

Recommendations with regard to request for advice ACCC/A/2014/01 by Belarus

Adopted by the Compliance Committee on 18 June 2017¹

I. Introduction

1. At the fifth session of the Meeting of the Parties to the Aarhus Convention (Maastricht, 30 June – 2 July 2014), the Party concerned delivered a statement under agenda item 7(a), Implementation of the work programme for 2012-2014, in which it, inter alia, sought clarification of how certain provisions of the Convention were to be interpreted.²

2. The Meeting of the Parties took note of the statement by the representative of the Party concerned with regard to interpretation of the Convention's provisions. It agreed with the Bureau's proposal in relation to the request by the Party concerned and, pursuant to paragraph 13(b) and 14 of the annex to decision I/7, agreed to follow a procedure that would also apply to similar requests, namely:

(a) The secretariat would prepare a draft response (taking into account the Implementation Guide, jurisprudence, Compliance Committee decisions, other relevant legislation, etc.) and consult on the draft response with both the Compliance Committee and the Bureau, taking into account their views, and then submit the response to the Party making the request;

(b) If it emerged that there were serious differences of opinion between or within the Compliance Committee, the Bureau and/or the secretariat, the Bureau would report on the matter to the Working Group of the Parties, which could entrust the Bureau (or establish an ad hoc committee), with input provided by the secretariat and Compliance Committee, to prepare a proposal on the subject matter for the consideration of the Meeting of the Parties.³

3. At the fiftieth meeting of the Compliance Committee (Geneva, 6-9 October 2015), it was agreed that the secretariat would prepare its draft in response to the request of the Party concerned, which would be posted on the Committee's webpage four weeks in advance of its fifty-first meeting (Geneva, 15-18 December 2015). The Committee agreed to discuss the secretariat's draft in open session at its fifty-first meeting taking into account comments received from observers, and to thereafter prepare its recommendations in closed session in accordance with paragraph 33 of the annex to decision I/7.

4. On 17 November 2015 the secretariat prepared and posted on the relevant webpage⁴ a draft response taking into account existing sources of interpretation developed under the auspices of the Convention, and in particular, the second edition of the Aarhus Convention Implementation Guide, the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, and relevant findings adopted by the Aarhus Convention Compliance Committee.

5. On 20 November 2015, the secretariat's draft response was forwarded to the Party concerned together with an invitation for the Party concerned to participate in the Committee's fifty-first meeting (Geneva, 15 – 18 December 2015) during which the Committee had agreed to discuss the secretariat's draft in open session taking into account

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

² Available at http://www.unece.org/env/pp/aarhus/mop5_docs.html#/

³ ECE/MP.PP/2014/2, para. 53.

⁴ The Party concerned's request for advice, the secretariat's draft response and related documentation from the Party concerned and secretariat, is available from <http://www.unece.org/env/pp/cc/a1.html>

comments received from observers, and to thereafter prepare its recommendations in closed session in accordance with paragraph 33 of the annex to decision I/7.

6. On 22 December 2015, the Party concerned provided its comments to the secretariat's draft response.

7. At its fifty-first meeting, the Committee held an open session to discuss the secretariat's draft response. The Party concerned attempted to take part by audio conference in the open session; however, owing to a failure of the conferencing equipment provided in the meeting room, it was unable to join the audio conference. The Committee agreed to reschedule the discussion of the secretariat's draft in open session to its fifty-second meeting.

8. At its fifty-second meeting (8-11 March 2016), the Party concerned took part in an open session to discuss the draft response prepared by the secretariat, together with the written comments of 22 December 2015. The Committee took note of the oral comments received from the Party concerned and observers during the meeting and agreed to proceed with the preparation of its recommendations in closed session in accordance with paragraph 33 of the annex to decision I/7.

9. The Committee completed its draft recommendations at its virtual meeting on 22 December 2017. In accordance with paragraph 34 of the annex to decision I/7, the draft recommendations were then forwarded to the Party concerned for comments on 21 February 2017. The Party concerned was invited to provide comments by 21 March 2017.

10. The Party concerned provided comments on 23 March 2017.

11. After taking into account the comments received, the Committee finalized its recommendations in closed session and adopted them through its electronic decision-making procedure on 18 June 2017. The Committee agreed that they should be published as a formal pre-session document to its fifty-eighth meeting (Budva, Montenegro, 10-13 September 2017) and requested the secretariat to send the recommendations to the Party concerned.

II. Summary of facts, evidence and issues⁵

A. Substantive issues

Article 2, paragraph 3 (a) – whether size of land parcel is “environmental information”

12. The Party concerned sought clarification of whether the size of a land parcel should be considered as within the scope of the term “state of elements of the environment” for the purposes of the definition of “environmental information” in article 2, paragraph 3 (a), of the Convention:

“A definition “state”⁶ is applicable to the lands in terms of the para. 3a) article 2 of the Aarhus Convention and means qualitative characteristics (for example, degree of degradation) or status of the lands, cadastral characteristics of the land parcels, their purpose of use, etc. Is the size of the land parcel environmental information?”⁷

⁵ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

⁶ The Russian language version of Belarus' statement uses the term «состояние» which is the same as found in article 2, paragraph 3(a) of the Convention, «состоянии». Therefore, for the purposes of the English language version of the present document, the corresponding term in the English language of the Convention i.e. “state” will be used, rather than the term used in the English translation of Belarus' statement, which was “condition”. The term “condition” is not found in article 2, paragraph 3(a) of the Convention.

⁷ Statement by Party concerned, question 1.

Article 4, paragraphs 1(a) and 3(b) – access to information without an interest having to be stated and refusals of unreasonable requests

13. The Party concerned asked to clarify the requirement in article 4, paragraph 1 (a), of the Convention to provide access to information “within an interest having to be stated” when article 4, paragraph 3 (b), entitled a request to be refused if it was unreasonable:

“According to para. 1a) article 4 of the Aarhus Convention each Party shall ensure that government agencies submit environmental information to the public “without an interest having to be stated”. However, according to para. 3b) of above mentioned article that a request for environmental information may be refused if this request is “unreasonable”.⁸

Annex I, paragraph 8(a) and article 6, paragraph 1(a) – public participation in decision-making on airport runways

14. The Party concerned sought clarification of the scope of the obligation to provide public participation in decision-making on airport runways in accordance with paragraph 8 (a), of Annex I and article 6, paragraph 1 (a), of the Convention:

“According to para. 1a) article 6 and List of Activities contained in the Annex I to Aarhus Convention the implementation of procedures for public participation in airports construction with a basic runway length of 2,100 m or more is obliged.

Questions:

Is it necessary to conduct procedures for public participation if it is planned to construct the second (not basic) runway with length of more than 2,100 m?

Is a length of runway specified in the Annex I taking into account in run and running-down zones or not?”⁹

Article 6, paragraph 6 (a) – meaning of “residues”

15. The Party concerned queried the meaning of the term “residues” referred to in article 6, paragraph 6 (a), of the Convention:

“What does it mean “residues” in the context of para. 6a) article 6 of the Aarhus Convention?”¹⁰

Article 6, paragraph 7 – right to submit comments orally

16. The Party concerned sought clarification of whether article 6, paragraph 7, of the Convention imposes an obligation on Parties to give the public a right to submit comments orally during a public hearing:

“According to para. 7 article 6 of the Aarhus Convention “Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or enquiry with applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity”. Does it mean that

⁸ Ibid., question 2.

⁹ Ibid., question 6.

¹⁰ Ibid., question 3.

government agency shall give public a right for verbally expression its opinion during public hearing?”¹¹

New (innovative) activities

17. The Party concerned asked to clarify the application of the provisions on public participation in decision-making in terms of new (innovative) activities:

“One issue is still remains unclear, how to apply provisions of the Aarhus Convention devoted to public participation in decision-making by concrete activities in terms of new (innovative) activities?”¹²

Article 8 – scope of obligation

18. The Party concerned asked to clarify the scope of the obligation in article 8 of the Convention:

“According to the definition which specified in the... Implementation Guide of the Aarhus Convention “The measurement of the extent to which Parties meet their obligations under article 8 is not based on results, but on efforts”. What does it mean “to take efforts”? If the Party “took efforts”, but nothing happened and a goal was not achieved, is it implementation of the Aarhus

Deliberate release into the environment – planting at proving ground

19. The Party concerned sought clarification of whether the planting of a genetically modified organism (GMO) at a proving ground would constitute an “intentional introduction into the environment” within the scope of the definition of “deliberate release into the environment” contained in Annex I, paragraph 2 (d) of the Lucca Guidelines on access to information, public participation and access to justice with respect to GMOs¹³:

“According to para. 2d) in the Annex I to the Guidelines on access to information, public participation and access to justice in GMOs matters it defines ‘Deliberate release’ is defined¹³ as any intentional introduction into the environment of a GMO or a combination of GMOs for which no specific containment measures are used to limit their contact with and to provide a high level of safety for the general population and the environment.

The proving ground which is used for GMO’s tests has a number of above mentioned control measures (barriers, security, security cameras, etc.).

Is a planting of GMO at the proving ground an intentional introduction of GMOs in the environment?”¹⁴

Domestic remedies

20. The Party concerned made a request according to article 13 (b) of the annex to decision I/7. The use of domestic remedies is not relevant to the Committee’s consideration of the Party concerned’s request.

¹¹ Ibid., question 7.

¹² Ibid. 1 July 2016, question 5.

¹³ Available at <http://www.unece.org/env/pp/gmos.html>

¹⁴ Ibid., question 4.

III. Consideration and evaluation by the Committee

21. The Aarhus Convention was signed by Belarus on 16 December 1998 and entered into force for Belarus on 30 October 2001, being the general date of the Convention's entry into force.

Article 2, paragraph 3 (a) – whether size of land parcel is “environmental information”

22. The Party concerned sought clarification of whether the size of a land parcel should be considered as within the scope of the term “state of elements of the environment” for the purposes of the definition of “environmental information” in article 2, paragraph 3 (a) of the Convention:

“A definition “state”¹⁵ is applicable to the lands in terms of the para. 3a) article 2 of the Aarhus Convention and means qualitative characteristics (for example, degree of degradation) or status of the lands, cadastral characteristics of the land parcels, their purpose of use, etc. Is the size of the land parcel environmental information?”¹⁶

23. In its draft response of 17 November 2015, the secretariat noted that:

Communication ACCC/C/2004/08 (Armenia) concerned requests for information concerning, inter alia:

– “the boundaries of Dalma Orchards, the category of land to which Dalma Orchards belonged, the administrative area the land was in, whether there were leases issued for the land on this territory (and, if so, their boundaries)...;”¹⁷

– “maps annexed to the decrees, and ... the location of land plots allocated by the decrees for particular activities”¹⁸

In its findings, the Aarhus Convention Compliance Committee found:

*“the information referred to ... above clearly falls under the definition of “environmental information” under article 2, paragraph 3.”*¹⁹

In the same paragraph of its findings, the Committee found that:

*“The issuing of government decrees on land use and planning constitutes “measures” within the meaning of article 2, paragraph 3 (b), of the Convention.”*²⁰

24. In its comments of 22 December 2015, the Party concerned stated that it was satisfied by the secretariat's above draft response.

25. Having considered the secretariat's draft response, and after taking into account the Party concerned's comments on the draft response, the Committee considers that the secretariat's draft response indeed addresses the Party concerned's question. The Committee accordingly recommends to the Party concerned that the size of a land parcel be understood to fall within the scope of the term “state of elements of the environment”

¹⁵ The Russian language version of Belarus' statement uses the term «состояние» which is the same as found in article 2, paragraph 3(a) of the Convention, «состоянии». Therefore, for the purposes of the English language version of the present document, the corresponding term in the English language of the Convention i.e. “state” will be used, rather than the term used in the English translation of Belarus' statement, which was “condition”. The term “condition” is not found in article 2, paragraph 3(a) of the Convention.

¹⁶ Statement by Party concerned, question 1.

¹⁷ ECE/MP.PP/C.1/2006/2/Add.1, para. 13(a).

¹⁸ ECE/MP.PP/C.1/2006/2/Add.1, para. 13(c).

¹⁹ ECE/MP.PP/C.1/2006/2/Add.1, para. 20.

²⁰ Ibid.

and therefore also of the definition of “environmental information” according to article 2, paragraph 3 (a), of the Convention.

Article 4, paragraphs 1(a) and 3(b) – access to information without an interest having to be stated and refusals of unreasonable requests

26. The Party concerned asked to clarify the requirement in article 4, paragraph 1 (a), of the Convention to provide access to information “without an interest having to be stated” when article 4, paragraph 3 (b), entitled a request to be refused if it was unreasonable:

“According to para. 1a) article 4 of the Aarhus Convention each Party shall ensure that government agencies submit environmental information to the public “without an interest having to be stated”. However, according to para. 3b) of above mentioned article that a request for environmental information may be refused if this request is “unreasonable”.²¹

27. In its draft response of 17 November 2015, the secretariat noted that:

The Implementation Guide explains that:

“Under the Convention, public authorities shall not impose any condition for supplying information that requires the applicant to state the reason he or she wants the information or how he or she intends to use it. Requests cannot be rejected because the applicant does not have an interest in the information. This follows the “any person” principle”.²²

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee found that:

“The public authorities, including the developer, did not address the request of the members of the public and, in some instances, requested that a specific purpose for the use of the information be stated. The Committee notes that the statement of a specific interest is not included in the grounds that may justify the refusal of the public authorities to provide access to information, which are listed in article 4, paragraphs 3 and 4, of the Convention. Besides, article 4, paragraph 1 (a), of the Convention specifically provides that the requested information shall be available “without an interest having to be stated”.²³

In its findings on communication ACCC/C/2004/1 (Kazakhstan), the Compliance Committee found that:

“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”.²⁴

With respect to when a request for environmental information may be refused on the basis of being “manifestly unreasonable”, the Implementation Guide states:

“Although the Convention does not give direct guidance on how to define “manifestly unreasonable”, it is clear that it must be more than just the

²¹ Ibid., question 2.

²² Implementation Guide, second edition, page 80.

²³ ECE/MP.PP/2011/11/Add.2, para 71.

²⁴ ECE/MP.PP/C.1/2005/2/Add.1, para 20.

volume and complexity of the information requested. Under article 4, paragraph 2, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request “manifestly unreasonable” as envisioned in paragraph 3 (b).”²⁵

To date, no findings of the Compliance Committee have directly addressed what would constitute a “manifestly unreasonable” request within the meaning of article 4, paragraph 3(b).

28. In its comments of 22 December 2015, the Party concerned stated that the above is clear to those who work with the Convention closely. However, local public authorities are guided by the text of the Convention only, which in one place says that it is not necessary to justify an interest, and in another, that it is possible to reject a request if it is manifestly unreasonable. The Party concerned proposed that at the earliest opportunity, the text of article 4, paragraph 3(b), of the Convention should be amended by either: (i) replacing the word "unreasonable" with another synonym, for example "бессмысленной" [without meaning] or "неразумной" [ill-advised]; or (ii) deleting the words "manifestly unreasonable". The Party concerned submitted that if one of these options is adopted, the matter could be considered solved.

29. Having considered the secretariat's draft response, and after taking into account the Party concerned's comments on the draft response, the Committee emphasises that whether or not a request is manifestly unreasonable relates to the nature of the request itself, for example, its volume, vagueness, complexity or repetitive nature, rather than the reason for the request, which is not required to be stated. The Committee accordingly recommends to the Party concerned that it inform its authorities that, when handling information requests within the scope of article 4 of the Convention, they are not permitted to require applicants to give a reason for their request.

30. In addition, recognizing the possible risk of confusion resulting from the use of the word “необоснованной” in the Russian language text of the Convention, and understanding that the words “manifestly unreasonable” can be expressed in Russian in several ways, the Committee recommends to the secretariat that it consult the UN Interpretation Service to seek its view on the most appropriate translation of “manifestly unreasonable” in the context of article 4 of the Convention (for example, “нецелесообразной”, “явно нерациональной” or “бессмысленной”) and to explore with the United Nations Treaty Office the possibility of undertaking a correction procedure to correct the word “необоснованной” in article 4, paragraph 3(b), of the Russian text of the Convention accordingly.

Annex I, paragraph 8(a) and article 6, paragraph 1(a) – public participation in decision-making on airport runways

31. The Party concerned sought clarification of the scope of the obligation to provide public participation in decision-making on airport runways in accordance with paragraph 8 (a) of Annex I and article 6, paragraph 1 (a), of the Convention:

“According to para. 1a) article 6 and List of Activities contained in the Annex I to Aarhus Convention the implementation of procedures for public participation in airports construction with a basic runway length of 2,100 m or more is obliged.

Questions:

²⁵ Implementation Guide, second edition, page 84.

Is it necessary to conduct procedures for public participation if it is planned to construct the second (not basic) runway with length of more than 2,100 m?

Is a length of runway specified in the Annex I taking into account in run and running-down zones²⁶ or not?”²⁷

32. In its draft response of 17 November 2015, the secretariat noted that:

With respect to whether it is necessary to conduct a public participation procedure if it is planned to construct a second runway (not basic) runway with a length of more than 2,100 metres, paragraph 22 of annex I to the Convention states that:

“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.”

As to whether the length of the runway specified in annex I includes the in-run and running-down zones, neither the Implementation Guide nor the Compliance Committee have to date addressed this point.

In accordance with footnote 2 of annex I, for the purposes of the Convention, “airport” means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (annex 14).

*Annex 14 to the Chicago Convention provides the following definitions:*²⁸

“Aerodrome”²⁹ is “a defined area on land or water (including any building, installations and equipment) intended to be used either wholly or in part for the arrival, departure and movement of aircraft”.

“Runway” is “a defined rectangular area, on a land aerodrome selected or prepared for the landing and take-off run of aircraft along its length.”

“Taxiway” is “a defined path, on a land aerodrome, selected or prepared for the use of taxiing aircraft.”

*In annex 14 to the Chicago Convention, the length of any taxiways is not included in basic runway length.*³⁰

33. In its comments of 22 December 2015, the Party concerned stated that it was satisfied by the secretariat’s draft response with respect to the first question, but sought further clarification regarding its second question as the secretariat’s draft response addressed “taxi-ways” only.

34. Having considered the secretariat’s draft response, and after taking into account the Party concerned’s comments on the draft response, the Committee considers that some further clarification is needed to fully address the Party concerned’s two questions.

35. With respect to the Party concerned’s first question, the Committee recommends to the Party concerned that if it is planned to construct a second runway with

²⁶ The terms “in run” and “running-down” zones are used in the English translation provided by Belarus. The Russian version of Belarus’ text could also be translated in English as “acceleration” and “braking”, as the terms that are more commonly used in practice.

²⁷ Ibid., question 6.

²⁸ Annex 14, Part I, Chapter 1.

²⁹ The term “aerodrome” rather than “airport” is used in Annex 14 to the Chicago Convention.

³⁰ Annex 14, Part III, Chapter 1.

a length of more than 2,100 metres, then in accordance with article 6, paragraph 1 (a), and paragraph 22 of annex I to the Convention, the provisions of article 6 shall be applied to the decision to permit that activity.

36. Regarding the Party concerned's second question, the Committee notes that the term "basic runway length" is not defined in the Convention. However, in accordance with article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. To this end, the Committee also recommends to the Party concerned that, while in accordance with annex 14 to the Chicago Convention, taxiways are not included in basic runway length, the ordinary meaning of the term "basic runway length" in paragraph 8(a) of annex I to the Convention be understood to include accelerating and braking zones.

Article 6, paragraph 6 (a) – meaning of "residues"

37. The Party concerned queried the meaning of the term "residues" referred to in article 6, paragraph 6 (a) of the Convention:

"What does it mean "residues" in the context of para. 6a) article 6 of the Aarhus Convention?"³¹

38. In its draft response of 17 November 2015, the secretariat noted that:

Article 6, paragraph 6 of the Convention states that "Each Party shall require the competent public authorities to give the public concerned access for examination...to all information relevant to the decision-making...that is available at the time of the public participation procedure.... The relevant information shall include at least, and without prejudice to the provisions of article 4:

(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)

With respect to residues, the Implementation Guide states:

"The description must include an estimate of the residues and emissions expected as a result of the proposed activity. This establishes a link between these physical and technical characteristics and the potential environmental impact of the proposed activity".³²

To date, no findings of the Compliance Committee have directly addressed what constitutes "residues" for the purposes of article 6, paragraph 6(a).

39. In its comments of 22 December 2015, the Party concerned stated that it was not satisfied by the secretariat's draft response.

40. In its comments of 23 March 2017, the Party concerned asked whether the term "residues" should be understood as referring to the following categories: raw materials not having been used in the production process; secondary raw materials generated in the production process; and unsold end products.

41. Having considered the secretariat's draft response, and after taking into account the Party concerned's comments above, the Committee considers that further clarification

³¹ Ibid., question 3.

³² Implementation Guide, second edition, page 151.

of the term “residues” is required to address the Party concerned’s question. In accordance with article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Committee considers that the ordinary meaning of residues is “a small amount of something that remains after the main part has gone or been taken or used”.³³ Regarding the Party concerned’s question of 23 March 2017, the Committee considers that, in the context of article 6, paragraph 6(a) residues may include, but are by no means limited to, raw materials not having been used in the production process; secondary raw materials generated in the production process; and, in some cases, unsold end products. In this regard, the Committee emphasises that “residues” are not limited to substances or objects that have economic value. The Committee also points out that the estimate of the expected residues of the proposed activity should be made on a case-by-case basis, taking into account the nature of the specific activity proposed and the environment in which it will be undertaken.

42. In light of the foregoing, the Committee considers that the ordinary meaning of residues as stated above fits with the context of article 6, paragraph 6(a), and with the object and purpose of the Convention. The Committee accordingly recommends to the Party concerned that, for the purpose of article 6, paragraph 6(a), of the Convention, “expected residues” is understood to be “that which is expected to be left behind as a result of the proposed activity being undertaken.”

Article 6, paragraph 7 – right to submit comments orally

43. The Party concerned sought clarification of whether article 6, paragraph 7, of the Convention imposes an obligation on Parties to give the public a right to submit comments orally during a public hearing:

“According to para. 7 article 6 of the Aarhus Convention “Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or enquiry with applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity”. Does it mean that government agency shall give public a right for verbally expression its opinion during public hearing?”³⁴

44. In its draft response of 17 November 2015, the secretariat noted that:

In its findings to communications ACCC/C/2010/45 and ACCC/C/2011/60 (the United Kingdom of Great Britain and Northern Ireland), the Compliance Committee found that:

“Nevertheless, the Committee notes that article 6, paragraph 7, of the Convention gives any member of the public the right to submit comments, information, analyses or opinions during public participation procedures, either in writing or, as appropriate, orally at a public hearing or inquiry with the applicant. The fact that some local authorities only provide for participation of members of the public at planning meetings via written submissions, as stressed in communication ACCC/C/2011/60, is not as such in non-compliance with article 6, paragraph 7, of the Convention.”³⁵

With respect to when a public hearing or enquiry may be appropriate, the Maastricht Recommendations recommend that:

“With respect to the selection of the most appropriate tools and techniques for public participation, experience has shown that:

³³ Oxford Dictionary online, last accessed 20 June 2016.

³⁴ Ibid., question 7.

³⁵ ECE/MP.PP/C.1/2013/12, para 78.

(a) For activities subject to the Convention of high potential environmental significance or affecting a large number of people, more elaborate procedures may be appropriate to ensure effective public participation. For example, in addition to opportunities for the public to submit written comments, public inquiries or hearings (more formal, including submission of formal evidence and the possibility for cross-examination in many countries) or public debates or meetings (less formal, possibly with facilitated group processes), may be appropriate;

*(b) For activities subject to the Convention with less significant environmental effects, access to all relevant information and the opportunity to submit written comments and to have due account taken of them may sometimes be sufficient. Nevertheless, the public authority should have the power to organize a hearing in any case it considers it appropriate to do so, including upon request from the public”.*³⁶

45. In its comments of 22 December 2015, the Party concerned stated that it was satisfied by the secretariat’s above draft response.

46. Having considered the secretariat’s draft response, and after taking into account the Party concerned’s comments on the draft response, the Committee notes with approval paragraph 11 of the Maastricht Recommendations as cited above. According to the wording of article 6, paragraph 7, of the Convention, and subject to the requirements of national law, it may not be necessary to hold a public hearing in every decision-making procedure within the scope of article 6. The Committee however recommends to the Party concerned that its public authorities select the appropriate tools and techniques that will ensure, bearing in mind the nature of the proposed activity, that the public concerned can participate effectively, including a public hearing where one would be appropriate to achieve this end. In accordance with article 6, paragraph 8, of the Convention, authorities must in all cases ensure that due account can be taken of the outcome of the public participation. In keeping with this, the Committee recommends to the Party concerned that when a public hearing is held, the public should be able to submit their comments, information and so forth orally during the hearing, in addition to having the opportunity to submit written comments.

New (innovative) activities

47. The Party concerned asked to clarify the application of the provisions on public participation in decision-making in terms of new (innovative) activities:

“One issue is still remains unclear, how to apply provisions of the Aarhus Convention devoted to public participation in decision-making by concrete activities in terms of new (innovative) activities?”³⁷

48. In its draft response of 17 November 2015, the secretariat noted that:

The Convention’s exact requirements for public participation in decision-making on a new (innovative) activity will depend on the type of decision under consideration. For example, whether the decision in question is a draft policy (see article 7), a draft plan or programme (see article 7), a draft executive regulation or legally binding rule (see article 8), or a decision to permit a specific activity (see article 6).

With respect to a decision to permit a specific new (innovative) activity, paragraph 20 of annex I requires the provisions of article 6 to be applied to:

³⁶ Maastricht Recommendations, ECE/MP.PP/2014/2/Add.2, para. 11.

³⁷ Ibid.1 July 2016, question 5.

“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.”

In addition, article 6, paragraph 1(b), of the Convention stipulates that each Party:

“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;”

With respect to the implementation of article 6, paragraph 1 (b), the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations), states that:

“Article 6, paragraph 1 (b), of the Convention requires a mechanism to be established within the national legal framework to determine whether a decision on a proposed activity which is not listed in annex I may yet have a significant effect on the environment and thus require public participation in accordance with the requirements of article 6. The mechanism for such a determination may be related to the system of EIA or may be independent from it, or a mixture of both approaches may be applied.”³⁸

Finally, if the innovative activity is being undertaken exclusively or mainly for research, development or testing, paragraph 21 of annex I of the Convention provides that:

“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.”

In relation to paragraph 21 of annex I of the Convention, the Implementation Guide states:

“With respect to paragraph 21 of annex I, under very special circumstances the authorities may avoid public participation if their decision concerns activities listed in annex I that are performed within various kinds of research. Research must be the primary goal of the activity and the period of the project may not exceed two years. If the research project may cause a significant adverse effect on the environment or health, article 6 automatically applies.”³⁹

49. In its comments of 22 December 2015, the Party concerned queried whether it was correct to understand that the appropriate additions should be made in the national legislation.

50. Having considered the secretariat’s draft response, and after taking into account the Party concerned’s comments on the draft response, the Committee considers that the secretariat’s draft response addresses the Party concerned’s original question. In the light of the Party concerned’s query as to whether it was correct to understand that appropriate additions should be made to its national legislation, the Committee recommends to the Party concerned that it review its legal framework in order to ascertain whether the current

³⁸ Maastricht Recommendations, para. 43.

³⁹ Implementation Guide, second edition, page 240.

framework provides a mechanism to determine whether a decision on a proposed activity which is not listed in annex I may yet have a significant effect on the environment and thus require public participation in accordance with the requirements of article 6. If the Party concerned's current legal framework does not include such a mechanism, then the Committee recommends that the Party concerned consider the introduction of such a mechanism.

Article 8 – scope of obligation

51. The Party concerned asked to clarify the scope of the obligations in article 8 of the Convention:

“According to the definition which specified in the... Implementation Guide of the Aarhus Convention “The measurement of the extent to which Parties meet their obligations under article 8 is not based on results, but on efforts”. What does it mean “to take efforts”? If the Party “took efforts”, but nothing happened and a goal was not achieved, is it implementation of the Aarhus Convention?”⁴⁰

52. In its draft response of 17 November 2015, the secretariat noted that:

Article 8 of the Aarhus Convention states that “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.”

Article 8 then sets out a list of steps that should be taken, namely:

- “(a) Time-frames sufficient for effective public 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.*

Lastly, article 8 requires that “the results of the public participation shall be taken into account as far as possible”.

With respect to the three steps set out in paragraphs (a)-(c) of article 8, the Implementation Guide explains:

The Convention sets forth a minimum of three elements that should be implemented in order to meet the obligation to promote effective public participation in the preparation of executive regulations and other generally applicable legally binding rules. These elements establish a basic procedural framework for public participation, including time frames, access to information and opportunity for commenting.

With respect to the final sentence of article 8, requiring the result of the public participation to be taken into account as far as possible, the Implementation Guide states:

While the specific modalities of public participation in the preparation of rules are not prescribed by the Convention, it is mandatory for the Parties to ensure that the outcome of public participation is taken into account as far as possible. As discussed above under article 6, paragraph 8, this provision establishes a

⁴⁰ Ibid., question 8.

*relatively high burden of proof for public authorities to demonstrate that they have taken into account public comments in processes under article 8.*⁴¹

In its findings on communication ACCC/C/2010/53 (United Kingdom), the Compliance Committee found that:

*“The Convention prescribes the modalities of public participation in the preparation of legally binding normative instruments of general application in a general manner, pointing to some of the basic principles and minimum requirements on public participation enshrined by the Convention (i.e., effective public participation at an early stage, when all options are open; publication of a draft early enough; sufficient timeframes for the public to consult a draft and comment). Parties are then left with some discretion as to the specificities of how public participation should be organized.”*⁴²

In the same findings, the Committee found:

*“The Committee also examines whether the result of public participation was taken into account as far as possible. This is mandatory under article 8 and in practice it means that the final version of the normative instrument ... should be accompanied by an explanation of the public participation process and how the results of the public participation were taken into account.”*⁴³

53. In its comments of 22 December 2015, the Party concerned stated that it was satisfied by the secretariat’s draft response.

54. Having considered the secretariat’s draft response, and after taking into account the Party concerned’s comments on the draft response, the Committee considers that the above cited excerpt from page 185 of the Implementation Guide and paragraph 86 of the Committee findings on communication ACCC/C/2010/53 are particularly relevant to the Party concerned’s question. The Committee recommends to the Party concerned that, bearing in mind that:

- article 8, paragraphs (a)-(c) of the Convention set forth a minimum of three elements that should be implemented in order to meet the obligation to promote effective public participation; and
- the final sentence of article 8 requires Parties to ensure that the outcome of public participation is taken into account as far as possible;

the final version of a normative instrument be in practice accompanied by an explanation of the public participation process and how the results of the public participation were taken into account.

Deliberate release into the environment – planting at proving ground

55. The Party concerned sought clarification of whether the planting of a genetically modified organism (GMO) at a proving ground would constitute an “intentional introduction into the environment” within the scope of the definition of “deliberate release into the environment” contained in Annex I, paragraph 2 (d), of the Lucca Guidelines on access to information, public participation and access to justice with respect to GMOs⁴⁴:

“According to para. 2d) in the Annex I to the Guidelines on access to information, public participation and access to justice in GMOs matters it defines ‘Deliberate release’ is defined as any intentional introduction into the environment of a GMO or a combination of GMOs for which no specific

⁴¹ Implementation Guide, second edition, page 185.

⁴² ECE/MP.PP/C.1/2013/3, para 84.

⁴³ ECE/MP.PP/C.1/2013/3, para 86.

⁴⁴ Available at <http://www.unece.org/env/pp/gmos.html>

containment measures are used to limit their contact with and to provide a high level of safety for the general population and the environment.

The proving ground which is used for GMO's tests has a number of above mentioned control measures (barriers, security, security cameras, etc.).

Is a planting of GMO at the proving ground an intentional introduction of GMOs in the environment?"⁴⁵

56. In its draft response of 17 November 2015, the secretariat noted that:

The preamble of the 2002 Lucca Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms recognizes that "the deliberate release of GMOs into the environment and the accidental release of GMOs from certain types of contained use may have significant adverse effects on the environment, and pose risks to human health".⁴⁶ Annex I to the Lucca Guidelines states that:

"Deliberate release is defined as any intentional introduction into the environment of a GMO or a combination of GMOs for which no specific containment measures are used to limit their contact with and to provide a high level of safety for the general population and the environment."⁴⁷

In contrast, annex I to the Lucca Guidelines states that.

"Contained use means any activity, undertaken within a facility, installation or other physical structure, which involves genetically modified organisms that are controlled by specific measures that effectively limit their contact with, and their impact on, the external environment."⁴⁸

To date, no findings of the Compliance Committee have directly considered the "deliberate release" or "contained use" of GMOs.

57. In its comments of 22 December 2015, the Party concerned clarified that in accordance with its national law, the test site where the GMO plants are planted is fenced, equipped with video-cameras and protection guards, i.e. measures that limit contact with the environment and humans. However, plant seeds could be transported outside the polygon by insects or small animals. Hence, there is still the possibility of contact with the environment.

58. Having considered the secretariat's draft response, and after taking into account the Party concerned's comments on the draft response and the definitions of "deliberate release" and "contained use" in Annex I of the Lucca Guidelines, the Committee recommends to the Party concerned that the planting of GMOs at a testing site be understood to constitute a "deliberate release into the environment" within the meaning of paragraph 2(d) of Annex I to the Lucca Guidelines.

IV. Conclusions and recommendations

59. Having considered the above, the Committee adopts the recommendations set out in the following paragraphs. The Committee recommends to the Party concerned that:

a) The size of a land parcel be understood to fall within the scope of the term "state of elements of the environment" and therefore also of the definition

⁴⁵ Ibid., question 4.

⁴⁶ MP.PP/2003/3 KIEV.CONF/2003/INF/7, second preambular paragraph.

⁴⁷ MP.PP/2003/3 KIEV.CONF/2003/INF/7, para 2 (d) of the Annex I.

⁴⁸ MP.PP/2003/3 KIEV.CONF/2003/INF/7, para 2 (f) of the Annex I.

of “environmental information” according to article 2, paragraph 3 (a), of the Convention.

b) It inform its authorities that, when handling information requests within the scope of article 4 of the Convention, they are not permitted to require applicants to give a reason for their request.

c) If it is planned to construct a second runway with a length of more than 2,100 metres, then in accordance with article 6, paragraph 1 (a), and paragraph 22 of annex I to the Convention, the provisions of article 6 shall be applied to the decision to permit that activity.

d) The term “basic runway length” in paragraph 8(a) of annex I to the Convention be understood to include accelerating and braking zones.

e) For the purpose of article 6, paragraph 6(a), of the Convention “expected residues” is understood to be “that which is expected to be left behind as a result of the proposed activity being undertaken.”

f) Its public authorities select the appropriate tools and techniques that will ensure, bearing in mind the nature of the proposed activity, that the public concerned can participate effectively, including a public hearing where one would be appropriate to achieve this end. In accordance with article 6, paragraph 8, of the Convention, authorities must in all cases ensure that due account can be taken of the outcome of the public participation. In keeping with this, when a public hearing is held, the public should be able to submit their comments, information and so forth orally during the hearing, in addition to having the opportunity to submit written comments.

g) It review its legal framework in order to ascertain whether the current framework provides a mechanism to determine whether a decision on a proposed activity which is not listed in annex I may yet have a significant effect on the environment and thus require public participation in accordance with the requirements of article 6. If the Party concerned’s current legal framework does not include such a mechanism, then the Committee recommends that the Party concerned consider the introduction of such a mechanism.

h) Bearing in mind that:

- article 8, paragraphs (a)-(c), of the Convention set forth a minimum of three elements that should be implemented in order to meet the obligation to promote effective public participation; and
- the final sentence of article 8 of the Convention requires Parties to ensure that the outcome of public participation is taken into account as far as possible;

the final version of a normative instrument be in practice accompanied by an explanation of the public participation process and how the results of the public participation were taken into account.

i) the planting of GMOs at a testing site be understood to constitute a “deliberate release into the environment” within the meaning of paragraph 2(d) of Annex I to the Lucca Guidelines.

60. In addition, the Committee recommends to the secretariat that it consult the UN Interpretation Service to seek its view on the most appropriate translation of “manifestly unreasonable” in the context of article 4 of the Convention (for example, “нецелесообразной”, “явно нерациональной” or “бессмысленной”) and to explore with the United Nations Treaty Office the possibility of undertaking a correction procedure to correct the word “необоснованной” in article 4, paragraph 3(b), of the Russian text of the Convention accordingly.

