						9.4
ACCC/C/2008/24	Spain				4.8		6.1 (a), 6.2 (a and b), 6.4			9.2, 9.3, 9.4, 9.5
ACCC/C/2008/25	Albania					5	6.1 (a)	7		
ACCC/C/2008/26	Austria						6	7	8	9.2
ACCC/C/2008/27	United Kingdom			3				7		9
ACCC/C/2008/28	Denmark				4	5				9
ACCC/C/2008/29	Poland	1			4		6.2 (a), 6.2 (b), 6.8			
ACCC/C/2008/30	Republic of Moldova			3.1, 3.2	4.1, 4.4					
ACCC/C/2008/31	Germany									9.2, 9.3
ACCC/C/2008/32	European Community									9.2, 9.3, 9.4, 9.5
ACCC/C/2008/33	United Kingdom									9.2, 9.3, 9.4, 9.5
ACCC/C/2008/34	Spain				4.1 (b), 4.4., 4.8					
ACCC/C/2009/35	Georgia						6.2, 6.4			
ACCC/C/2009/36	Spain				4.1, 4.2		6.4, 6.5			9.1
ACCC/C/2009/37	Belarus				4.1		6.2, 6.3, 6.6, 6.7, 6.8, 6.9			
ACCC/C/2009/38	United Kingdom	1		3	4	5.1	6.2, 6.4, 6.5, 6.7, 6.9	7		9.2, 9.3
ACCC/C/2009/39	Austria		2.5				6.4			9
ACCC/C/2009/40	United Kingdom			3.8						9.4
ACCC/C/2009/41	Slovak Republic						6.1, 6.4, 6.10			9.2, 9.4
ACCC/C/2009/42	Hungary			3.8						
ACCC/C/2009/43	Armenia						6.2, 6.4, 6.8, 6.9, 6.10			9.2
ACCC/C/2009/44	Belarus			3.1, 3.8	4.1		6.2, 6.4, 6.6, 6.7	7	8	
ACCC/C/2010/45	United Kingdom									9.2(b), 9.3, 9.4, 9.5

Reference No. Cases	Country	Art. 1	Art. 2	Art. 3	Art. 4	Art. 5	Art. 6	Art. 7	Art. 8	Art. 9
ACCC/C/2010/46	United Kingdom						6.3; 6.6, 6.7, 6.8			
ACCC/C/2010/47	United Kingdom									9.2, 9.4
ACCC/C/2010/48	Austria	1		3.1, 3.3, 3.9	4.2					9.1, 9.2, 9.3, 9.4, 9.5
ACCC/C/2010/49	United Kingdom			3.8						9.4
ACCC/C/2010/50	Czech Republic		2.5	3.1						9.2 (in relation to 6.3 and 6.8), 9.3, 9.4
ACCC/C/2010/51	Romania			3.2, 3.9	4.1, 4.4, 4.6	6.1a, 6.2, 6.3, 6.4, 6.6, 6.7, 6.8, 6.9		7		9.4
ACCC/C/2010/52	United Kingdom									
ACCC/C/2010/53	United Kingdom				4		6			9
ACCC/C/2010/54	European Union					5		7		
ACCC/C/2010/55	United Kingdom		2.2		4					
ACCC/C/2010/56	United Kingdom									9
ACCC/C/2011/57	Denmark									9.2, 9.3, 9.4, 9.5
ACCC/C/2011/58	Bulgaria									9.2, 9.3

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THIS IS THE SECOND EDITION OF THE CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE. IT ATTEMPTS TO SUMMARIZE THE PRACTICE OF THE COMPLIANCE COMMITTEE OF THE AARHUS CONVENTION. SINCE ITS SET UP IN 2002 BY THE FIRST MEETING OF THE PARTIES OF THE AARHUS CONVENTION, THE COMMITTEE HAS DEALT WITH NUMEROUS ISSUES RELATED TO PRACTICAL IMPLEMENTATION OF THE CONVENTION BY THE PARTIES. IN MANY CASES, THE COMMITTEE HAD TO INTERPRET AND APPLY CONVENTION'S PROVISIONS TO SPECIFIC SITUATIONS BROUGHT TO ITS ATTENTION BY THE PUBLIC AND PARTIES, AS WELL AS ITS OWN RULES OF PROCEDURES. THEREFORE, SUBSTANTIAL CASE LAW WAS DEVELOPED BY THE COMMITTEE DURING 2004-2011. UNDERSTANDING THIS CASE LAW MAY HELP POLICY MAKERS AND PRACTITIONERS APPLY AND USE THE CONVENTION IN A MORE EFFECTIVE AND UNIFORM WAY PROMOTING COMMON STANDARDS FOR PRACTICAL ENFORCEMENT OF ENVIRONMENTAL HUMAN RIGHTS IN UN ECE REGION.



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