

Possible further means for effective case management

Note by the Chair for the 67th meeting of the Compliance Committee (6-10 July 2020)

This note is prepared to facilitate the discussion at the open dialogue session to be held on Friday, 10 July 2020, during the Compliance Committee's 67th meeting.

The note recognizes that all those entities involved in the Committee's procedures have a potential role to play in enhancing the Committee's case management. It is thus divided into sections, considering the different contributions that each can make to the Committee's more efficient and effective management of its caseload, without compromising fairness and due process.

The note is proposed as a starting point for the discussion of possible means to enhance the Committee's effective case management and is not intended as an exhaustive list. Rather, during the open dialogue session on 10 July, Committee members, Parties and observers will be invited to provide further suggestions, as well as to provide their views on the possible means listed below.

The intention is that the Committee can decide, after discussions with Parties and observers, on a set of means to handle its caseload more efficiently and effectively before the upcoming seventh session of the Meeting of the Parties (MOP7).

Following the 67th meeting, a further draft will be prepared as an input to the next open dialogue session on effective case management to be held during the Committee's 68th meeting (23-27 November 2020).

The note is divided into two parts:

- Part I identifies some concrete efforts that the Parties, communicants and observers can, and should, make in order to significantly assist the Committee to more efficiently and effectively carry out its work.
- Part II lists a range of possible means that the Committee might use to handle its caseload more efficiently and effectively, without compromising fairness and due process, and while at all times remaining consistent with decision I/7. It is intended as a list of options for possible discussion only at this stage. The final decision on whether in due course to use all or any of the means listed in Part II will lie with the Committee.

Part I: Concrete efforts that Parties, communicants and observers can take to enhance the Committee's effective case management

1. Efforts to be taken by communicants and observers

a. Arrange for properly funded NGO legal support to be available to communicants

In the past, there was a small team of NGO legal experts who offered their services to provide support to communicants in the preparation of their communications and to assist them during hearings before the Committee. This has shown to be helpful to improve the quality of the communications and to avoid unnecessary exchanges between the Committee and the communicant to sort out uncertainties or other matters

in the communication. In more recent years, due to lack of funding, that legal support has necessarily been significantly reduced. It would be important that adequate funding for this NGO legal support is restored.

b. No tit-for-tat comments

Some communicants view it as essential to always comment on any information or replies provided by the Party concerned, even if the communicant is only restating its earlier position. This is not helpful as the Committee must still carefully review the comments in order to identify whether, in fact, there is any new relevant insights, or there is merely repetition of what is already before the Committee. Dealing with voluminous documentation adds considerably to the Committee's workload.

2. Efforts to be taken by Parties concerned

a. Ensure high quality and timely responses to communications and replies to questions from the Committee

Some Parties concerned indeed provide very clear, complete and timely responses and replies. However, some do not. The failure to do so significantly hampers the Committee's work.

b. No tit-for-tat comments

Dealing with multiple commenting rounds and voluminous documentation adds considerably to the Committee's workload. If the Committee intends to examine any new information or points raised by a communicant, it will specifically invite the Party concerned to provide its comment on those points. Accordingly, the Party concerned is not expected to comment unless the Committee specifically asks it to do so.

c. Fully briefed representation at hearings

If the Committee schedules a hearing to discuss the substance of a case, the Party concerned should ensure that its representatives are fully briefed by all relevant authorities and able to answer the Committee's questions during the hearing.

d. If the Committee finds non-compliance, that the Party concerned agrees to, and promptly implements, the Committee's recommendations

If the Party concerned can fully address the Committee's recommendations prior to the Committee's report to the next Meeting of the Parties (MOP), then there will be no need for a decision on that Party's compliance to be adopted by the MOP, and no need for the Committee to work with the Party concerned to review the implementation of that MOP decision throughout the next intersessional period.¹ This would significantly reduce the Committee's workload during the next intersessional period.

¹ See decision VI/8 on general issues of compliance, para. 3 (ECE/MP.PP/2017/2/Add.1): https://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_2_Add.1_E.pdf

- e. Implement the recommendations in the MOP decision as soon as possible after the decision is adopted.**

If the Committee already concludes that a Party concerned has fully addressed the recommendation in the MOP decision early in the next intersessional period, there will be no need for the Party concerned to continue to report on that recommendation (and for the Committee to review that report) during the intersessional period unless the situation in the Party concerned on that issue subsequently changes.

3. Contribution by Parties more generally

- a. Increase the funding to secretariat legal staff working on compliance**

As set out by the Bureau in the proposed staffing allocation in the Convention's draft 2022-2025 work programme, an increase in secretariat legal support for the Compliance Committee will be essential in order to ensure the Committee's efficient and effective case management. This was also emphasized by the Chair of the Committee in his statement to the 24th meeting of the Working Group of the Parties, on 2 July 2020.

- b. Provide funding to NGOs to ensure the continuity of legal support to communicants**

As noted in paragraph 1(a) above, pro bono support to communicants from environmental lawyers and NGO representatives who are well-versed in the Convention and the Committee's procedures can significantly improve the quality of communications. This lessens the workload of both the Committee and the Parties concerned.

Part II: Options for the Committee's future working methods

- Greater vigilance against parties engaging in tit-for-tat commenting rounds.
 - Recently, the Committee has taken a firmer approach to tit-for-tat commenting in those cases where the communicant and the Party concerned have engaged in multiple commenting rounds without the Committee inviting the parties to do so. The Committee may decide to take this approach on a regular basis in the future.
- For the Committee to apply its discretion in paragraph 14 of the annex to decision I/7 to select only the most important allegations from among the allegations made in a communication/submission which of those it will examine.
 - In accordance with paragraph 14 of the annex to decision I/7, the Committee may examine compliance issues and make recommendations if and as appropriate. It has always been the Committee's position that paragraph 14 means that it is not bound by the allegations made in the communication/submission. This means that it has the discretion to examine compliance issues in a case before it even if no allegations have

been made by the communicant/submitting Party on that point. It also means that the Committee is not bound to consider every allegation of non-compliance made by the communicant or submitting Party. In the aim of more efficient and effective case management, the Committee could more frequently exercise its discretion to decide which allegations in a communication/submission it considers most important to examine. The other allegations would then be left aside.

- In some cases (e.g. C23 (UK) and C93 (Norway)), when the Committee has found the Party concerned to be in non-compliance, and considered that the non-compliance is of a “one-off” nature and that there is no evidence of a problem in the legal framework or the wider judicial or administrative practice of the Party concerned, the Committee has refrained from making recommendations. The Committee may decide to apply this approach on a regular basis.
- For the Committee, where it considers it appropriate, to invite the Party concerned to acknowledge non-compliance and agree, through a summary procedure, to the Committee making a finding of non-compliance, without making any recommendations.
 - If the Committee considers that there appears to be a prima facie case of non-compliance, but the non-compliance appears to be of a “one-off” nature and not due to a wider problem in the legal framework or judicial or administrative practice in the Party concerned, the Party concerned could be invited by the Committee to acknowledge to the Committee and the communicant that it failed to comply with the Convention in that specific case. Upon the Party concerned providing such an acknowledgement, after hearing the views of the communicant, the Committee would then adopt its findings on non-compliance in a summary way, while also concluding that the non-compliance appears to be of a “one-off” nature and not due to a wider problem in the legal framework or judicial or administrative practice in the Party concerned, and thus refrain from making any recommendation.
- For the Committee, where it considers it appropriate, to invite the Party concerned to acknowledge non-compliance and agree, through a summary procedure, to the Committee making a finding of non-compliance and recommendations under paragraph 37(b) of the annex to decision I/7.
 - In some cases, the Committee may consider there to be a prima facie case of non-compliance with the legal framework or wider judicial or administrative practice. The Party concerned could then be invited by the Committee to acknowledge that non-compliance and to accept findings on non-compliance and recommendations directly from the Committee, without the Committee having to apply its regular procedure for examining non-compliance. Once the finding is adopted, the Committee could move directly to assisting the Party to come into compliance. When reporting the case to the MOP, the Committee would commend the Party concerned for having acknowledged the non-compliance and indicate that a summary procedure had been applied to reach its findings and recommendations.