

Findings and recommendations with regard to the case initiated by the Committee ECE/MP/WH/CC/CI/1 concerning compliance by Portugal¹

Adopted by the Compliance Committee on 15 July 2015

I. Introduction

1. At its tenth meeting (Geneva, 25 November 2014), the Compliance Committee under the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes considered that, based on paragraph 11 (c), read in conjunction with paragraph 12, of the Compliance Procedure set out in annex to decision I/2 of the Meeting of the Parties to the Protocol,² the Committee itself had the competence not only to examine general issues of compliance but also to take appropriate action in case of possible non-compliance by a specific Party with the obligation to report under the Protocol.

2. Accordingly, the Committee decided to initiate a case regarding possible non-compliance by Portugal with the obligation to report under article 7 of the Protocol.

3. The Committee prepared draft findings at its eleventh meeting (Geneva, 24–25 March 2015). In accordance with paragraph 34 of the annex to decision I/2, the draft findings were then forwarded for comments to the Party concerned on 20 April 2015. The Party was invited to provide comments by 15 May 2015.

4. The Party concerned did not provide any comments by the deadline.

5. The Committee proceeded to finalize its findings on 8 June 2015, with all Committee members giving their agreement by electronic mail by 15 July 2015. The Committee adopted its findings and agreed that they should be annexed to the report of its twelfth meeting (Geneva, 19–20 October 2015). It requested the secretariat to send the findings to the Party concerned.

6. In addition, on 24 November 2014, the secretariat received a communication from the non-governmental organization Earthjustice addressed to the Committee, alleging that the Party concerned was not in compliance with its obligations under articles 6 and 7 of the Protocol thereby undermining the capacity of the Party concerned, as well as opportunities for the public and the international community to contribute to achieving the substantive goals of the Party concerned to improve water management, protect water ecosystems and control water-related disease.

7. Specifically, the communicant alleged that the Party concerned failed to comply with articles 6 and 7 of the Protocol by not submitting its summary report within the second reporting exercise under the Protocol.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes which are not part of the editorial process and aim at correcting errors in the argumentation, but have no impact on the findings and conclusions) may take place.

² See www.unece.org/fileadmin/DAM/env/documents/2007/wat/wh/ece.mp.wh.2_add_3.e.pdf

8. By electronic mail prior to its eleventh meeting, the Committee determined on a preliminary basis that the communication was admissible.
9. Pursuant to paragraphs 20 and 21 of the annex to decision I/2, the communication was forwarded to the Party concerned on 17 February 2015 with the deadline of 17 July 2015 to submit any written explanations or statements clarifying the matter referred to in the communication and describing any response that may have been made in the meantime.

II. Summary of facts, evidence and issues³

A. Facts

10. The Meeting of the Parties to the Protocol on Water and Health, at its second session (Budapest, 23–25 November 2010), having considered the outcomes of the first reporting exercise, adopted the guidelines and template for summary reports in accordance with article 7 of the Protocol⁴ and recognized the strategic importance of the summary reports for assessing progress with the implementation of the Protocol. The Meeting of the Parties requested Parties to the Protocol and other States to follow the guidelines and template in the following reporting cycle for the third session of the Meeting of the Parties. The deadline for submission of summary reports was 210 days prior to the following session of the Meeting of the Parties, i.e. 29 April 2013.

11. At the fifth meeting of the Working Group on Water and Health (Geneva, 11–12 October 2012), the secretariat informed the delegates of the timeline for the second reporting exercise.

12. Subsequently, a letter from the secretariat inviting Parties to submit their summary reports of the data collected and evaluated and indicating the deadline for submission was sent on 13 December 2012.

13. At its sixth meeting (Geneva, 3–4 July 2013), the Working Group invited Parties that had not yet submitted their summary reports to do so as soon as possible.

14. In its report to the third session of the Meeting of the Parties (Oslo, 25–27 November 2013), the Compliance Committee noted that the concerned Party, among a number of other Parties, had failed to report in the second reporting exercise. Based on the recommendation of the Committee, the Meeting of the Parties adopted decision III/1 on general issues of compliance, in which it requested those Parties that had failed to submit their national implementation reports to submit their reports to the secretariat by 28 February 2014, inter alia, for forwarding to the Committee.⁵

15. On 20 May 2014, a letter from the secretariat was addressed to the official focal point of the Party concerned inviting the country to submit its national report by 20 August 2014 or to furnish necessary information about the matter to the secretariat.

³ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as considered by the Committee.

⁴ See ECE/MP.WH/4–EUDHP1003944/4.2/1/06, paragraph 52 (a), referring to the document ECE/MP.WH/2010/L.5–EUDHP/1003944/4.2/1/7.

⁵ See ECE/MP.WH/11/Add.2–EUDCE/1206123/3.1/2013/MOP-3/06/Add.2, paragraph 10.

16. Taking into account the holiday season, an email was sent by the secretariat to the focal point of the Party concerned on 18 July 2014 extending the deadline until 15 September 2014.

17. A reminder email was sent by the secretariat on 5 August 2014. A response by the Party concerned on 17 September 2014 indicated that, due to the high workload, the Party would not be able to submit its summary report within the second reporting exercise.

18. At the time of drafting these findings and recommendations, the Party concerned had not submitted its summary report to the secretariat.

B. Substantive issues

19. As mentioned in paragraph 1 above, at its tenth meeting, the Compliance Committee considered that, based on paragraph 11 (c), read in conjunction with paragraph 12, of the annex to decision I/2, the Committee itself had the competence not only to examine general issues of compliance but also to take appropriate action in case of possible non-compliance by a specific Party with the obligation to report under the Protocol. Accordingly, the Committee decided to initiate a case regarding possible non-compliance with the obligation to report under the Protocol by the Party concerned.

20. In order to define a procedure for the Committee to address the failure of Parties to report, further to the positions and considerations just mentioned, the Committee decided to apply, *mutatis mutandis*, the relevant rules of the Compliance Procedure, specifically the deadline for a reply of three months indicated in paragraph 14 and the principles set out in paragraphs 20–22 and 30–32 of the Compliance Procedure, taking into account that any procedure should be governed by the spirit of the compliance mechanism under the Protocol.

21. The Committee asked the secretariat to proceed in accordance with its decision informing the Party that the Committee expected to deliberate the case and proceed with drafting findings, measures and recommendations, as appropriate, at its eleventh meeting.

22. The letter from the secretariat to the focal point of the Party concerned was sent on 19 December 2014, inviting the Party to submit any reply, written explanations or statements clarifying the matter as well as supporting information to the secretariat within three months. No reply was received within the specified deadline.

23. In the light of the above considerations, the substantive issue the Committee had to consider was whether the failure of the Party to submit its summary report within the second reporting exercise constituted non-compliance with article 7, paragraph 5, of the Protocol.

24. At its eleventh meeting, the Committee noted that the legal issue to be considered by the Committee was the same issue raised in the communication referred to in paragraph 6. Since the deadline for the Party concerned to respond to the communication had not yet passed, the Committee limited its considerations to the present case.

III. Consideration and evaluation by the Committee

25. Portugal approved the Protocol on Water and Health on 23 February 2005. The Protocol entered into force on 4 August 2005.

26. The Protocol in its article 7, paragraph 5, establishes that “each Party shall provide to the secretariat ..., for circulation to the other Parties, a summary report of the data collected and evaluated and the assessment of the progress achieved. Such reports shall be in accordance with guidelines established by the Meeting of the Parties”. The Committee

considers that the Protocol establishes a clear obligation of result which is the obligation of Parties to submit their summary reports to the secretariat. The Committee observes that, although it is not its task to evaluate provisions of the Protocol, reporting is a key instrument for assessing the implementation of the Protocol by Parties themselves and by the Meeting of the Parties.

27. At its second session, the Meeting of the Parties adopted the guidelines and template for summary reports in accordance with article 7 of the Protocol and requested Parties to the Protocol and other States to follow the guidelines and template in the following reporting cycle for the third session of the Meeting of the Parties. The guidelines “require” Parties to submit the summary reports 210 days prior to the following session of the Meeting of the Parties, i.e. by 29 April 2013.

28. In the view of the Committee, it is obvious that the clear legal obligation of article 7, paragraph 5, of the Protocol to submit summary reports cannot become operational without supplementary decisions by the Meeting of the Parties as it does not contain any provisions on the submission deadline. Hence, such decisions are presupposed following also from the principle of effectiveness in treaty interpretation.

29. Although the guidelines referred to in paragraph 28 are generally speaking formulated in a non-obligatory language, the particular provision relating to the submission deadline contains a requirement. Since that requirement does not entail any additional substantive obligations of the Parties, but may be considered as a procedural decision having been made only to operationalize a clear legal obligation reflected in a provision of the Protocol, the Committee considers that the decision is legally binding upon the Parties.

30. The above considerations of the Committee are confirmed by the decisions of the Meeting of the Parties at its second and third sessions, recognizing that failure to submit summary reports or to submit reports within the specified deadlines constitutes non-compliance with the article 7 of the Protocol, since those decisions may be considered as agreement by Parties to interpret the relevant provision of the Protocol in that manner. The Committee refers in that respect to the article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties which establishes that when interpreting a treaty “there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” The Committee considers that the above mentioned decisions of the Meeting of the Parties may be considered to constitute an agreement of the Parties to interpret the provisions of the Protocol.

31. In the opinion of the Committee there was a clear legal obligation for Parties to submit summary reports and to do so within the deadline established by the Meeting of the Parties.

IV. Conclusions and recommendations

32. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

33. The Committee finds the Party concerned has failed to comply with article 7, paragraph 5, of the Protocol since it has not submitted its summary report within the second reporting exercise.

B. Recommendations

34. The Committee, pursuant to paragraph 34 (d) of the annex to decision I/2 of the Meeting of the Parties, issues a caution to the Party concerned.

35. The caution includes a warning to the effect that the Committee recommends to the Meeting of the Parties to issue a declaration of non-compliance pursuant to paragraph 35 (d) of the annex to the above mentioned decision if the Party concerned has not submitted its summary report within the second reporting exercise prior to the fourth session of the Meeting of the Parties to the Protocol (scheduled to be held in Bern from 14 to 16 November 2016).

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