



**Economic and Social
Council**

Distr.
GENERAL

MP.PP/C.1/2004/6
26 November 2004

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

Compliance Committee

REPORT ON THE FIFTH MEETING

1. The fifth meeting of the Compliance Committee took place in Geneva on 23-24 September 2004. All members of the Committee were present. Representatives of the non-governmental organizations Earthjustice and Center for International Environmental Law participated as observers.
2. The meeting was opened by the Chairman, Mr. Veit Koester.

I. ADOPTION OF THE AGENDA

3. The Committee adopted its agenda as set out in document MP.PP/C.1/2004/5, adding a number of topics for discussion under agenda item 9 (modus operandi).

**II. RELEVANT DEVELOPMENTS
SINCE THE PREVIOUS MEETING OF THE COMMITTEE**

4. The Chairman and the secretariat informed the Committee about the work carried out by the Legal Board under the Protocol on Water and Health. The Board has been entrusted, among other things, with developing a draft decision on review of compliance under the Protocol for possible adoption by the Meeting of the Parties. The draft (MP.WAT/WG.4/2004/7) would be presented to the Working Group on Water and Health at its meeting on 9-10 December 2004.

5. The Committee noted the importance of building synergies with processes addressing compliance issues, such as that under the Protocol, and proposed to revisit the point at a future meeting.

6. Ms. Kravchenko informed the Committee about the upcoming meetings under the Economic and Social Commission for Latin America and the Caribbean in October 2004 and the meeting of the Commission on Environmental Law of the World Conservation Union (IUCN) in Bangkok that were relevant to the Convention.

III. OTHER MATTERS ARISING FROM THE PREVIOUS MEETING

7. The secretariat presented a compilation of the materials related to the Committee's *modus operandi*. The Committee agreed that the compilation should be placed on the web site and, when necessary, updated. The Committee further agreed that, once the main aspects of the *modus operandi* had been developed, it should be made available in the three UNECE working languages in time for the second meeting of the Parties. It also agreed to explore the possibility of producing a publication on the compliance mechanism following the second meeting of the Parties. The Committee agreed to revisit these matters at its next meeting.

IV. SUBMISSIONS BY PARTIES CONCERNING OTHER PARTIES

8. The Committee had received a submission from the Government of Romania concerning compliance by the Government of Ukraine with its obligations under article 6, paragraph 2 (e), of the Convention (ACCC/S/2004/01). The submission, made on 7 June 2004, alleged violation by Ukraine of that provision through its failure, in the opinion of the submitting Party, to ensure that the public affected by the Bystroe Canal project in the Danube Delta was informed early in the decision-making procedure that the project was subject to a national and transboundary environmental impact assessment procedure. The submission had been forwarded to the Government of Ukraine on 17 June 2004 and at the same time copied to the Committee. The secretariat had received a letter from the Agency for Protected Areas of Ukraine on 23 September 2004 indicating that the Party would require more time than the initial three-month period to respond.

9. The Committee noted that this submission was closely related to the communication ACCC/C/2004/03, made by the Ukrainian NGO Ecopravo-Lviv on 5 May 2004, and agreed to consider the issues side by side.

10. Mr. Wiecher Schrage, Secretary of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, presented information on a submission made by the Government of Romania to the Convention's Implementation Committee about an alleged breach by Ukraine of its obligations under the Espoo Convention in the case of the Bystroe Canal. Consideration of the submission had later been suspended because Romania had initiated an inquiry procedure under the Espoo Convention. The procedure aimed at determining whether the activity was likely to have a significant transboundary environmental impact.

11. The Compliance Committee agreed that it would consider the question of compliance with the part of article 6, paragraph 2 (e), relating to environmental impact assessment in a transboundary

context in the light of the findings of the inquiry procedure being undertaken under the Espoo Convention because the findings of this procedure might provide useful guidance to the Compliance Committee on the issue of alleged transboundary effects. The outcome of the inquiry was not expected until some time next year. The Committee would, however, proceed to consider the question of compliance with the part of article 6, paragraph 2 (e), relating to national environmental impact assessment procedures at its sixth meeting. It requested the secretariat to notify the Parties concerned of this and of their right to participate in accordance with chapter IX of the annex to decision I/7.

12. The secretariat informed the Committee about an informal international ad hoc consultation that had taken place on 21 September 2004 at the initiative of the Government of Romania. A number of experts from international organizations and secretariats of multilateral environmental agreements as well as representatives of the Governments of Ukraine and Romania had participated. The representative of the European Commission had informed the participants about the proposed EU-led mission on 6-8 October 2004 to further investigate the matter. The secretariat had subsequently been invited to join the mission. The Committee took note of this information and emphasized that participation of the secretariat in the mission should not be viewed as information gathering in the sense of paragraph 25 of the annex to decision I/7.

V. SUBMISSIONS BY PARTIES CONCERNING THEIR OWN COMPLIANCE

13. The secretariat informed the Committee that no submissions had been made by Parties concerning their own compliance.

VI. REFERRALS BY THE SECRETARIAT

14. The secretariat reported that it had not received any reply from the Government of Turkmenistan in response to its letter of 15 March 2004 concerning the new Turkmen Law on Public Associations. According to decision I/7, a response should have been provided within three months or at the latest within six months, i.e. by 15 September 2004.

15. The Committee took note of this information. However, it decided to take up the matter when dealing with communication ACCC/C/2004/05, which covered the same topic, rather than pursuing it on the basis of a referral by the secretariat.

VII. COMMUNICATIONS FROM MEMBERS OF THE PUBLIC

16. Four new communications had been received since the previous meeting.

17. As regards the first five communications received in advance of the previous meeting, no responses had yet been received from the Parties concerned. The deadline for responses was in all five cases 17 October 2004. The Committee therefore agreed not to enter into discussions on the substance of these communications until its next meeting. It did, however, decide that the substance

of the communications would be considered at that meeting and requested the secretariat to notify the Parties concerned and the communicants of this and of their right to participate in accordance with chapter IX of the annex to decision I/7.

18. With regard to communication ACCC/C/2004/04, the communicant had recently provided further supporting information, which was circulated to the Committee and would be forwarded to the Party concerned. The Committee agreed that it would not be necessary to raise any additional points with the Party concerned when forwarding the additional information. It did, however, consider that some further contextual information on the Hungarian system of environmental regulation could facilitate its review of the matter. It therefore mandated the secretariat to contact the communicant with a request for such information and to copy the Party concerned on the correspondence.

19. Of the four new communications submitted to the Committee by members of the public pursuant to chapter VI of the annex to decision I/7, two had reached the secretariat only during the week before the meeting and the other two since the beginning of the month.

20. Communication ACCC/C/2004/06 submitted by Mr. and Mrs. Gatin and Ms. Konyshkova concerned compliance by Kazakhstan with the provisions of article 9, paragraphs 3 and 4, of the Convention. The communicants alleged that their rights under article 9, paragraph 3, to have access to administrative or judicial procedures were violated when a court repeatedly rejected consideration of the part of a lawsuit related to the alleged failure by the public authorities to act. The communicants further claimed that postponement of the lawsuit without sufficient reason, resumed consideration of the case in violation of the civil procedure code without notifying the plaintiffs of the hearing and failure to supply the plaintiffs with the decision taken in their absence were in breach of the requirements of article 9, paragraph 4, of the Convention.

21. Communication ACCC/C/2004/07 submitted by Mr. Zawyslak concerned compliance by Poland with the provisions of articles 3 and 9 of the Convention in a matter concerning enforcement of environmental legislation in connection with a toxic waste storage site.

22. Communication ACCC/C/2004/08 submitted by the Center for Regional Development/ Transparency International Armenia concerned compliance by Armenia with the provisions of articles 4, paragraphs 1 and 2, article 6, paragraphs 1 to 5 and 7 to 9, article 7, and article 9, paragraph 2, of the Convention. The communicants alleged failure by the public authorities to provide information and to ensure opportunities for public participation in decision-making processes related to urban planning and zoning as well as in procedures related to tendering.

23. Communication ACCC/C/2004/09 submitted by the NGO Investigative Journalists (Armenia) alleged breach by Armenia of its obligations under articles 1, 4 and 5 in conjunction with article 2, paragraph 3 and article 3 of the Convention in a matter related to provision upon request of information on siting permits.

24. In accordance with its procedures, the Committee agreed upon the following distribution of the communications to the special rapporteurs:

- ACCC/C/2004/06: Mr. Merab Barbakadze;
- ACCC/C/2004/07: Mr. Sándor Fülöp;

- ACCC/C/2004/08: Ms. Elizabeth France and Mr. Laurent Mermet;
 - ACCC/C/2004/09: Ms. Elizabeth France and Mr. Laurent Mermet.
25. The Committee discussed each of the cases in turn, addressing the following points:
- Whether the information contained in the data sheet was accurate or needed modifying;
 - Whether, on preliminary examination, the communication appeared to fulfil the admissibility criteria; and
 - Which points should be raised with the Party concerned.
26. The Committee determined on a preliminary basis that communications ACCC/C/2004/06 and ACCC/C/2004/08 were admissible but did not at this stage draw any conclusions on the compliance issues raised in them. The Committee also agreed on a set of issues to be raised with each Party when forwarding the communications.
27. The Committee determined on a preliminary basis that communication ACCC/C/2004/07 was inadmissible. In its view, to determine otherwise would set a precedent for the Convention's compliance mechanism being used to review cases of unsuccessful environmental litigation, which was clearly not its purpose. It did however agree to offer the communicant the opportunity to provide additional information clearly indicating the relevance of the matter to the Convention, in which case it would consider the communication further. If no such information were provided or if, following the provision of further information, the Committee remained unconvinced, the determination of inadmissibility would be confirmed by default at its next meeting.
28. With regard to communication ACCC/C/2004/09, although the Committee considered that the criteria of paragraph 20 of the annex to decision I/7 were met, it decided to exercise the discretion given to it under paragraph 21 of the annex to decision I/7 not to consider the communication further, as the matter has just been submitted for review by the domestic court of appeals. It noted, however, that if in the future the communicant still wished to bring the matter before the Committee due to the outcome or length of the review procedure, the communicant could ask for the file to be reopened.

VIII. OTHER INFORMATION RECEIVED BY THE COMMITTEE RELEVANT TO POSSIBLE CASES OF NON-COMPLIANCE

29. The Committee had received no additional information relevant to possible cases of non-compliance.

IX. MODUS OPERANDI

30. The Committee discussed some additional issues related to its modus operandi, including the procedures for bringing submissions to its attention; procedures for dealing with requests for information regarding details of communications, submissions and referrals, and otherwise making these publicly available; procedures for processing submissions, communications and referrals; participation by the Committee members or the secretariat in meetings related to matters being reviewed by the Committee; and allocation of financial support for participation of Committee members in meetings of subsidiary bodies.

Procedure for forwarding submissions

31. The Committee agreed that when forwarding a submission by a Party about another Party to the Party concerned, the secretariat would send to the members of the Committee copies of the submission and the covering letter to the Party concerned. The Committee further agreed that for the purposes of paragraph 26 of the annex to decision I/7, such information should be considered as held by the Committee once it had been forwarded to it.

Availability of documentation

32. In order to further facilitate public access to information related to compliance issues, the Committee agreed that communications which had, on a preliminary basis, been determined to be admissible should be posted on the web site after they had been forwarded to the Parties concerned, indicating that their presence on the web site did not imply endorsement of the content by the Committee or by UNECE. Communications determined to be inadmissible would not be put on the web site but would be available from the secretariat upon request.

33. The Committee discussed whether communications should be forwarded to the Party concerned, or whether the Party concerned should be notified that a communication had been received, at the same time as the communication was forwarded to the Committee and before its admissibility had been considered. The Committee considered, in particular, that while such a step might not be necessary when a communication was submitted shortly prior to its meeting, there might be a stronger case for doing so when a certain delay in consideration of admissibility could be foreseen (for example, due to additional time needed for translation). On the other hand, to do so might generate unnecessary concern, especially in cases where the communication was subsequently determined by the Committee to be inadmissible.

34. The Committee decided for the time being to keep the existing procedure of forwarding communications to the Parties concerned only following a preliminary determination on admissibility. However, taking into account the non-confrontational character of the mechanism, communicants could be encouraged to forward the communications to the government at the same time as submitting them to the Committee. It asked the secretariat to reflect this in the information paper on communications available from the Committee's web site.

Procedures for discussing submissions, referrals and communications and preparing and adopting findings, measures and recommendations

35. Having discussed the initial steps in processing communications at its previous meeting, the Committee proceeded to discuss the subsequent steps leading up to the preparation and adoption of findings, measures and recommendations on submissions, referrals and communications. It agreed upon the procedures set out in the paragraphs 36 to 48 below.

36. When the Committee has received the response to a submission,¹ communication or referral from the Party concerned, or, if no response is received, when the final deadline for receiving such a response has passed, it should:

- (a) Consider whether sufficient information is available for it to be able to consider the substance of the case, and if not, identify what further information is needed;
- (b) If sufficient information is available, start the formal discussion on the substance of the case in open session, as referred to in paragraph 32 of the annex to decision I/7;
- (c) If the discussion is completed, prepare draft findings, measures and recommendations in closed session, as referred to in paragraph 33 of the annex to decision I/7; and
- (d) Finalize and adopt the findings, measures and recommendations taking account of any comments received from the Parties concerned and/or the communicant.

37. As a general rule, the Committee should aim to start the formal discussion on a particular submission, referral or communication at the first meeting that takes place more than two weeks following either the receipt of a response to the submission, referral or communication from the Party concerned or the applicable deadline (the six-month deadline in the case of submissions and referrals) if no response has been received by then.

38. In general, the Committee should not begin the formal discussion on a particular submission, referral or communication at any meeting that takes place before a response has been received from the Party concerned or the applicable deadline for responding has passed.

39. When it is known that the Committee will discuss the substance of any submission, referral or communication at a particular meeting, the secretariat should notify the Party concerned, and, as appropriate, the submitting Party and/or the communicant, that the matter will be discussed and of their right to participate in the discussion in accordance with paragraph 32 of the annex to decision I/7. The secretariat, having consulted with the Committee, may also indicate to the Party concerned and, as appropriate, the submitting Party and/or the communicant the likelihood that the Committee will enter into an in-depth discussion on the case in question. The discussion could be preceded by a formal hearing, meaning that the Party concerned and, as appropriate, the submitting Party and/or the communicant would not just be notified but would be invited to come and present information and opinions on the matters under consideration, with a greater likelihood of financial support being provided to enable communicants and eligible government representatives to participate.

40. The discussion of any submission, referral or communication should generally take the following form:

- (a) Introduction by the Chair and opening of the discussion (by the Chair or the special rapporteur for the case if one has been appointed);
- (b) Presentations by the submitting Party, secretariat (if a referral) or communicant, and by the Party concerned, including possible joint proposals;

- (c) Questions from the Committee, responses from the Party concerned and, as appropriate, the submitting Party, the secretariat and/or the communicant;
- (d) Comments from observers at the invitation of the Chair;
- (e) Final comments by the submitting Party, secretariat (if a referral) or communicant;
- (f) Final comments by the Party concerned.

41. The discussion phase may be concluded in a single meeting, or may continue over two or more meetings, e.g. if further information needs to be gathered. When the Committee considers that it has a sufficiently complete picture of the situation, it should move to the preparation of draft findings, measures or recommendations without delay. The conclusion of the discussion and the preparation of draft findings, measures or recommendations should generally happen at the same meeting.

42. Having regard to paragraph 33 of the annex to decision I/7 and earlier decisions of the Committee (MP.PP.C.1/2003/2, para. 17), the Committee should prepare draft findings, measures or recommendations in closed session. It should start by considering and drawing appropriate conclusions as to whether or not the Party concerned is in compliance. It may distinguish at this point between failure to establish the necessary implementing measures and failure to apply such measures.

43. If the Committee provisionally finds that the Party in question is not in compliance, it should then consider and agree upon possible measures or recommendations. 'Measures' in the sense of paragraphs 33 and 34 of the annex to decision I/7 are understood to refer to measures which the Committee is entitled to take in accordance with paragraph 36 of the annex to decision I/7, pending consideration by the Meeting of the Parties (which may include recommendations to the Party concerned). 'Recommendations' are understood to refer to recommendations to the Meeting of the Parties (which may include recommendations to take one or more of the measures listed in paragraph 37 of the annex to decision I/7). In this regard, paragraphs 36 and 37 should not be interpreted as requiring a specific sequence in which these measures could be recommended or undertaken.

44. If the Committee wishes to take interim measures pending consideration by the Meeting of the Parties, it should consult with or, as appropriate, seek the agreement of the Party concerned. If a significant amount of time remains before the next meeting of the Parties (e.g. one or two years), the Committee might be expected to propose such interim measures with a view to providing an opportunity for the Party concerned to address the problems identified. If only a few months remain before the next meeting of the Parties, the Committee is more likely to prepare recommendations for the Meeting of the Parties than to propose interim measures.

45. Once prepared, the draft findings, draft measures and/or draft recommendations should be transmitted to the Party concerned and, as appropriate, the submitting Party and/or the communicant with an invitation to them to comment within a reasonable deadline. If necessary to help the Party concerned, the submitting Party or the communicant, the secretariat may arrange for the draft to be translated into another UNECE language.

46. At its next meeting following the deadline for comments, the Committee should review and finalize the draft findings, draft measures and/or draft recommendations. The final version should be prepared as an addendum to the report of the meeting (i.e. as an official document available in the

three UNECE languages), and transmitted to the Party concerned, the submitting Party or the communicant.

47. If, at the time of preparing its report to the Meeting of the Parties, the issue which was the subject of the submission, referral or communication that prompted the Committee to adopt findings and take measures under paragraph 36 of the annex to decision I/7 remains unresolved, the Committee will reformulate the earlier findings and measures as a recommendation to the Meeting of the Parties, which will be included as an addendum to its report to the Meeting of the Parties.

48. Further information may need to be gathered at any stage in the process, including in the period before the Party concerned has responded. Such information may include specific facts, contextual information, arguments of members of the public or the Parties concerned and advice to the Committee. In order to avoid last-minute provision of information by the Party concerned and, as appropriate, the submitting Party and/or the communicant in the discussion phase, the Committee may impose a deadline by which information that is to be considered at a particular meeting must be supplied.

Other issues

49. The possibility that members of the Committee might receive requests for information about submissions, referrals and communications under consideration was raised. The Committee considered that while its members were at liberty to deal with such requests, channelling them via the secretariat would ensure more up-to-date and complete information and was therefore advisable.

50. The relationship between the procedure of information gathering and any meetings that the secretariat or members of the Committee might have with a communicant or a Party concerned was discussed. It was emphasized that, unless it was specifically mandated by the Committee to collect information, meetings of the secretariat or members of the Committee with the parties concerned did not constitute information gathering for the purpose of paragraph 25 of the annex to decision I/7. The appropriate way for the parties concerned to submit any information for consideration would be to address it formally to the Committee, through the secretariat.

51. In accordance with the decision taken at its third meeting (MP.PP/C.1/2004/2, para. 39), the Committee discussed the issue of prioritizing participation of its members in meetings of subsidiary bodies under the Convention and other relevant meetings. In particular, it considered allocation of financial support for such purposes. It agreed that the secretariat should decide on such matters on an ad hoc basis and may consult the Chairman of the Committee, if necessary.

52. During the discussions on the Committee's modus operandi, a suggestion was made to make clear the non-confrontational nature of the compliance review mechanism. It agreed that a clear reference to this should be made in the information paper on communications and the secretariat was requested to introduce such a reference in an appropriate place.

53. In the light of the discussions on procedures for discussing submissions, referrals and communications, the Committee revisited the issues arising from possible conflicts of interest. It agreed that any member considered to have a possible conflict of interest would be treated from the outset and throughout the procedure in the same manner as an observer. Consequently, any such

member should not take part in formal discussions or attend meetings where the Committee was preparing or adopting findings, measures or recommendations.

54. The Committee noted that where communications were submitted less than two weeks before a given meeting, it was doubtful whether the Committee would be able to consider their admissibility at that meeting.

X. PROGRAMME OF WORK AND CALENDAR OF MEETINGS

55. The Committee confirmed that it would hold its sixth meeting on 15-17 December 2004 and its seventh meeting on 16-18 February 2005, both meetings to take place in Geneva. It provisionally agreed to hold its eighth meeting in Almaty (Kazakhstan) around the time of the second meeting of the Parties, with the precise date to be fixed in consultation with the Bureau. The Committee would deal with the regular agenda at that meeting but would also be on hand to deal with any compliance-related issues arising in the meeting of the Working Group of the Parties or the meeting of the Parties itself, if so requested.

XI. ADOPTION OF THE REPORT AND CLOSURE OF THE MEETING

56. The Committee adopted the draft report prepared by the Chairman and the secretariat and requested the secretariat in cooperation with the Chairman to finalize it. The Chairman then closed the meeting, thanking the secretariat for its preparations and assistance.

¹ References to submissions in this section of the report should generally be understood to refer to submissions made by a Party about another Party's compliance, in accordance with paragraph 15 of the annex to decision I/7, rather than submissions by a Party about its own compliance.