



**Economic and Social
Council**

Distr.
GENERAL

ECE/MP.PP/2005/13
11 March 2005

ORIGINAL: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

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

(Second meeting, Almaty, Kazakhstan, 25-27 May 2005)
(Item 6 (b) of the provisional agenda)

REPORT OF THE COMPLIANCE COMMITTEE

Introduction

1. Through decision I/7 on the review of compliance, the Parties to the Convention at their first meeting established the Aarhus Convention's Compliance Committee and agreed on its structure and functions and on procedures for the review of compliance (Lucca, 21-23 October 2002). On the same occasion, the Meeting of the Parties elected the eight members of the Committee by consensus, taking into account the geographical distribution of membership and its diversity of experience (ECE/MP.PP/2, paras. 44-50).

2. Since its establishment, the Compliance Committee has held seven meetings, all of which took place in Geneva. The meeting reports are available on the Committee's web site (www.unece.org/env/pp/compliance.htm):

- (a) 1st meeting (17-18 March 2003) - MP.PP/C.1/2003/2;
- (b) 2nd meeting (18-19 September 2003) - MP.PP/C.1/2003/4;
- (c) 3rd meeting (22-23 January 2004) - MP.PP/C.1/2004/2;
- (d) 4th meeting (13-14 May 2004) - MP.PP/C.1/2004/4;

- (e) 5th meeting (23-24 September 2004) - MP.PP/C.1/2004/6;
- (f) 6th meeting (15-17 December 2004) – MP.PP/C.1/2004/8;
- (g) 7th meeting (16-18 February 2005) – MP.PP/C.1/2005/2.

3. With the exception of the sixth meeting, when one member was absent, all the Committee members attended all the meetings. The meetings were also attended by a number of observers, including from non-governmental organizations.

I. ISSUES RELATED TO THE FUNCTIONING OF THE COMPLIANCE MECHANISM AND THE COMMITTEE

4. The Committee has progressively developed its modus operandi as well as various related procedures and guidelines. All procedures were adopted on a tentative basis, on the understanding that they may need to be modified in the light of experience, taking into account the unique nature of the mechanism. In developing the modus operandi, attention was paid to procedures developed under other relevant mechanisms, and the Committee invited representatives of the bodies responsible for servicing some of them to provide information on their procedures (e.g. the Human Rights Committee, the Implementation Committee of the Convention on Long-range Transboundary Air Pollution).

5. The main procedures developed by the Committee have been recorded in its meeting reports. The aim of this practice has been to ensure transparency and to give Parties an opportunity to provide comments and feedback. In addition, a compilation of all the relevant procedures has been prepared and is periodically updated. The compilation is available on the Committee's web site and includes a general introduction to the Committee, its composition, formation, functions and powers; issues related to the Committee's modus operandi, such as general principles, procedures for handling submissions, referrals and communications, information gathering and on-the-spot appraisals; the relationship between the Committee and non-governmental organizations; and an information paper on communications from the public.

6. The procedures agreed upon by the Committee cover the various steps involved in processing communications, including preliminary determination on admissibility and decision on points to raise with the Party concerned; forwarding of the communication to the Party concerned; discussion by the Committee of the subject matter, with the participation of the concerned parties; and preparation and adoption of the draft findings, measures and recommendations. The procedures also cover the relevant steps with respect to submissions and referrals. Some examples of the decisions taken by the Committee with regard to these and other aspects of its modus operandi are provided in the following paragraphs.

7. The Committee has been keen to ensure transparency in its activities. It requested the secretariat to publicize through the web site all the official documentation as well as any new aspects of its modus operandi and summary information enabling the public to track the processing of submissions, referrals and communications. The Committee also decided to make available in full on the web site all submissions, referrals and communications that are determined to be admissible

and significant related documentation, other than information which it is required to keep confidential pursuant to chapter VIII of the annex to decision I/7.

8. An information paper on communications from the public was developed to assist members of the public intending to submit a communication to present the information in a clear and logical way that would facilitate the work of the Committee. The paper provides a detailed explanation of the Committee's procedures for dealing with communications and provides guidance to members of the public on the criteria for admissibility of communications and practical arrangements for the submission of communications, including a checklist of information required. However, the Committee considers that further work is needed in order to ensure that the public is aware of this guidance and makes effective use of it. The paper is available on the Committee's web site.

9. In order to make its operation more efficient and expedite the processing of communications from the public, the Committee decided that preliminary determinations on the admissibility of communications and points to be raised with the Party concerned when forwarding the communication may be decided upon through electronic mail by explicit consent of all members and subsequently recorded in the report of the Committee's next meeting. The detailed procedure for such decision-making is described in the report of the 4th meeting (MP.PP/C.1/2004/4, paras. 39-40). The procedure was subsequently extended to cover the preparation of draft findings, measures and recommendations.

10. Having regard to paragraph 32 of the annex to decision I/7, the Committee considers it to be important to actively facilitate the participation of the Parties concerned, Parties having made submissions and communicants in its discussions on submissions, referrals and communications, including through the provision of financial support where necessary. In this regard the Committee has agreed that participation should be broadly understood in the sense in which the concept is enshrined in the Convention, comprising in particular the right to comment, the right to be heard and the right to have comments taken into account by the Committee, within the framework of the procedures of the meeting (MP.PP/C.1/2003/2, para. 16). On the other hand, the Committee has interpreted paragraph 33 of the annex to decision I/7 as requiring that the preparation and adoption of any findings, measures and recommendations take place in closed session.

11. The Committee decided that if a Committee member considers himself or herself to have a possible conflict of interest, he or she would be expected to bring the issue to the Committee's attention and decision before consideration of that particular matter. Being a citizen of a State whose compliance was to be discussed would not in itself be considered as a conflict of interest (MP.PP/C.1/2003/2, para. 22). A member deemed to have a conflict of interest would be treated throughout the procedure as an observer and would not take part in formal discussions or participate in the preparation or adoption of findings, measures or recommendations with respect to the case in question (MP.PP/C.1/2004/6, para. 53).

12. The Committee also considered the relation between the compliance mechanism and the reporting requirements under the Convention. On the one hand, the Committee has a distinct responsibility under its mandate to monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention (see

chap. IV below). On the other, the information generated through the reporting mechanism is clearly relevant to the Committee's examination of compliance. On the latter point, the Committee considers that the implementation reports will not generally provide a basis for the Meeting of the Parties to draw any conclusions about possible non-compliance by a Party, but be expected to provide important contextual information in the subsequent examination of compliance issues either by the Committee or by the Meeting of the Parties. The Committee recognizes the potential overlap between the synthesis report and its own report to the Meeting of the Parties, and has undertaken, at the invitation of the secretariat, to play a consultative role in the preparation of the synthesis report (see, in particular, MP.PP/C.1/2004/2, paras. 20-35).

13. Having in mind the objectives of the compliance mechanism under the Convention in accordance with decision I/7, the Committee notes that the compliance procedure is designed to improve compliance with the Convention and is not a redress procedure for violations of individual rights. Consequently, the Committee does not consider itself restricted to the consideration of the legal or factual arguments presented by communicants, Parties making submissions or Parties concerned and will consider itself free to draw conclusions that go beyond the scope of those presented to it. For the same reason, it also considers itself free to decide not to address all the arguments and assertions presented in submissions, referrals or communications, but rather to focus upon those that it considers most relevant. The fact that it might not explicitly refute any given assertion or argument made by any of the parties concerned should not be taken to imply that it endorses them and, conversely, lack of explicit endorsement of an argument by the Committee should not be taken to imply that it rejects it.

14. In view of the importance of protecting the interests of third parties, the Committee has construed paragraph 29 of the annex to decision I/7 to apply to information which the communicant has requested be kept confidential not only out of the communicant's concern that he or she might be penalized, persecuted, or harassed but out of his or her concern that another person or persons might be so treated.

15. In accordance with paragraph 21 of the annex to decision I/7, the Committee, when determining the admissibility of a communication, is required to take into account any available domestic remedies, unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective or sufficient means of redress. The fact that a domestic remedy, even one which is not unreasonably prolonged or does provide an effective or sufficient means of redress, was available and was not used in the case does not in itself preclude the Committee from considering the communication.

16. While acknowledging the need to build synergies with other international processes and avoid duplication of effort, the Committee, having regard to the non-confrontational, non-judicial and consultative nature of the Convention's compliance mechanism, considered that the fact that a matter was under consideration by another international review procedure would not in itself prevent the Committee from dealing with the matter.

17. The Committee has taken note of a number of useful comments on its evolving procedures provided by delegations to the Working Group of the Parties and has followed up on these. The

Committee would welcome feedback from the Meeting of the Parties on the way in which it has been working and on the procedures that it has developed.

18. While recognizing that its procedures will continue to evolve and that some flexibility will continue to be needed, the Committee intends to publish the modus operandi in the three official languages of the Convention following the second meeting of the Parties, taking into account the outcome of that meeting.

II. SUBMISSIONS, REFERRALS AND COMMUNICATIONS CONCERNING NON-COMPLIANCE BY PARTIES WITH THE CONVENTION

19. To date, no Party has opted out of the aspect of the compliance mechanism whereby communications from members of the public may be brought before the Committee.

20. In the period from the first meeting of the Parties up to the Committee's seventh meeting, the Committee received one submission from a Party with regard to compliance by another Party and 11 communications from the public.

21. All communications were considered with respect to their admissibility. Three were not considered beyond the admissibility stage: two were deemed inadmissible on the grounds of lack of clear and precise information to substantiate relevance to any of the Convention's provisions; one was considered by the Committee to have been submitted prematurely, the matter having just been submitted for review by the domestic court of appeals.

22. The Committee has considered, and made findings and recommendations, with respect to the substance of five of the communications and most aspects of the submission.

23. Submission ACCC/S/2004/01 was made by the Government of Romania on 7 June 2004 with regard to the compliance by Ukraine with the provisions of article 6, paragraph 2 (e), read in conjunction with article 2, paragraph 5, or with article 6, paragraph 7, and article 3, paragraph 9, of the Convention in the case of decision-making on the construction of the Bystre deep-water navigation canal in the Danube delta.

24. Communications ACCC/C/2004/01 and ACCC/C/2004/02 were made by the Kazakh non-governmental organization Green Salvation on 7 February 2004 and 17 March 2004, respectively. Communication ACCC/C/2004/01 concerned the compliance by Kazakhstan with its obligations under article 4, paragraphs 1 and 7, article 6, paragraph 6, and article 9, paragraph 1, of the Convention in the case of information related to the import and disposal of radioactive waste requested by the communicant from the national nuclear authority Kazatomprom. Communication ACCC/C/2004/02 concerned compliance by Kazakhstan with its obligations under article 6, paragraphs 2 to 4 and 6 to 8, and article 9, paragraphs 3 and 4, of the Convention in the case of the construction of a high-voltage power line through a residential area in Almaty.

25. Communication ACCC/C/2004/03 was made on 5 May 2004 by the Ukrainian non-governmental organization Ecopravo-Lviv with regard to the compliance by Ukraine with its obligations under article 1 and article 6, paragraphs 2 to 4 and 6 to 9, of the Convention in the case of the Bystre deep-water navigation canal construction in the Danube delta.
26. Communication ACCC/C/2004/04 was made by the Hungarian non-governmental organization Clean Air Action Group on 7 May 2004 with regard to the compliance by Hungary with its obligations under article 6 and article 9, paragraphs 2 to 4, of the Convention in connection with the introduction of the new Act on the Public Interest and the Development of the Expressway Network.
27. Communication ACCC/C/2004/05 was made by the Moldovan non-governmental organization Biotica on 10 May 2004 with regard to the compliance by Turkmenistan with its obligations under article 3, paragraphs 4 and 9, of the Convention through its introduction of the new Act on Public Associations.
28. The Committee, having noted that submission ACCC/S/2004/01 and communication ACCC/C/2004/03 were closely related in their subject matter, considered them side by side.
29. In each case, the communication or submission was forwarded to the Party concerned and the Party concerned was provided with the opportunity to comment, following which the Committee discussed the matter. In some cases, additional information and/or comments were provided by the communicants.
30. The five communications and submission were considered on merit at the Committee's 6th meeting. Representatives of some of the Parties concerned, the Party having made a submission and some of the communicants attended the meeting in an observer capacity as did other observers, pursuant to paragraph 32 of the annex to decision I/7. Following the discussion of each case in open session, the Committee proceeded to prepare its draft findings and recommendations in closed session and continued the process after the meeting through e-mail. The draft findings and recommendations were then forwarded to each of the concerned parties, who were given an opportunity to comment. The Committee then finalized and adopted its findings and recommendations at its seventh session.
31. The Committee found that, with respect to communications ACCC/C/2004/01, ACCC/C/2004/02, ACCC/C/2004/03 and ACCC/C/2004/05 and submission ACCC/S/2004/01, the respective Parties concerned were not in compliance with the Convention. With respect to communication ACCC/C/2004/04, the Committee did not find the Party concerned to be in non-compliance. A table showing which provisions have been the subjects of allegations and / or findings of non-compliance is annexed to this report.

32. The Committee, pursuant to paragraph 35 of the annex to decision I/7, recommends the Meeting of the Parties to:

(a) Take note of the main facts of the communications and the consideration and evaluation by the Committee, as set out in the addenda to the report of the Committee's seventh meeting (MP.PP/C.1/2005/2/Add.1 to Add.5);

(b) Endorse the Committee's main findings with regard to compliance and adopt the Committee's recommendations, as set out in addenda 1 to 5 to this report; and

(c) Undertake to review, at its third meeting, the implementation of those recommendations adopted with respect to specific Parties, if appropriate on the basis of input from the Committee.

33. The remaining four cases are 'pending' in the sense that the Committee has yet to reach any conclusions as to whether there is non-compliance, due to the fact that the Parties concerned have not yet provided responses and the deadlines for them to do so have not yet passed. These are not addressed further in this report.

34. The Committee notes with regret the generally poor level of response from some of the Parties concerned when they received the submission and communications. Not one of them responded (other than with a holding reply) within the five-month deadline stipulated in paragraph 23 of the annex to decision I/7, and some even failed to respond at all. The Committee believes that more precise and complete information reflecting various aspects related to an alleged non-compliance enables it and subsequently the Meeting of the Parties to promote and improve compliance more efficiently. A dialogue with the Party concerned in each particular case and throughout the procedure is essential to ensure the consultative nature of the process of reviewing and facilitating compliance. While the Committee in many instances could make its findings and recommendation on the basis of only the information presented by a communicant, the secretariat or a Party making a submission or other sources, its main objective is to facilitate compliance in a non-judicial way and this can be best realized if any findings and/or recommendations stem from the dialogue with the Party concerned. The Committee therefore **recommends** that the Meeting of the Parties should call on all the Parties to approach a review of compliance as a consultative process and to adhere to the deadlines for providing information and comments, as established in decision I/7.

III. GENERAL COMPLIANCE ISSUES

35. The Committee, having reviewed the communications and the submission forwarded to it as well as, to the extent possible, the information contained in the national implementation reports and synthesis report, has identified a number of more general issues (i.e. not limited to a particular country) that it considers worth bringing to the attention of the Meeting of the Parties. Some of these are also addressed by means of specific recommendations contained in the addenda to this report.

36. One underlying problem related to non-compliance by Parties with the Convention arises from the fact that some Parties, in particular those with legal systems that allow for ratification of an international treaty without prior transposition of its requirements into the domestic system, rely on the direct applicability of the Convention. Such Parties sometimes fail to adapt or adapt only parts of their legislation, or make inadequate institutional arrangements in order to implement the

Convention. In some of these cases, while the Convention itself becomes a part of domestic legislation, it remains a framework. Such framework legislation fails to provide clear requirements, standards and guidance for those who implement and enforce it and those who make use of their rights under the Convention. This in turn leads to non-compliance with various provisions of the Convention in practice. In an extreme case, the failure to take the sufficient legislative, regulatory and other measures, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention may constitute non-compliance with article 3, paragraph 1.

37. On the other hand, some countries have a very complex regulation of access to information and, in particular, public participation procedures through multiple, often conflicting laws and regulations. This lack of transparency and clarity in the legal framework can also significantly complicate implementation of the Convention by the authorities and lead to non-compliance.

38. The Committee therefore **recommends** that Parties should review and where necessary update their legal and institutional frameworks, taking into account their practical experience implementing various provisions of the Convention and the need to fulfil their obligations under article 3, paragraph 1.

39. The Committee notes that while the Convention itself does not, strictly speaking, preclude a derogation from existing rights of access to information, public participation in decision-making and access to justice, as long as these remain within the standards established by it, such derogation would generally not be in line with either the objective or the spirit of the Convention, in particular in the light of the provisions of article 3, paragraphs 5 and 6. The Committee has, therefore, **recommended** that Parties should be urged to refrain from taking any measures which would reduce existing rights, even where such measures would not necessarily involve any breach of the Convention (addendum 4).

40. The Committee considers that there is a need for guidance on implementing the public participation provisions of the Convention with respect to decision-making on projects in border areas that affect the public in other countries but do not require transboundary environmental impact assessment under the Espoo Convention, which includes procedures for public participation. It has, therefore, **recommended** that the Working Group of the Parties should be mandated to develop such guidance for consideration at the third meeting of the Parties (addendum 3).

41. The Committee furthermore believes that there would be value in developing guidance on the scope of the permitting processes in which the public participation procedures set out in article 6 should apply, i.e. the extent to which such processes should be environmental in character and what 'environmental' would mean in this context, having in mind the environmental focus of the Convention. It has therefore **recommended** that the Working Group of the Parties should be mandated to develop such guidance and to present it for endorsement by the Parties at their third meeting (addendum 2).

42. The Committee recognizes that, in a number of countries, a lack of resources might be causing deficiencies in compliance and takes note of information to that effect provided in some of the

national implementation reports. It **recommends** that in such cases the Meeting of the Parties should encourage those Parties in a position to do so to provide the countries with economies in transition with financial and technical assistance aimed at improving implementation of the Convention.

43. Both the national implementation reports and the communications received by the Committee suggest that the decisions and actions of the judiciary may contribute to problems of implementation and/or compliance in certain countries. There is also some evidence that Environment Ministries and other environmental authorities tend to be more aware of the Convention than other public authorities, or more willing to implement it. The Committee **recommends** the Meeting of the Parties to consider measures to raise awareness among the judiciary and those public authorities dealing with environmental matters only indirectly.

IV. REPORTING REQUIREMENTS

44. In accordance with its mandate under decision I/7 (annex, para. 13 (c)), the Committee reviewed the implementation by Parties of their obligations under the reporting requirements of decision I/8. Specifically, it looked into whether and how the Parties had prepared their national implementation reports, whether reports were submitted in a timely manner, the quality of the information provided and the level of transparency and consultation in preparing the reports, in order to verify that a process compatible with the procedural requirements of the decision had been followed.

45. According to the terms of decision I/8 of the Meeting of the Parties, the deadline for submitting national implementation reports to the secretariat in the first reporting cycle was 24 January 2004. The Committee notes that, of the 30 States for which the Convention was in force at that time, 16 had submitted national implementation reports on time, while four more reports were submitted with a slight delay.

46. The Committee notes with concern that 10 Parties either failed to submit reports at all or failed to do so in time for them to be taken into account in the preparation of the synthesis report by the secretariat. Failure to submit reports, or to submit reports within the deadlines specified in paragraph 4 of decision I/8, constitutes non-compliance with the reporting requirements under the Convention.

47. The Committee **recommends** the Meeting of the Parties to strongly urge Parties to comply with decision I/8. The Committee also recommends that the Meeting call on all Parties that failed to submit their national implementation reports, with the exception of the States having become Parties after the deadline for submission of the implementation reports, to submit their reports to the secretariat, inter alia for forwarding to the Committee, by 15 September 2005.

48. Some of the reports were excessively long when first submitted and had to be reduced, which led to delays in processing them. Although the length of reports is not specified under decision I/8, the decision of the Working Group of the Parties that the reports should be produced as official documents in order to enhance their status and ensure their translation into the official languages entailed that they should meet the 8,500-word restriction that applies to all United Nations

documentation. It is recommended that Parties give more attention to complying with any such stipulations in future reporting cycles.

49. With regard to the processes through which the reports were prepared, the Committee welcomes the fact that almost all of the reports appear to have been prepared through a transparent and consultative process involving the public, as required under paragraph 3 of decision I/8. While recognizing that the primary purpose of the report is to reflect the official governmental position, the Committee considers that, in order to provide a more complete picture of implementation, it would be useful if the reports were to indicate any major difference of opinion emerging from the consultation process. The Committee noted that supplementary reports on the process submitted by some non-governmental organizations were helpful in this regard.

50. Finally, the Committee notes that the information provided in the reports was of varying quality and that certain reports did not provide sufficient information to enable assessment of the implementation. Furthermore, most of the reports did not provide much information on the practical application of the various provisions of the Convention. The Committee **suggests** that the Meeting of the Parties should recommend to all Parties to include relevant and adequate information, in particular with regard to the practical implementation of each of the Convention's provisions, pursuant to paragraph 1 (b) of decision I/8, in their future implementation reports.

51. The Committee will further examine the issue of the quality of information in the reports at its eighth meeting and may present orally further information or suggestions to the Meeting of the Parties on this.

V. OTHER ISSUES

52. While not having received a specific request from the Meeting of the Parties pursuant to paragraph 39 of the annex to decision I/7, the Committee is conscious of the importance of enhancing synergies with compliance procedures developed, or being developed, under other instruments. With this in mind, its members and the secretariat have established informal links and/or exchanged information on an ad hoc basis with the relevant bodies under the Protocol on Water and Health, the Cartagena Protocol, the Barcelona Convention, the Espoo Convention and the Convention on Long-range Transboundary Air Pollution.

VI. FUTURE WORK

53. The Committee anticipates a need to meet approximately four times per year in the coming intersessional period. Additional work will be undertaken between meetings using electronic means of communication as referred to in paragraph 9. Furthermore, individual Committee members will be expected to take on certain specific responsibilities.

54. The Committee is conscious of, and somewhat concerned by, the workload which it and in particular the secretariat will face in the coming period. The work of the Committee is to a large

extent reactive, being driven by the communications from the public. The number of such communications and the associated workload can only be expected to increase as the number of Parties and public awareness of the mechanism increase. It is also important that the Committee has the possibility, within its mandate, to be proactive.

55. To some extent, the way in which the Committee deals with communications can influence the amount of work involved (e.g. by urging communicants to make greater use of national remedies where it is reasonable to do so). The Committee has attempted to spread the workload among its members by assigning each case to one of its members, who serves as the 'curator' for the case and has a special responsibility for entering into the detail of the case. However, it will remain necessary to ensure that additional resources are made available to the secretariat to enable it to service the work of the Committee.

56. Notwithstanding the commitment of time and resources implied in the processing of communications from the public, the Committee remains convinced that this aspect of the mechanism provides a unique and valuable channel of information on matters relevant to compliance, which would otherwise not necessarily come to its attention or to that of the Meeting of the Parties.

