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Comments by Justice and Environment to the Draft Findings for ACCC/C/2014/123 (EU)

INTRODUCTORY REMARKS

1. First and foremost Justice and Environment would like to express its gratitude for this extended opportunity to comment on the Draft Findings for ACCC/C/2014/123 (EU). This is enormously appreciated.
2. Regarding the ACCC's consideration and evaluation of this case, we must confess, however, to having some concerns as to the effect that these will have. It seems to be common ground that a lack of access to justice is likely the single most problematic aspect of compliance with the Convention in the EU Member States. The status quo is marked by uneven and ineffective access to justice, and in many instances access is blocked entirely. We observe with regret that the Draft Findings are unlikely to change these circumstances in any way, and will not promote efforts to achieve compliance.
3. Concretely, we would like to raise three concerns. The first is that the Draft Findings address article 9 as a whole, rather than only its paragraphs 3 and 4. The second pertains to the ACCC's interpretation of the EU's declaration for purposes of article 19, paragraph 5 of the Convention, particularly in connection to its discussion at paragraph 92 of the Draft Findings. The third, related pragmatic concern, stems from the Committee's approach more broadly, and how we perceive the Committee's unique mandate to promote compliance.

SUBSTANTIVE COMMENTS¹ ON THE DRAFT FINDINGS

4. The Draft Findings observe that "the effect of the Party concerned's declaration is that it assumes obligations to the extent that it has EU law in force; Member States remain responsible for the implementation of obligations that are not covered by EU law in force"² to conclude that the EU is not in non-compliance with article 9 of the Convention.³ First, we would like to point out that our Communication alleged non-compliance with article 9, *paragraphs 3 and 4*,⁴ *not article 9 in its entirety*. We think this is an important distinction.

¹ One brief editorial comment: The Draft Findings designate the case improperly as ACCC/C/2013/123 in the title

² Draft Findings at para. 88

³ Ibid. at para. 94; see also para. 96

⁴ Communication at IV(3)

5. Second, the Committee finds that its determination of no-noncompliance with article 9 entails no non-compliance with other provisions, notably article 3.⁵ Yet we would suggest that, even were one to accept the notion that the declaration has the effect of placing responsibility for the performance of article 9, paragraph 3 obligations on the Member States, this does not lead to the clear conclusion that there is no compliance issue with respect to the Party concerned.
6. As we pointed out in our Communication, the Party concerned's "most obvious failure" relates to article 3, in that it has not provided "a clear, transparent and consistent framework" for access to justice for its Member States.⁶ In subsequent submissions⁷ we argued further that the Party concerned bears a special duty to create a "common framework for its Member States to implement the Convention",⁸ and we bolstered this with citations to previous ACCC decisions.⁹ We remain unpersuaded that the declaration relieves the Party concerned of this duty, which in our view relates not merely to article 9, paragraph 3, but flows from article 3, paragraph 1 directly.
7. We would note further that in an even earlier case, while not going so far as to find the EU non-compliant with the Convention, the ACCC listed and discussed in some detail potential shortcomings related to the then-existing EU legal framework, observing that "[w]hile 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."¹⁰ We find the facts of all of these cases bear important similarities to the present case. As in those cases, there are shortcomings relating to the framework which are adversely affecting implementation of the Convention. Here this is occurring to a quite serious degree.
8. In our view all of the above suggests that article 3, paragraph 1 is in a meaningful sense a stand-alone provision. We find this consistent, too, with the express wording of that provision. This could mean that neither a determination of no non-compliance with article 9, paragraph 3 of the Convention, nor the underlying reason for such a determination – namely the declaration – necessitates a finding of no non-compliance with article 3, paragraph 1 for the Party concerned's failure to create a framework.
9. We note further that the discussion in paragraph 92 of the Draft Findings might be interpreted to suggest that, had the EU been a party to one of the many other previous cases in which the ACCC found a Member State to be in non-compliance with article 9, paragraph 3 of the Convention, its own compliance, too, might be called into question. In a similar vein, this could suggest that future cases involving the EU as a second party where a Member State fails to provide access to justice, or submitting a parallel case against the EU, might have some promise. At first blush we would welcome this language as helpful and quite in keeping with this Committee's past practice in the

⁵ Draft Findings at para. 95

⁶ Communication, Section IV(2)

⁷ Answers to the comments of the European Union and of the United Kingdom in case No. ACCC/C/2014/123, of 24.2.2016, p. 1; see also Justice and Environment's final written submissions, of 16.9.2016, at paras, 8 and 21

⁸ Ibid., citing ACCC/C/2012/70 (Czechia) (henceforth "C-70") at para. 66

⁹ Namely ACCC/C/2010/54 (EU) (henceforth "C-54") and C-70

¹⁰ ACCC/C/2006/17 (European Community), (henceforth "C-17") at para. 59

cases cited above. Yet it would seem to us rather difficult to reconcile this with the Committee's approach to compliance in this case, particularly its interpretation of the effect of the declaration. At any rate we find this raises potential difficulties in application. Clarity here would be useful.

10. Building on the above, we find that the ACCC has in the past adopted a more pragmatic approach. This relates to our third concern about the Draft Findings. While in our view this Committee has always given proper due to the *identification and attribution of responsibility* in the formal sense of international law, it has additionally taken care to evaluate and consider cases with an eye to determining *which party is most suitably positioned to undertake actions that would actually achieve compliance*,¹¹ and offered helpful discussion that has served to explain, elucidate, and *promote compliance* in an effective way. This was particularly evident in cases C-17, C-54, and C-70.
11. We respectfully submit that the Draft Findings in this case diverge from this facilitative and forward-looking practice. If we may, we would further suggest that, were the ACCC to offer more helpful guidance in this respect, it would not only *not* be exceeding its mandate in so doing, but in fact would be *clearly fulfilling its mandate*. Indeed, such steps seem very much in keeping with the ACCC's unique role and mandate as an arrangement of a "non-confrontational, non-judicial and consultative nature for reviewing compliance"¹² *in order to promote and improve compliance*.¹³

CONCLUSION

12. We had hoped that these concerns would have been addressed more fully in the Draft Findings in any number of ways. To name but a few examples, the ACCC: (1) could have come to a different finding on the question of no non-compliance; (2) could have arrived at the same finding of no non-compliance, but have provided a more comprehensive analysis to the questions presented in this case, including a discussion aimed at promoting and improving compliance in the manner described in the earlier cases cited above; and/or (3) could have issued Recommendations (without any findings of non-compliance) directly to the Party concerned. We observe further that (4) the ACCC is currently in the process of preparing its report for the next MOP, which will include a section on general compliance issues. We find this could provide an additional or alternative means to highlight the systemic issues raised by this Communication and provide valuable guidance.
13. We are very mindful of and appreciate the quite serious work demands on both the ACCC and the Secretariat, and the complexity of this and all cases involving the EU and its special status as a Party to the Convention. We very much hope that the Committee will take these comments in the spirit in which they were offered, namely to engage all concerned in a truly productive way, and with the aspiration to alleviate the demands on all, both now, and looking forward.

Yours Faithfully,

Justice and Environment

¹¹ This terminology appears frequently in the literature. See e.g. A. Ali, 2012 'The EU & Compliance Mechanisms of MEAs' in E. Morgera (ed), *The External Environmental Policy of the European Union. EU and International Law Perspectives*, Cambridge: Cambridge University Press, 287, at pp. 289-303, and references cited therein

¹² See article 15 of the Convention

¹³ See the Preamble of Decision I/7