

**FINDINGS AND RECOMMENDATIONS¹ OF THE COMPLIANCE COMMITTEE
WITH REGARD TO COMMUNICATION
ACCC/C/2008/32 (Part I) CONCERNING COMPLIANCE BY THE EUROPEAN
UNION²**

Adopted on 14 April 2011

I. INTRODUCTION

1. On 1 December 2008, the non-governmental organization (NGO) ClientEarth (hereinafter the communicant), supported by a number entities and a private individual,³ submitted a communication to the Committee alleging a failure by the European Union (EU) to comply with its obligations under article 3, paragraph 1, and article 9, paragraphs 2, 3, 4 and 5, of the Convention.

2. The communication alleges that by applying the “individual concern” standing criterion for private individuals and NGOs that challenge decisions of the EU institutions before the Court of Justice of the European Union (the European Court of Justice (hereinafter the ECJ) and General Court or Court of First Instance (CFI)⁴) (hereinafter, collectively the EU Courts), the EU fails to comply with article 9, paragraphs 2-5, of the Convention. The communication further alleges that the law adopted by the EU in the form of a regulation in order to comply with the provisions of the Convention⁵ (hereinafter the Aarhus Regulation), fails to grant to individuals or entities, other than NGOs, such as regional and municipal authorities, access to internal review; and that the scope of this internal review procedure is limited to appeals against administrative acts of individual nature. As a result, the EU fails to comply with article 3, paragraph 1, and article 9, paragraph 2, of the Convention. Finally, the communication alleges that by charging the applicants before the EU Courts with expenses of uncertain and possibly prohibitive nature in case of loss of their case, the EU fails to comply with article 9, paragraph 4, of the Convention. Additionally, the communication alleges also a breach of article 6 by not providing for public participation, and related access to justice, in decision-making related to certain decisions taken by EU institutions.

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 The present communication was originally submitted by the communicant concerning non-compliance by the European Community. As of 1 December 2009, the European Union succeeded the European Community in its obligations arising from the Convention (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community). EC law has become EU law. The present findings will systematically refer to EU law and EU institutions and bodies, even if they refer to the status before the entry into force of the Lisbon Treaty.

³ The communicant submitted a list that includes: Ludwig Krämer, Asociación para la Justicia Ambiental, Bond Beter Leefmilieu (BBL), CEE Bankwatch Network (Bankwatch), Ecologistas en Acción, France Nature Environment (FNE), Friends of the Irish Environment, Greenpeace International, International Fund for Animal Welfare (IFAW), Instituto Internacional de Derecho y Medio Ambiente (IIDMA), Naturschutzbund Deutschland e.V. – NABU, Oceana, Oekobuero and SOS Grand Bleu.

⁴ From its inception on 1 January 1989 to 30 November 2009, the General Court was known as the Court of First Instance (CFI). In the present findings, the term CFI will nevertheless be used where the earlier case-law of the General Court is being discussed or cited.

⁵ Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264 of 25.09.2006, p.13.

3. Overall, the communicant alleges a general failure by the EU to comply with the provisions of the Convention on access to justice in environmental matters. This allegation is supported by references to a number of decisions by the EU Courts, including *WWF-UK v Council of European Union* (WWF Case);⁶ *EEB and Stichting Natuur en Milieu v Commission of the European Communities* (EEB Cases);⁷ *Região autónoma dos Açores v Council* (Azores Case);⁸ and *Stichting Natuur en Milieu and Pesticides Action Network Europe v Commission* (Stichting Milieu Case).⁹ In the *EEB* cases, the CFI dismissed the actions, and that decision was not appealed. The *Azores* case and the *WWF-UK* case were dismissed on appeal to the ECJ. The *Stichting Milieu* case was pending before the EU Courts when these findings were adopted by the Committee.

4. At its twenty-second meeting (17-19 December 2008), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 24 December 2008. On 19 January 2009, the Committee wrote a letter to the Party concerned and the communicant along with a number of questions soliciting additional information from both parties on the applicable legal framework, the nature of the allegations and the facts presented in the communication. The communicant sent its response to the questions raised by the Committee on 25 May 2009. The Party concerned sent its comment to the communication and its response to the questions of the Committee on 11 June 2009.

6. On 24 June 2009, the Committee received information in the form of an amicus memorandum from the NGO WWF-UK. The amicus memorandum alleged that the rejection of the WWF-UK application to the CFI to review the quotas for cod fishing set by Council Regulation No 41/2006¹⁰ constituted a failure by the Party concerned to comply with the requirements of article 9, paragraphs 2 and 3. The appellate decision confirmed the CFI ruling. This case was submitted in support of the allegation of the communicant that the Party concerned is in non-compliance with article 9, paragraphs 2 and 3, concerning access to a review procedure for members of the public concerned and review procedures concerning substantive legality of decisions, acts or omissions subject to article 6 of the Convention.

7. In subsequent correspondence dated 2 July 2009, the Party concerned requested the Committee to postpone examining the communication until the release of the final court decision, on the basis of paragraph 21 of the annex to decision I/7, as some of the issues raised in the communication and concerning the *Stichting Milieu* case were sub judice before the CFI. The Committee examined the request from the Party concerned at its twenty-fourth meeting (30 June – 3 July 2009) and sought the views of the communicant. Having taken note of the reply of the communicant and the amicus dated 10 August 2009 and 23 August 2009 respectively, and also of its earlier decision to defer consideration of communication ACCC/C/2008/31 (Germany), the Committee, using its electronic decision-making procedure

⁶ *WWF-UK Ltd v Council of the European Union*, T-91/07, 2 June 2008; and *WWF-UK Ltd v Council of the European Union and the Commission of the European Communities*, C-355/08, 5 May 2009.

⁷ *EEB and Stichting Natuur en Milieu v Commission*, joined cases T-236/04 and T-241/04, 28 November 2005.

⁸ *Região autónoma dos Açores v Council*, T-37/04, 1 July 2008 and C-444/08, 26 November 2009.

⁹ *Stichting Natuur en Milieu and Pesticides Action Network Europe v Commission*, T-338/08, action brought on 11 August 2008.

¹⁰ Council Regulation (EC) No. 41/2006 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, OJ L 15 of 21.12.2006, p. 1.

decided to discuss the substance of at least part of the communication at its twenty-fifth meeting (22 – 25 September 2009). At the time, the Committee also decided to defer consideration of those elements for which it made sense to await the outcome of the *Stichting Milieu* case.

8. The Committee discussed the communication at its twenty-fifth meeting, with the participation of representatives of the communicant, the amicus and the Party concerned, the latter represented by the European Commission. At the same meeting, the Committee confirmed the admissibility of the communication. After the discussion, the Committee agreed to defer its decision on whether draft findings would be prepared immediately thereafter or at a later stage following the judgment in the *Stichting Milieu* case.

9. By letter of 21 January 2010, the Committee invited the parties and the amicus to submit their views on how the changes introduced by the entry into force of the Lisbon Treaty on 1 December 2009 (such as the new article 263 replacing article 230, new provisions on democratic principles and the entry into force of the EU Charter of Fundamental Rights) might impact on the merits of the communication. The Party concerned and the communicant replied on 26 February and 1 March 2010 respectively, and the amicus on 19 February 2010.

10. The Committee prepared draft findings at its thirty-first meeting (22-25 February 2011), focusing on the main allegation of the communicant by examining the jurisprudence of the EU Courts on access to justice in environmental matters generally. In doing so, the Committee considered whether in the *WWF-UK* case the EU Courts accounted for the fact that the Aarhus Convention had entered into force for the Party concerned, but decided not to make specific findings on whether the case in itself amounts to non-compliance with the Convention. In addition, while awaiting the outcome of the *Stichting Milieu* case, which was still pending before the EU Courts, the Committee refrained from examining whether the Aarhus Regulation or any other relevant internal administrative review procedure of the EU meet the requirements on access to justice in the Convention.

11. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 15 March 2011. Both were invited to provide comments by 12 April 2011.

12. The Party concerned and the communicant provided comments on 12 and 11 April 2011, respectively.

13. At its thirty-second meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. SUMMARY OF FACTS, LEGAL FRAMEWORK AND ISSUES¹¹

A. Legal Framework and relevant jurisprudence

¹¹ 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.

Aarhus Convention and the EU legal framework

14. According to art.17 of the Aarhus Convention it was open for signature by inter alia „regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters”. In accordance with article 19, a regional economic integration organization may ratify, accede to or approve the Convention. As set out in article 2 paragraph 2(d) of the Convention, an institution of a regional economic integration organization shall also be considered as “public authority” under the Convention.

15. Agreements concluded by the Party concerned are binding upon the EU institutions and the Member States (art. 216, para. 2 of the Treaty on the Functioning of the European Union (TFEU), previously art. 300 para. 7 of the Treaty establishing the European Community (TEC)).

Procedures and remedies for natural and legal persons to bring a case before the EU Courts

16. There are, in principle, four types of procedure for individuals and entities to bring a case before the EU Courts:

- a) Action for annulment under TFEU article 263, paragraph 4 (ex TEC art. 230, para. 4);
- b) Preliminary reference under TFEU article 267 (ex TEC art. 234);
- c) Action for failure to act under TFEU article 265, paragraph 3 (ex TEC art. 232 para. 3); and
- d) Action for damages under TFEU 268 (ex TEC art. 235).

For the purposes of the present findings the two first remedies will be described in the following paragraphs, namely action for annulment and preliminary reference. This examination includes an analysis of the jurisprudence of the EU Courts. For the reasons stated in paragraph 10 above the Aarhus Regulation is not described in the following paragraphs.

Action for annulment under TFEU article 263 paragraph 4 (ex TEC art. 230, para. 4)

17. Prior to 1 December 2009, article 230, paragraph 4 (ex art.173 para. 4, before the Treaty of Amsterdam) of the TEC provided that: “[a]ny natural or legal person may [...] institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”. The ECJ has developed jurisprudence on the interpretation and implementation of this provision, as outlined in the following paragraphs, both in general terms as well as in the interpretation of environmental matters. Of particular relevance is the interpretation of what it means for a decision to be of “individual concern”.

18. Article 263, paragraph 4, of the TFEU (in force since 1 December 2009) reads: “[a]ny natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.” No relevant ECJ jurisprudence exists yet with respect to this provision.

Preliminary reference under TFEU article 267 (ex TEC art. 234)

19. Natural and legal persons may access the EU Courts through the preliminary reference procedure of TFEU article 267. In this case the court of an EU Member State submits to the ECJ for resolution a question on the interpretation of EU law. The request (reference) put to the Court is not of general nature and is accompanied by the specific facts and circumstances that triggered it. According to TFEU, article 267:

“[w]here such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.”

Summary of relevant decisions by the EU Courts on actions of annulment.

The Plaumann case

20. In 1963, the ECJ interpreted for the first time the criterion of “individual concern” in the *Plaumann* case.¹² In that case, *Plaumann & Co*, a German corporation, sought the annulment of a decision of the European Commission that had refused to authorize the Federal Republic of Germany to suspend, in part, customs duties applicable to fresh mandarins and clementines imported from third countries. The Court held that: “Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed”. Following this reasoning, the ECJ found that the corporation was not individually concerned. The criteria for standing established in this decision have since then been referred to as the “*Plaumann* test”.

The Greenpeace case and the Danielsson case

21. The ECJ used for the first time the *Plaumann* test in environmental matters in the *Greenpeace* case.¹³ *Greenpeace International* and local associations and residents of Gran Canaria (Spain) sought the annulment of a decision adopted by the Commission to provide financial assistance from the European Regional Development Fund for the construction of two power stations on the Canary Islands, without requiring the conduct of an environmental impact assessment (EIA). The CFI asserted that the *Plaumann* test was applicable to environmental matters and refused standing to the applicants. The ECJ confirmed the CFI decision and also added that remedies were available in the national courts, based on article 234 of the TEC (art. 267 of the TFEU) concerning preliminary rulings. The Court affirmed its interpretation in later cases, and in the *Danielsson* case¹⁴ the Court clarified that such an individual concern could not be established even if the applicants suffered harm.

¹² *Plaumann & Co v Commission*, Case 25/62, 15 July 1963.

¹³ *Stichting Greenpeace Council and Other v Commission*, T-585/93, 9 August 1995; and *Stichting Greenpeace Council and Others v the Commission*, C-321/95 P, 2 April 1998.

¹⁴ *Marie-Thérèse Danielsson, Pierre Largeteau, Ewin Haa v Commission of the European Communities*, T-219/95 R, 22 December 1995, [1995] ECR:II 3051.

The UPA case

22. In 1999, the Court in the *Unión de Pequeños Agricultores (UPA)* case¹⁵ did not grant standing to the trade association UPA, representing and acting on behalf of small Spanish agricultural businesses, which sought the annulment of a Council Regulation reforming the common organization of the olive oil market. The CFI confirmed the Plaumann test and denied standing to the UPA, even if some of its members would have to cease their economic activity because of the contested Regulation. On appeal in 2002, the ECJ confirmed the CFI decision and ruled that under the current TEC provisions, Member States were responsible for the establishment of a system of legal remedies and procedures ensuring respect of the right to effective judicial protection. In this case, the opinion delivered by Advocate General Jacobs, which was ultimately not followed by the Court, suggested that article 230, paragraph 4, of the TEC should be interpreted so as to recognize that “an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interest”.

The Jégo-Quéré case

23. In 2002, the CFI reversed the Plaumann test in the *Jégo-Quéré* case¹⁶; the CFI interpreted article 230, paragraph 4, of the TEC in a manner that granted access to the applicant Jégo-Quéré and argued that there was no need to amend the TEC to that effect. Specifically, the Court ruled that “there [was] no compelling reason to read into the notion of individual concern a requirement that an individual applicant seeking to challenge a general measure [had to] be differentiated from all others affected by it in the same way as an addressee”;¹⁷ and that “a natural or legal person [was] to be regarded as individually concerned by a Community measure of general application that [concerned] him directly if the measure in question [affected] his legal position, in a manner which is both definite and immediate by restricting his rights or by imposing obligations on him. The number and position of other persons who [were] likewise affected by the measure, or who [might] be so [affected], [were] of no relevance in that regard”. In 2004, on appeal, the ECJ reversed the CFI ruling and reaffirmed its Plaumann test.¹⁸

The EEB cases

24. In 2005, the CFI confirmed the Plaumann jurisprudence in the European Environmental Bureau (EEB) cases.¹⁹ The actions were submitted (9 and 11 June 2004) before the entry into force of the Convention, but the ruling was rendered (28 November 2005) after the entry into force of the Convention, but before the Aarhus Regulation came into effect. In these cases two environmental NGOs were denied standing before the EU Courts to challenge some provisions of two decisions of the European Commission, which allowed the Member States to maintain in force authorizations for the use of two herbicide products with potential negative effects on the environment and human health, atrazine and simazine. The CFI found

¹⁵ *Unión de Pequeños Agricultores v Commission*, Case T-173/98, 23 November 1999; and *Unión de Pequeños Agricultores v Council*, Case C-50/00, 25 July 2002.

¹⁶ *Jégo-Quéré et Cie SA v Commission*, T-177/01, 3 May 2002.

¹⁷ *Ibid.* para. 49 refers to the Opinion of Advocate General Jacobs delivered on 21 March 2002 for *Unión de Pequeños Agricultores v Council*, Case C-50/00, para. 59.

¹⁸ *Commission v Jégo-Quéré et Cie SA*, C-263/02P, 1 April 2004.

¹⁹ See n 7 above.

that neither the statutory aim of the applicant to protect the environment nor its special consultative status with the European institutions established its “individual concern.” The CFI also ruled that the proposal for the Aarhus Regulation did not grant standing to environmental NGOs unless the latter met the “individual concern” criterion stipulated in article 230, paragraph 4, of the TEC. This case was not appealed to the ECJ.

The Açores case

25. In 2008, the CFI applied the Plaumann test in the *Açores* case,²⁰ where the autonomous region of Azores (Portugal) sought the annulment in part of a regulation on the management of fishing areas and resources in the European Community (EC). The action for this case was submitted to the CFI on 2 February 2004, before the entry into force of the Convention, but the CFI ruling was rendered after its entry into force (1 July 2008).

26. The CFI argued that the Aarhus Convention had not been approved by the EC, when the action was brought before it; it recalled that, in any event, article 9, paragraph 3, of the Convention, referred to the criteria laid down in the national law, and in EU law such criteria were set by article 230, paragraph 4 and the related jurisprudence; and stated that the autonomous region of Azores was not an NGO, and the requirements of article 12 of the Aarhus Regulation were not fulfilled. The decision of the CFI was appealed to the ECJ on 8 October 2008. By order of 26 November 2009, the ECJ dismissed the appeal.

The WWF-UK case

27. This action was submitted on 19 March 2007, after the entry into force of the Convention for the EU, but before the Aarhus Regulation became effective (on 17 July 2007). The CFI ruling (2 June 2008), the appeal application (30 July 2008) and the dismissal of the appeal application (5 May 2009) took place after the Aarhus Regulation became effective.

28. In this case,²¹ WWF-UK, sought the partial annulment before the CFI of Council Regulation No 41/2006 of 21 December 2006 fixing the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in community waters for the year 2007 in respect of cod in the zones covered by Council Regulation No 423/2004 establishing measures for the recovery of cod stocks.²²

29. Regulation 41/2006 finds its origin in Council Regulation No 2371/2002.²³ The latter requires the Council of the European Union to fix the quantities of fish and species of fish that may be fished (Total Allowable Catches or TACs), the geographical areas where these species can be fished, quotas per Member State, and the specific conditions (conservation measures) under which Community vessels are authorized to catch and land fish. The Council annually decides on these matters in the form of a Regulation, such as Regulation 41/2006, which sets the fishing conservation measures for the following year. In its decision-making procedure, the Council takes into account the advice provided by the International Council for the Exploration of the Sea (ICES) for areas within its remit, the Scientific, Technical and

²⁰ See n 8 above.

²¹ See n 6 above.

²² Council Regulation (EC) No 423/2004 of 26 February 2004 establishing measures for the recovery of cod stocks, OJ L 70 of 9.3.2004, p 8.

²³ Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358 of 31.12.2002, p. 59.

Economic Committee for Fisheries (STECF) and the Regional Advisory Councils (RAC), in which stakeholders participate. For the North Sea the relevant RAC is the North Sea RAC, a council that advises the Commission on matters of fisheries in respect of fishing zones located in the North Sea. WWF-UK is a member of the North Sea RAC. Regulation 41/2006 is binding upon the Member States, which distribute the quota allocated to them among their fishing vessels by issuing individual fishing permits. For the 2007 TACs, the North Sea RAC submitted its advice to the Council and the Commission, which took that advice into account in the adoption of Regulation No 41/2006. The North Sea RAC's report records the minority opinion of environmental NGOs, including WWF-UK. In this minority opinion WWF-UK and three other environmental NGOs disputed the TAC adopted for cod (30,000 tonnes) in the light of the advice submitted by ICES and the measures for the recovery of cod stocks established by Council Regulation (EC) No 423/2004 of 26 February 2004.

30. The CFI denied standing to the applicant. The CFI held that neither the statutory aim of the applicant to protect the environment nor its consultative status in the decision-making process, as a member of the North Sea RAC, for the contested regulation established its "individual concern." It also stated that "any entitlements which the applicant may derive from the Aarhus Convention and from [the Aarhus Regulation] [were] granted to it in its capacity as a member of the public. Such entitlements [could] not therefore be such as to differentiate the applicant from all other persons with the meaning of the [Plaumann test]". On appeal the CFI order was reaffirmed.

The Stichting Milieu case

31. The applicants in this case²⁴ requested the Commission to review Regulation No 149/2008²⁵ in accordance with Title IV of the Aarhus Regulation on internal review and access to justice. In its request to the Commission, Stichting Milieu en Natuur argued that the said Regulation amending the maximum residue levels for food products, although it might have the form of a general measure, should be seen as a compilation of individual decisions concerning the residues of all the individual products and substances. Thus, because of its individual scope, the Regulation is an administrative act meeting the criteria of article 2(1)(g) of the Aarhus Regulation and/or an administrative act of a public authority, under article 9, paragraph 3, of the Aarhus Convention. The Commission by letters of 1 July 2008 declared the request inadmissible on the ground that the contested regulation could not be regarded as an act or as a bundle of decisions of individual scope. The applicants submitted that the contested Regulation No 149/2008 consists of a bundle of decisions and contended that it applies to a definitely defined and previously determined group of products and active substances. In this respect, the applicants also invoked Regulation No 396/2005,²⁶ which in its article 6 provides that a separate application for modification may be submitted for each maximum residue level established by civil society organizations, among others, with an interest in health, such as the applicants. In the view of the applicants, a decision on such an application, in the context of Regulation No 396, must be a decision which specifically relates to a particular product or a particular active substance, and the same reasoning ought to be

²⁴ See n 9 above.

²⁵ Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto, OJ L 58 of 1.3.2008, p. 1.

²⁶ Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC, OJ L 70 of 23.2.2005, p. 1.

followed in respect of maximum residue levels established by Regulation No 149. Alternatively, the applicants argued that Regulation No 149 concerns a decision which falls under the scope of article 6, paragraph 1, of the Aarhus Convention, in that it relates to a decision which is of direct and individual concern to the applicants in a manner which satisfies the requirements of the TEC article 230, paragraph 4 (now TFEU article 263, paragraph 4).²⁷ As mentioned above (see paras. 3 and 10), this case was pending before the EU Courts when the findings were adopted by the Committee.

Costs

32. According to the rules of procedure of the Court of Justice,²⁸ in principle, the proceedings before the Court are free of charge, with some exceptions, such as when a party has caused the Court to incur avoidable costs or where copying or translation work had to be carried out. As for the parties' costs, the unsuccessful party is ordered to pay the costs, if they have been applied for in the successful party's pleadings; if costs are not claimed, each party bears its own costs. Member States and institutions that intervene have to bear their own costs. Usually, the Court orders interveners, other than Member States and institutions, to bear their own costs. The rules of procedure provide for legal aid procedure, when a party is wholly or in part unable to meet the costs of the proceedings.

B. Substantive issues and arguments of the parties

33. The communicant brings forward a number of allegations concerning general failure of the EU to comply with its obligations under the Convention. The allegations of the communicant and the response of the Party concerned are summarized in the following paragraphs. For the reasons stated in paragraph 10 above, allegations and arguments relating to the Aarhus Regulation are not summarized below.

Standing

34. The communicant alleges that the "individual concern" standing criterion for individuals and NGOs to challenge decisions of EU institutions and bodies, as established in article TEC 230, paragraph 4, (now TFEU article 263, paragraph 4,) and interpreted in the jurisprudence of the EU Courts (Plaumann test), restrict the access to justice rights of individuals and NGOs. The communicant notes that public interests are by definition diffuse and collective, and that as a result individuals and NGOs that seek to challenge decisions regarding environmental matters issued by EU institutions or bodies, are not granted standing before the EU Courts. Such an interpretation, according to the communicant, does not fulfill the objective of the Convention to give the public concerned wide access to justice; it does not provide members of the public access to judicial procedures to challenge acts or omissions in environmental matters; it prevents the EU Courts from providing adequate and effective remedies and constitutes a barrier to access to justice; and for all these reasons it is not in compliance with article 9, paragraphs 2-5 of the Convention.

35. In this regard, the communicant brings to the attention of the Committee a number of cases adjudicated by the ECJ.²⁹ In its view, the jurisprudence regarding article 230, paragraph 4, established before the entry into force of the Convention remains relevant, as the ECJ

²⁷ See OJ C 301 of 22.11.2008, p.40.

²⁸ See OJ C 177/21 of 2.7.2010, p. 20-21.

²⁹ Appendix 1 to the communication.

continues to rely on this jurisprudence after the entry into force of the Convention for the Party concerned.

36. The communicant also alleges that the established ECJ jurisprudence on the interpretation of TEC article 230, paragraph 4, is more favorable towards corporations and other entities with economic objectives, than towards NGOs and private individuals with environmental objectives. Furthermore, the communicant alleges that the fact that the ECJ has over the years developed a flexible interpretation of the “individual concern” criterion in article 230, paragraph 4, and has granted locus standi to entities in the field of competition, state aid, and intellectual property,³⁰ demonstrates that a more flexible interpretation of article 230, paragraph 4, is possible also in environmental matters.

37. The communicant stresses that such a more flexible interpretation has not been applied in environmental matters; WWF-UK, for instance, was not considered as individually concerned and was not granted locus standi, even though the decision challenged was taken pursuant to a Council Regulation that granted it the procedural rights in the decision-making process as a member of the North Sea RAC.

38. In addition, the communicant maintains that the ECJ has developed flexible and liberal interpretations of the first two paragraphs of article 230 TEC so as not to undermine the rule of law and the institutional balance (known as “purposive interpretation”). In its view, this lends support to the argument that there is a margin of flexibility in the way the ECJ construes this article. Hence, according to the communicant, the ECJ should apply its “purposive interpretation” with regard to paragraph 4 of the same article, so as not to undermine the provisions of the Convention on access to justice.³¹

39. The Party concerned does not agree with the allegations submitted by the communicant. In general, the Party concerned submits that access to justice is sufficiently assured at community level by means of combined application of articles 230 and 234 TEC, while Title IV of the Aarhus Regulation provides for additional remedies in environmental matters.

40. First, the Party concerned draws the attention of the Committee to the institutional features peculiar to the EU legal order. The Party concerned stresses that legal acts adopted by EU institutions, so-called “secondary legislation”, must be in accordance with the EU Treaty law (TEC, now TFEU), i.e. the “primary legislation”, and may not add to the rules already laid down by the Treaty. In the present case, the restrictive interpretation of the applicable rules on legal standing for natural and legal persons stems from the primary legislation itself: the locus standi criteria are set in TEC article 230, paragraph 4 (now TFEU art. 263 para. 4) and these can change when all Member States agree to do so (according to art. 48 of the Treaty establishing the European Union). In addition, the Party concerned points out that EU Courts may determine in full independence from the other EU institutions the correct interpretation of the Treaty provisions.

³⁰ The communicant cites a number of rulings in the documents it submitted, among them *CFI, Comité Central d' Entreprise de la Société Anonyme Vittel and Comité d' Etablissement de Pierval and Federation Générale Agroalimentaire v Commission*, T-12/93, 27 April 1995; *Metropole Télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission*, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, 11 July 1996; *Extramet Industry SA v Council*, C-358/89, 11 June 1992; *Codorniu SA v Council*, C-309/89, 18 May 1994.

³¹ The communicant cites the following rulings *Commission v Council*, C-22/70, 31 March 1971; *Parti écologiste “les Verts” v European Parliament*, C-294/93, 23 April 1986; *European Parliament v Council*, C-70/88, 22 May 1990; *Hellenic Republic v Council*, C-62/88, 29 March 1990.

41. Also, as a general matter, the Party concerned mentions that the Commission has amended its Rules of Procedure to ensure the smooth application of the Aarhus Regulation by its departments.³²

42. The Party concerned disagrees with the assessment rendered by the communicant on the jurisprudence developed by the EU Courts on article 230, paragraph 4, in that standing has been provided to entities representing economic interests, but not to public interest organizations. It stresses the non-discriminatory nature of the case-law and that the Plaumann test has been applied and adapted to particular legal or factual circumstances, irrespective of the nature of the would-be applicant as an economic operator or as a public interest entity. In support of its arguments, the Party concerned provides for a list of cases where economic operators were denied locus standi.³³

43. The Party concerned also maintains that article 234 of the TEC is in full compliance with the Convention, since applicants have the right to dispute the legality of a administrative measure of a Member State based on an EU act (including a Regulation) before national courts, request its suspension and also that the national court request a preliminary ruling from the ECJ. Naturally, the success of their request will also depend on the validity of their arguments. In the event of dismissal of its arguments, the applicant may appeal the domestic court's decision.

44. The Party concerned made the following additional comments, that:

“74. Community acts that are directly applicable - such as Regulations - normally still require the adoption of administrative implementing measures, typically in the form of decisions addressed to the economic operator(s) concerned, by national authorities.

75. That clarification made, it may indeed not be totally excluded that in exceptional cases a Community measure is both directly applicable deploys its full effect without requiring any further administrative implementing act to be adopted at Member State level.

76. The Commission would like to point out in this connection that the mere fact that a Community act, such as a Regulation, applies directly, without intervention by the national authorities, does not necessarily mean that a party who is directly concerned by it can only contest the validity of that Regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure (in particular an administrative decision, either explicit or implicit) which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by a Community Regulation may seek from the national authorities

³² Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 to Community institutions and bodies.

³³ See appendix to para. 35 of the submissions of the European Commission on behalf of the Party concerned dated 11 June 2009.

a measure under that Regulation which may be contested before the national court, enabling the operator to challenge the Regulation indirectly”,³⁴

Decisions by EU institutions and bodies on specific activities under article 6

45. The communicant alleges that the EU institutions and bodies take measures that are decisions subject to article 6, paragraph 1(b), of the Convention. The communicant specifically mentions in this context a number of decisions of different legal nature taken by various EU institutions, including financing decisions or decisions related to placing products or substances on the market. According to the communicant, such decisions relate to activities “not listed in Annex I which may have a significant effect on the environment” and therefore meet the criteria in article 6 paragraph 1(b) which is drafted in sufficiently broad way to include various types of decisions. The main argument of the communicant is that article 6 paragraph 1(b), does not relate only to decisions of a permitting nature, as it is the case in article 6, paragraph 1(a).

46. The Party concerned submits that the EU institutions and bodies do not adopt decisions or acts subject to article 6 of the Convention. EU acts commonly require administrative implementing measures by the national authorities and only in exceptional cases is a Community measure directly applicable and deploys its full effect without requiring any further administrative measures.

Application of article 9, paragraph 2, to plans and programs

47. The communicant alleges that decisions within the meaning of article 7 of the Convention are subject to review procedures available under article 9, paragraph 2, of the Convention, by virtue of the fact that article 9, paragraph 2, applies to “any decision, act and omission subject to the provisions of article 6” of the Convention in conjunction with the fact that under article 7 the Parties are bound to apply article 6, paragraphs 3, 4 and 8.

48. In this regard, the communicant maintains that if the Committee considers that the decisions issued by EU institutions and bodies are not decisions in the sense of article 6 of the Convention, but decisions in the sense of article 7 of the Convention, article 9, paragraph 2, applies anyway. For instance, even if the Regulation on TACs challenged at the WWF-UK case is a decision in the sense of article 7 of the Convention, the remedies under article 9, paragraph 2, of the Convention, should be available to the public.

49. The Party concerned denies the allegation of non-compliance with article 9, paragraph 2, because EU institutions and bodies do not adopt decisions or acts subject to article 6 of the Convention and because the application of article 9, paragraph 2, does not apply to decisions subject to articles 7 and 8 of the Convention. In the example brought forward by the communicant, the Party submits that since Regulation No 41/2006 was not a decision within the scope of article 6 of the Convention, the review procedures under article 9, paragraph 2, are not available.

50. In the view of the Party concerned, article 9, paragraph 2, of the Convention leaves it to the discretion of the Parties to extend its application to provisions of the Convention other than decisions within the scope of article 6, and the EU in exercising this discretion, does not

³⁴ See paras. 74-76 of the submissions of the European Commission on behalf of the Party concerned dated 11 June 2009.

extend the application of article 9, paragraph 2, of the Convention to plans and programs relating to the environment.

Acts and omissions under article 9, paragraph 3

51. The communicant alleges that remedies under article 9, paragraph 3, of the Convention are available in a wider range of situations, because the broad scope of this provision allows challenges to any acts and omissions by private persons and public authorities. This provision also provides the right to contest the lack of or the improper organization of public participation in the adoption of decisions under article 7 of the Convention.

52. In the example of the WWF-UK case, the communicant alleges that if the Committee does not consider that the remedies of article 9, paragraph 2, apply, in any case, the remedies of article 9, paragraph 3, of the Convention apply. Thus, in the view of the communicant, by not ensuring that WWF-UK has access to administrative or judicial procedures to challenge acts and omissions by public authorities, the Party concerned failed to comply with article 9, paragraph 3, of the Convention.

53. The Party concerned submits that article 9, paragraph 3, allows the Parties a wide margin of discretion in defining, among other things, which environmental organizations have access to justice and denies any allegation by the communicant of non-compliance with article 9, paragraph 3, of the Convention. In the view of the Party concerned, articles 230 and 234 of the TEC establish a complete system of remedies and procedures to ensure control of the lawfulness of the acts of the EU institutions and bodies. These remedies are entrusted to the EU Courts that act in cooperation with national courts, where appropriate.³⁵ The Party concerned submits that the European Court of Human Rights has acknowledged that the protection of fundamental rights by EU law, as regards both the substantive guarantees offered and the mechanisms controlling their observance, can be considered to be “equivalent” to that of the European Convention on Human Rights.³⁶ The Party concerned provides relevant jurisprudence that shows that where EU law confers procedural guarantees on certain persons entitling them to request the Commission to initiate a specific decision-making process, those persons should be able to institute proceedings to protect their legitimate interests insofar as the decision to be made by the Commission must take into account the information supplied by those persons.³⁷

Costs

54. The communicant alleges that the costs that a losing party of a case before the EU Courts may have to pay are uncertain and may be prohibitively expensive, and thus that the Party concerned is not in compliance with article 9, paragraph 4, of the Convention.

³⁵ In support of its argument, the EC provides relevant excerpts from the EC jurisprudence, such as *Unión de Pequeños Agricultores v Council*, C-50/00P, F 2002 (paras. 37-41); *Commission v Jégo-Quéré et Cie SA*, C-263/02P, 1 April 2004 (paras. 31-32); *Fost Plus VZW v Commission*, T-142/03, 16 February 2005 (para. 75); *Região autónoma dos Açores v Council*, T-37/04, 1 July 2008 (para. 92).

³⁶ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC], no. 45036/98, para. 155, ECHR 2005-VI.

³⁷ The Party concerned refers to a number of cases, among them *Cofaz a.o. v Commission*, 169/84, 12 July 1990; *Timex v Council*, 264/82, 20 March 1985; *Fediol v Commission*, 191/82, 4 October 1983; *Commission v Aktionsgemeinschaft Recht und Eigentum eV*, C-78/03P, 13 December 2005; and *Comité Central d'Entreprise de la Société Générale des Grandes Sources a.o. v Commission*, T-96/92, 15 December 1992.

55. The Party concerned argues that the communicant's allegations on the prohibitively expensive costs remain hypothetical, since the communicant has not established any case where costs were indeed prohibitively expensive. The Party concerned also submits that proceedings before the EU Courts are free of charge (with a few exceptions); that the costs of the losing party are nominal, unless the Commission hires an external lawyer; and that legal aid may be available

D. Use of domestic remedies

56. When this case was submitted to the Committee, the *WWF-UK* case was still pending before the ECJ. As pointed out above, the *WWF-UK* case was later decided by the ECJ. The communicant has not invoked any procedures before the courts of the EU Member States to address the issues in the *WWF-UK* case or other relevant matters. Moreover, some of the issues raised in the present communication are currently sub judice before the General Court in the context of the *Stichting Milieu* case.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

A. Legal basis and scope of considerations of the Committee

57. The EU signed the Aarhus Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005.³⁸ The EU is a Party to the Convention since 17 May 2005. Upon signature, the EU acknowledged the importance of covering the EU institutions, alongside national public authorities, but declared that EU institutions would apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of EU law in the field covered by the Convention.

58. Upon approving the Convention, the EU confirmed its declaration made upon signature. It also declared that the legal instruments that it had already enacted to implement the Convention did not cover fully the implementation of the obligations resulting from Article 9, paragraph 3, of the Convention, to the extent that it did not relate to acts and omissions of EU institutions under article 2, paragraph 2 (d), and thus Member States would be responsible for the performance of these obligations until the EU in the exercise of its powers under the TEC adopted provisions of EU law covering the implementation of these obligations. The Aarhus Regulation came into effect on 28 June 2007.

59. The main allegation of the communication is that the Party concerned, through the consistent jurisprudence of the EU Courts on standing for members of the public, fails to ensure access to justice with regard to decisions, acts and omissions by EU institutions and bodies, and the communicant has referred to a number of court decisions in order to show this. Several of these cases were decided before the entry into force of the Convention for the Party concerned. The *EEB* cases and the *Açores* case while finally decided by the EU Courts in 2005 and 2009, respectively, were also initiated before the entry into force of the Convention for the Party concerned. The *WWF-UK* case was initiated after the entry into force of the Convention for the Party concerned, but before the Aarhus Regulation became effective. At the date of the action of the *Stichting Milieu* case the Convention was in force

³⁸ OJ L 124 of 17.5.2005, p. 1.

and the Aarhus Regulation was effective. That case is still pending before the General Court and will possibly be appealed to the ECJ.

60. The allegations of the communicant cover a broad spectrum of decision-making by the EU Commission, the EU Council, including a decision by the Commission on the funding of a specific project as well as the adoption by the Council of a regulation. The decisions of the EU Courts referred to also concern different forms of decision-making by the EU institutions. Whereas the EU Courts have consistently dismissed these cases on the basis of lack of standing, regardless of the issue at stake, whether the Party concerned fails to comply with the Convention in a specific case depends inter alia on the kind of decision-making challenged before the EU Courts.

61. As set out in article 2, paragraph 2, of the Convention, the EU institutions do not act as public authorities when they perform in their legislative capacity, with the effect that these forms of decision-making are not covered by article 9 of the Convention. Thus, in order to establish non-compliance in a specific case, the Committee will have to consider the form of decision-making challenged before the EU Courts.

62. The Committee does not rule out that some decisions, acts and omissions by the EU institutions may amount to decision-making under articles 6-8 of the Convention, challengeable under article 9 of the Convention. As held below, the Committee is convinced that some other acts and omissions by the EU may be challengeable under article 9 of the Convention.

63. Rather than assessing in detail each and every possible form of challengeable decision-making by the EU institutions or each decision by the EU Court referred to in order to determine whether the EU institution acted in a legislative capacity, the Committee will concentrate on the main allegation of the communicant, and examine the jurisprudence of the EU Courts on access to justice in environmental matters generally. In doing so, the Committee will only consider whether in the *WWF-UK* case the EU Courts accounted for the fact that the Convention had now entered into force for the Party concerned, but not make a specific finding on whether the *WWF-UK* case in itself amounts to non-compliance with the Convention. This also implies that the Committee does not examine whether the contested EU regulation on fishery in the *WWF-UK* case is as such a challengeable act under article 9 of the Convention.

64. The Committee will thus consider and evaluate the established court practice of the EU Courts in light of the principles on access to justice in the Convention. In this way, the findings of the Committee will reveal whether the general jurisprudence of the EU Courts is in line with the Convention. As mentioned, however, several of these cases were initiated before the entry into force of the Convention for the Party concerned. While these cases reveal the strict and consistent jurisprudence of the EU Courts, they do not show that the jurisprudence remains the same after the entry into force. For the given reasons, even if the Committee will find that the court practice reflected in the cases initiated before the entry into force of the Convention is not consistent with the Convention, this will not in itself lead to the conclusion that the Party concerned is in a state of non-compliance with the Convention (cf. ACCC/C/2005/11 Belgium, paras 22-23). Rather, it may reveal whether the Party concerned will be in compliance with the Convention if relevant jurisprudence remains the same.

65. Taking into account the particular features of the EU as a regional economic integration organization, the Committee will also consider whether the possibility for national courts of the Member States to request preliminary ruling is sufficient for the Party concerned to meet the requirements on access to justice in the Convention. For the reasons stated in paragraph 10, the Committee does not consider the review procedure under the Aarhus Regulation or any other internal, administrative review procedure of the EU.

66. The Committee notes that the EU legal framework changed on 1 December 2009 by the entry into force of the TFEU. While the Committee will examine the present communication within the legal framework of the TEC, which was applicable at the time the communication was submitted, it will also comment on the new legal framework.

B. Admissibility and exhaustion of domestic remedies

67. The Committee determined that the communication was preliminarily admissible at its twenty-second meeting and confirmed its admissibility at its twenty-sixth meeting.

68. The communication essentially concerns the general jurisprudence on standing established by the EU Courts, and the communicant has referred to efforts to use the remedies under EU law. In its response, the Party concerned has referred to the possibilities of members of the public to challenge decisions by the EU institutions in domestic courts, through requests for preliminary ruling to the ECJ. Regardless of whether such recourse to national courts in the Member States meets the criteria of the Convention, it is not relevant for the question of admissibility of the present case.

C. Substantive issues

Application of article 9 to acts and omissions by EU institutions and bodies

69. The Communicant alleges that the Party concerned fails to comply with article 9, paragraphs 2-5, of the Convention. In order to determine whether the Party concerned fails to comply with article 9, paragraphs 2-5, it must be considered whether the challenged decisions, acts and omissions by the EU institutions or bodies are such as to be covered by the Convention, as under article 2, paragraph 2 (a) to (d), or whether they are made by the EU institutions or bodies when acting in a legislative capacity.

70. As mentioned, the Convention imposes an obligation on the Parties to ensure access to review procedures with respect to various decisions, acts and omissions by public authorities, but not with respect to decisions, acts and omissions by bodies or institutions which act in a legislative capacity.

71. When determining how to categorize a decision, and act or an omission under the Convention, its label in the domestic law of a Party is not decisive (cf. ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, para 29)).

72. While the Committee does not rule out that some decisions, acts and omissions by the EU institutions – even if labeled “regulation” – may amount to some form of decision-making under articles 6-8 of the Convention, it will not carry out any examination on this issue. Rather, for the Committee, when examining the general jurisprudence and the interpretation of the standing criteria by the EU Courts, it is sufficient if it can conclude that some decisions,

acts and omissions by the EU institutions are such as to be covered by article 9, paragraph 3, of the Convention. That is the case if an act or omission by an EU institution or body can be (i) attributed to it in its capacity as a public authority, and (ii) linked to provisions of EU law relating to the environment.

73. The *Greenpeace case*, although decided before the Convention was in force, is a pertinent example of a case where an EU institution acted as a public authority, and its decision was challenged for contravening provisions of EU law relating to the environment. In this case, individuals as well as established environmental associations challenged and sought the annulment of the Commission's decision to provide financial assistance from the European Regional development Fund for the construction of two power stations without requiring the conduct of EIA.

74. Thus, without ruling out that also other acts and omissions by EU institutions may be covered by article 9, paragraphs 2 or 3, of the Convention, the Committee is convinced that for at least some acts and omissions by EU institutions, the Party concerned must ensure that members of the public have access to administrative or judicial review procedures, as set out in article 9, paragraph 3.

75. On the basis of this conclusion, the Committee will first examine the criteria for access to review procedures directly before the EU Courts, and then consider the review procedure before the EU Courts through national courts in the Member States.

Jurisprudence on direct access to the EU Courts until the entry into force of the Convention

76. Article 9, paragraph 3, of the Convention refers to review procedures relating to acts or omissions of public authorities which contravene national law relating to the environment. This provision is intended to provide members of the public access to remedies against such acts and omissions, and with the means to have existing environmental laws enforced and made effective. In this context, when applied to the EU, the reference to "national law" should be interpreted as referring to the domestic law of the EU (cf. ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4, para 27)).

77. As the Committee has pointed out in its findings with regard to communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paras. 29-37) and communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4, paras. 29-31), while article 9, paragraph 3, refers to "the criteria, if any, laid down in national law", the Convention does not set these criteria nor sets out the criteria to be avoided. Rather, the Convention allows a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action ("actio popularis") in their domestic laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national law relating to the environment.

78. In communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, para. 36), the Committee further observed that "the criteria, if any, laid down in national law"

should be such so that access to a review procedure is the presumption and not the exception, and suggested that one way for the Parties to avoid popular action (“actio popularis”) in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public.

79. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent the domestic law of the party concerned effectively has such blocking consequences for members of the public in general, including environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation, article 9, paragraph 3, should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (cf. ACCC/C/2005/11, Belgium, para. 34; and ACCC/C/2006/18 Denmark, para. 30).

80. The Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a “direct or individual concern”, provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to domestic environmental laws (cf. ACCC/C/2006/18 Denmark, para. 31).

81. The Committee will first focus on the jurisprudence established by the ECJ, based on the Plaumann test. If access to the EU Courts appears too limited, the next question is whether this is compensated for by the possibility of requesting national courts to ask for preliminary rulings by the ECJ.

82. As pointed out in paragraph 20, the judgment in the *Plaumann* case, decided in 1963, established what was to become a consistent jurisprudence with respect to standing before the EU Courts. When interpreting the criterion of being directly and individually concerned by a decision or a regulation, cf. TEC article 230, paragraph 4, the ECJ held that “persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.”

83. The Plaumann test has been maintained in the ECJ jurisprudence. In the field of the environment, the EU Courts have in no case accepted standing to any individual or civil society organization unless the matter concerned a decision addressed directly to that person. In two cases relating to the environment, i.e. the *Greenpeace* case and the *Danielsson* case, the EU Courts did not grant standing to the applicant, despite the possibility of reinterpreting the provision in question. The communicant has also referred to other cases, such as the *UPA* cases, the *Jégo-Quééré* case, the *EEB* cases, to show that the ECJ has not endeavoured to alter its jurisprudence.

84. The ECJ applied the criteria on direct and individually concerned in the *Greenpeace* case, in which the applicants, including an environmental NGO and local residents, challenged a decision of the Commission to finance the construction of two coal-fired power plants on the Canary Islands on the grounds that this decision contravened EU legislation relating, inter

alia, to environmental impact assessment. In this case, members of the public did indeed try to challenge an act issued by an EU authority for contravening EU law relating to the environment. However, the organization was not granted standing, and the case was dismissed. The Court held that the challenged decision was “a measure whose effects [were] likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned”.³⁹

85. The ECJ reasoned in the same vein in the *Danielsson* case:

“Even on the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, that circumstance alone would not be sufficient to distinguish them individually in the same way as a person to whom the contested decision is addressed [...] since damage of the kind they cite could affect, in the same way, any person residing in the area in question.”⁴⁰

86. It is clear to the Committee that TEC article 230, paragraph 4, on which the ECJ has based its strict position on standing, is drafted in a way that could be interpreted so as to provide standing for qualified individuals and civil society organizations in a way that would meet the standard of article 9, paragraph 3, of the Convention. Yet, the cases referred to by the communicant reveal that, to be individually concerned, according to the ECJ, the legal situation of the person must be affected because of a factual situation that differentiates him or her from all other persons. Thus, persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation. The consequences of applying the Plaumann test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ.

87. Without having to analyze further in detail all the cases referred to, it is clear to the Committee that this jurisprudence established by the ECJ is too strict to meet the criteria of the Convention. While the *WWF-UK* case was initiated after the entry into force of the Convention for the Party concerned, for the reasons stated in paragraph 62, the Committee decides not to make a specific finding on whether the decision of the EU Courts in the *WWF-UK* case amounted to non-compliance with the Convention (and accordingly does not examine whether the contested EU regulation on fishery in the *WWF-UK* case is as such a challengeable act under article 9 or the Convention). Yet, the Committee considers with regret that the EU Courts, despite the entry into force of the Convention, did not account for the fact that the Convention had entered into force and whether that should make a difference in its interpretation and application of TEC article 234.

88. Without prejudicing the forthcoming examination of the Aarhus Regulation and any other relevant internal administrative review procedure (cf. para. 10), the Committee is also convinced that if the examined jurisprudence of the EU Courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraph 3, of the Convention. However, since this conclusion is based on court cases that were initiated before the entry into force of the Convention and since the Committee is not examining the Aarhus Regulation or any other internal administrative review procedure, the Committee does not make a finding of

³⁹ Greenpeace, CFI Order of 9 August 1995 T-585/93, para. 54.

⁴⁰ See n 14 above at para. 71.

non-compliance by the Party concerned with article 9, paragraph 3, of the Convention in this case.

Review procedures before the EU Courts through national courts of the Member States

89. The Party concerned has referred to the possibility of members of the public to request national courts to ask for a preliminary ruling of the ECJ on the basis of article 234 TEC. Under EU law, while it is not possible to contest directly an EU act before the courts of the Member States, individuals and NGOs may in some states be able to challenge an implementing measure and thus pursue the annulment by asking the national court to request a preliminary ruling of the ECJ. Yet, such a procedure requires that the NGO is granted standing in the EU Member State concerned. It also requires that the national court decides to bring the case to the ECJ under the conditions set out in article 234 TEC.

90. While the system of judicial review in the national courts of the EU Member States and the request for preliminary ruling is a significant element for ensuring consistent application and proper implementation of EU law in the Member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies. Nor does the system of preliminary review amount to appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling does neither in itself meet the requirements of access to justice in article 9 of the Convention nor compensate for the strict jurisprudence of the EU Courts, examined in paragraphs 76-88 above.

Review procedures before the EU Courts under the TFEU

91. The jurisprudence examined was not actually implied by the TEC, but rather a result of the strict interpretation by the EU Courts. While this jurisprudence was built by the EU Courts on the basis of the old text in TEC, article 230, paragraph 4, the wording of TFEU article 263, paragraph 4, based on the Lisbon Treaty, is different. The Committee notes the debate on whether this difference in itself provides for a possible change of the jurisprudence so as to enable members of the public to have standing before the EU Courts, and considers this a possible means for ensuring compliance with article 9 of the Convention. Yet, the Committee refrains from any speculation on whether and how the EU Courts will consider the jurisprudence on access to justice in environmental matters on the basis of the TFEU.

Adequate and effective remedies (art. 9, para. 4)

92. The Committee has concluded in paragraph 87 that the established jurisprudence of the EU Courts prevents access to judicial review procedures of acts and omissions by EU institutions, when acting as public authorities. This jurisprudence also implies that there is no effective remedy when such acts and omissions are challenged. Thus, the Committee is convinced that if the jurisprudence of the EU Courts examined in paragraphs 76-88 were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would also fail to comply with article 9, paragraph 4, of the Convention (cf. ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, para. 40)).

Costs (art. 9, paras. 4 and 5)

93. The Communicant alleges that the costs incurred for the losing party before the EU Courts are uncertain and may be prohibitively expensive. The Party concerned disagrees with the communicant because the Court in principle does not charge any fees, and the costs of the losing party are nominal, unless the Commission hires an external lawyer. Based on the fact that the communicant did not present any case where the EU Courts have decided to allocate the costs on applicants in a way that would make the procedure prohibitively expensive, and having examined the applicable rules of procedure on costs and legal aid, the Committee finds that the allegations concerning costs were not sufficiently substantiated by the communicant.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Main findings with regard to non-compliance

94. With regard to access to justice by members of the public, the Committee is convinced that if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention.

95. Given the timing of the cases referred to above and the decision of the Committee to examine the jurisprudence on access to justice in general (see paras. 10 and 64 above), the Committee considers that the Party concerned is not in non-compliance with the Convention. (see paras. 87 and 90 above). However, without examining whether the challenged EU regulation in the *WWK-UK* case was as such challengeable under article 9 of the Convention, the Committee considers with regret that the EU Courts, despite the entry into force of the Convention, did not account for the fact that the Convention had entered into force and whether that should make a difference in its interpretation and application of TEC article 234. (see para. 87 above)

96. The Committee finds that the allegations of non-compliance with paragraphs 4 and 5 of article 9 of the Convention, with respect to costs, were not sufficiently substantiated by the communicant (see para. 93).

B. Recommendations

97. While the Committee is not convinced that the Party concerned fails to comply with the Convention, given the evidence before it, it considers that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention.

98. Therefore, the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, recommends the Party concerned that all relevant EU institutions within their competences take the steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters.