



Economic and Social Council

Distr.: General
8 February 2011

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

Twenty-eighth meeting
Geneva, 15–18 June 2010

Report of the Compliance Committee on its Twenty-eighth meeting

Addendum

Findings and recommendations with regard to Communication ACCC/C/2008/35 concerning compliance by Georgia

Adopted by the Compliance Committee on 18 June 2010

I. Introduction

1. On 16 December 2008, the Caucasus Environmental NGO Network (hereinafter the communicant or CENN) submitted a communication to the Committee alleging a failure by Georgia to comply with its obligations under article 6, paragraphs 2 and 4, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).
2. The communication alleged that by failing to inform the public concerned in a timely, adequate and effective manner about possibilities for public participation in decision-making on issuing licences for long-term forest use, the Party concerned was not in compliance with article 6, paragraph 2, of the Convention. The communication further alleged that by failing to provide for early public participation in the issuance of special licences for long-term forest use, the Party concerned was not in compliance with article 6, paragraph 4, of the Convention.
3. At its twenty-second meeting (17–19 December 2008), the Committee took note of the communication, but was not able to consider its preliminary admissibility, since the

communication had been submitted only several days prior to its meeting. However, the Committee sought more detailed information from the communicant with regard to the allegations. On 2 March 2009, the communicant submitted a new version of the communication with clarification on the issues raised by the Committee of non-compliance and the use of domestic remedies.

4. At its twenty-third meeting (31 March–3 April 2009), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Aarhus Convention, the communication was forwarded to the Party concerned on 13 May 2009 along with a number of questions put forward by the Committee soliciting additional information from the Party concerned on matters relating, inter alia, to the facts mentioned in the communication and the relevant Georgian legislation. Also on 13 May 2009, the secretariat forwarded to the communicant a number of questions put forward by the Committee soliciting additional clarification.

6. At its twenty-fourth meeting (30 June–3 July 2009), the Committee agreed to discuss the content of the communication at its twenty-sixth meeting.

7. On 23 September 2009, the communicant responded to the questions raised by the Committee clarifying several points of its communication. On 8 October 2009 and 19 November 2009, the Party concerned addressed the questions raised by the Committee and responded to the allegations made in the communication.

8. The Committee discussed the communication at its twenty-sixth meeting (15–18 December 2009), with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. The Committee prepared draft findings at its twenty-seventh meeting (16–19 March 2010), completing the draft through its electronic decision-making process. 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 12 May 2010. Both were invited to provide comments by 9 June 2010.

9. The Party concerned provided comments on 1 June 2010.

10. At its twenty-eighth meeting (15–18 June 2010), 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 of the meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues¹

National legal framework

11. The Georgian General Administrative Code of 25 June 1999 requires that the administration ensure stakeholder participation in administrative proceedings in the cases defined by law (art. 95).

12. The Forest Code of Georgia of 22 June 1999 (hereinafter the Forest Code; annex 1 to the communication — English translation provided by the communicant) regulates the protection, use and management of all forests, including their resources, in the territory of

¹ 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.

the country (arts. 1 and 5). Forest use and management works are permitted only with prior forest management planning, as detailed in the Law of Georgia on Environmental Permit of 15 October 1996 (hereinafter the Environmental Permit Law; annex 2 to the communication — English translation provided by the communicant), or in case of emergency (art. 27, paras. 4 and 6 of the Forest Code).

13. The Forest Code also provides for the participation of public interest organizations in the governance of State-owned forests, including the resources therein (“State Forest Fund”) (arts. 35–36). Accordingly, citizens and representatives of public interest organizations are entitled to receive full, reliable and timely information on the state of the State Forest Fund and to participate in forest management planning. Also, the Code requires that prior to any decision by the relevant authorities on the use of State Forest Fund, the following information has to be published: the forest management plan; the categories established for the State-owned forests; the protection regime established; and the allocation of areas for forest use for a period of five years or longer.

14. The Environmental Permit Law (subsequently abolished, see below) also established the legal basis for requiring information to be made available to the public and for public participation in the processing of permits for activities relating to the protection of water, wood, land, subsoil and other natural resources (preamble and art. 3). Whether or not the permit process was required depended on the nature of the activity, its size and effect. Permits for long-term forest use and timber activities were subject to this law. The process for a forest use permit involved the carrying out of an environmental impact assessment (EIA) and of a State ecological examination (called a State ecological expertise), and in general a decision-making process, including public participation (art. 4). Public participation was required to permit timber activities as well.

15. The Law on Permits for Impact on the Environment of 14 December 2007, regulating the issuance of permits for activities that may impact the environment, which came into force on 1 January 2008, explicitly abolished the Environmental Permit Law. The new law abandons the approach of considering categories of activities on the basis of their impact on the environment. The new law still requires the carrying out of an EIA for a number of activities, but not for forest use and management. Also, the public participation process has changed: environmental permits were previously issued through a detailed public administrative procedure, whereas under the new legislation permits are issued through the regular public administrative procedure. Finally, the carrying out of State ecological expertise, which had previously been regulated by the Law on State Ecological Expertise, has been replaced by the new Law on Ecological Expertise of 1 January 2008.

16. Meanwhile, the Law on Licences and Permits of 24 June 2005 had come into force. This law defines the list of categories of licences and permits and sets up the rules for the issuance, amendment and abolishment of licences and permits. In addition, Resolution No. 132 on approval of the provisions on the rules and conditions for issuance of licences on forest use of 11 August 2005 (hereinafter Resolution No. 132) was enacted to allow for the issuance of long-term licences on forest resource use. According to that resolution, information regarding auctions for the award of forest use licences should be announced in the press one month before the auction date.

Facts

17. On 1 May 2007 and on 7 and 8 October 2008, the Government carried out auctions for the award of long-term forest use licences.

18. According to the communication, the Ministry of Environmental Protection and Nature Resources publicly announced the auction of 1 May 2007 one month in advance. At this auction, licences for long-term use of forest areas in the regions of Kakheti, Samegrelo-

Zemo Svaneti and Samtskhe-Javakheti were auctioned. The Ministry of Economic Development publicly announced the auction of 7–8 October 2008 on 5 and 10 September 2008 in the newspaper “24 Saati” (“24 Hours”) and also on the Ministry’s website. At this auction round, licences for long-term use of forest areas in the regions of Kakheti and Mtskheta-Mtianeti, Shida-Kartli, Samtskhe-Havakheti, Guria, Samegrelo-Zemo Svaneti and Imereti were auctioned.

19. As a result of these auctions, licences were issued to companies for forest harvesting activities, which, according to the communicant, started immediately after the award of the licences (annex 4 to the communication lists the developers that were awarded licences, and the Party concerned also provided a list in its response dated 19 November 2009).

20. Another auction was initially scheduled to take place on 11 December 2008, but was cancelled further to protests from the affected population, who claimed that there would be an irreversible impact on the environment if the auctions went ahead.

21. The communicant also reports that, in 2008, a team of technical experts conducted field visits to evaluate the situation in the forest sites for which forest use licences had already been awarded in 2007 and in those sites for which an auction was scheduled in 2008. In the view of that team, the public authorities had failed to diligently monitor the activities for which the licences had been awarded and the areas were socially and economically affected.

Substantive issues

22. The communicant alleges that the long-term forest licences issued after the auctions in May 2007 and October 2008 are permits within the ambit of article 6, paragraph 1 (b), of the Convention, since the Party concerned has already decided to subject the activities for which the licences are awarded to public participation provisions, due to their size, location and effects (para. 14 above).

23. According to the communicant, the public concerned, including local citizens who were directly affected by the activities for which the licences were awarded, was not informed about the decision-making in an adequate, timely and effective manner, because the local population has no or very limited access to national mass media and the Internet, where the auctions were announced, and hence the Party concerned failed to comply with article 6, paragraph 2, of the Convention.

24. The communicant argues that the auction of 1 May 2007 was subject to the Environmental Permit Law and the auction of 7–8 October 2008 was subject to the Law on Permits for Impact on the Environment. The latter, in the view of the communicant, has weakened the public participation component of the decision-making process; it does not require the conduct of an EIA or of a State ecological expertise for forest use and management activities. According to the communicant, by failing to provide the opportunity for effective public participation, when all options were open, the Party concerned failed to comply with article 6, paragraph 4, of the Convention.

25. Moreover, the communicant argues that Resolution No. 132, together with Order No. 1–1/480 of the Minister of Economic Development of 4 April 2008 on the “Rules of Conduct of Auctions for the Purpose of Issuance of a Licence on Use, Establishment of the Initial Price of the Licence on the Use and Payment Method”², do not ensure public participation in administrative procedures, including in auctions for the award of long-term forest use licences. The communicant alleges that by failing to provide for the obligation of

² Title of the order per the English translation provided by the parties.

the authorities to inform the public in an adequate and effective manner, as well as to involve the public in the decision-making process, Resolution No. 132 is not in compliance with article 6, paragraphs 2 and 4, of the Convention. In support of its argument, the communicant submitted the legal opinion of the Aarhus Centre of Georgia, stating that the Resolution at issue is a by-law in the sense of article 8, of the Convention, and that its content is not in compliance with the Constitution of Georgia, the laws of Georgia (the Forest Code and the Environmental Permit Law) and the international obligations derived from the Aarhus Convention.

26. The Party concerned declares it is in compliance with the Convention and questions the legal basis of the communicant's arguments. It argues that the Law on Licences and Permits of 2005 abolished the 1996 Environmental Permit Law. For this reason, article 6, paragraph 1 (b), of the Convention is not applicable. However, forest use licence terms and conditions envisage the maintenance of an ecological balance.

27. The Party concerned states that the decision to hold an auction constitutes a legal administrative act, according to the General Administrative Code. Details of the auction are published on the Internet and in the printed media one month before the date of the auction and any interested party has the possibility to protect their legal rights before the auction, during the administrative procedure before the issuance of the licence and after the issuance of the licence.

28. With regard to the auctions at issue, the Party concerned affirms that all the necessary information was published within the applicable deadlines and that the public had the time and the opportunity to challenge any Government acts through the available administrative and judicial review procedures, as provided in particular in the General Administrative Code and Resolution No. 132. In its view, the fact that the auction of 11 December 2008 was cancelled further to the administrative action from the public demonstrates that Georgian law provides for effective protection of public participation rights (see para. 32 below).

Use of domestic remedies

29. According to the communicant, a number of civil society organizations, including the communicant, and representatives of the scientific community, had appealed before the relevant authorities against the auction of October 2008, but the authorities never responded to the appeal.

30. On 24 June 2007, the association Green Alternative (at times collaborating with the communicant) filed an administrative appeal to the Prime Minister requesting the repeal of the decrees of the Ministry of Environmental Protection and Natural Resources that confirmed the result of the auction of 1 May 2007. On 3 August 2007, the Prime Minister refused to repeal the decrees in question. On 12 September 2007, the Green Alternative appealed the Prime Minister's decision at the Tbilisi Administrative Court with the same request to repeal the decrees. The hearing took place on 15 September 2008. The communicant argues that neither the licensee nor representatives of the Ministry of Economic Development (i.e., the ministry responsible for the auction of 1 May 2007) were present, whereas the Party concerned claims that the Ministry of Environmental Protection and Natural Resources, the Ministry of Economic Development and the Prime Minister were represented at the proceedings. On 25 September 2008, the Court turned down the appeal. In the view of the communicant, the Court did not specify the grounds for the rejection; the Party concerned disagrees.

31. On 6 November 2007, the Green Alternative filed a petition with the Ombudsman requesting that it examine the legitimacy of the licences awarded through the decrees following the auction of 1 May 2007. The Ombudsman considered that the process for

promulgating the decrees at issue was not in compliance with Georgian legislation and issued a recommendation letter addressed to the Minister of Environmental Protection and Natural Resources that the decrees be repealed. The Minister did not react to the Ombudsman's recommendation.

32. In fall 2007, it was announced that an auction for long-term forest use licences was scheduled to take place in December 2007; the auction was later postponed to February 2008. The Green Alternative filed an application to the Administrative Court, requesting the cancellation of the planned auction. At the hearing of 5 February 2008, the authorities presented a temporary decision of the Acting Minister of Environmental Protection and Natural Resources of 29 January 2008 that cancelled the auction. Given the temporary character of the cancellation decision, the Green Alternative appealed before the Prime Minister to repeal the decree of the Ministry of Economic Development authorizing the auctions.

III. Consideration and evaluation by the Committee

33. The Aarhus Convention was signed by Georgia on 25 June 1998 and entered into force for Georgia on 30 October 2001.

34. The communicant is a non-governmental organization promoting environmental protection and falls under the definition of "the public" and the "public concerned" as set out in article 2, paragraph 5, of the Convention.

Clear, transparent and consistent framework (art. 3, para. 1)

35. The following decisions are being challenged before the Committee: the forest use licences issued by auction of 1 May 2007; those issued by auction of 7–8 October 2008; and those that had been planned to be issued by auction of 11 December 2008. The Committee observes that the auction of 11 December 2008 was eventually cancelled; for this reason, it decides not to examine the events surrounding the decision-making process involving the auction of 11 December 2008.

36. At the outset, the Committee notes that at the written and oral submissions of the parties, there was lack of clarity with regard to the applicable law regulating administrative proceedings for the issuance of licences and permits at the time of the forest licences relating to the two auctions (paras. 24 and 26 above).

37. The Committee notes that when the Law on Licences and Permits and Resolution No. 132 concerning licences on forest use came into force in 2005, the Environmental Permit Law of 1996 had not been formally revoked. With regard to the hierarchy of norms, the Committee recalls the general principles of law according to which a new law sets aside an old law. In addition, the Party concerned submitted the text of article 25 of the Georgian Law on Normative Acts confirming that principle and confirming that the two laws are of the same hierarchical level, while Resolution No. 132 was enacted to detail rules and conditions for issuance of licences on forest use. The communicant has not challenged these arguments. Hence, the licences issued by auction of 1 May 2007 were governed by the 2005 Law on Licences and Permits and Resolution No. 132.

38. For the auction of 7–8 October 2008, the Committee notes the entry into force of the Law on Permits for Impact on the Environment on 1 January 2008, which explicitly abolished the 1996 Environmental Permit Law. The Committee recalls the general principles of law according to which a special law sets aside a general law. In this regard, it notes that the 2005 Law on Licences and Permits and Resolution No. 132 regarding forest sector licences were not superseded by the 2008 Law on Permits for Impact on the

Environment, because the scope of the two laws was parallel and distinct. The latter includes a list of activities and sectors that it regulates and forest use licences are not mentioned. Hence, the Committee understands that the same legal framework applies to the licences issued by auction of 7–8 October 2008, as for the licences issued by auction of 1 May 2007, namely the 2005 Law on Licences and Permits and Resolution No. 132.

39. At the same time, the Committee notes that the Forest Code has been in force since 1999 and is applicable to both auctions. The Forest Code provides for its hierarchical superiority over any other laws and regulations on forest matters (art. 115.1: Should this Code and other laws regulating forest relations conflict, this Code has a superior power over the other) and is a legal text of general reference with regard to the conservation, use and management of forest resources.

40. The Forest Code provides for public participation rights as detailed in the 1996 Environmental Permit Law (Forest Code art. 35). Given that the 1996 Environmental Permit Law was tacitly abolished by the 2005 Law on Licences and Permits and Resolution No. 132 of 2005, the Committee understands that after 2005, when Resolution No. 132 came into force, the public participation rights in forest management use and planning continued to be warranted by the 1999 Forest Code; however, such rights were no longer detailed in the Environmental Permit Law, but in the provisions of administrative code on public participation in decision-making, which were incorporated by reference in Resolution No. 132 (art. 4). Hence, in the view of the Committee, for the sets of licences issued by the auctions of 1 May 2007 and 7–8 October 2008, the rights of the public to participate in the decision-making process to issue such licences were established by the Forest Code and further detailed by Resolution No. 132 of 2005 and the relevant administrative code provisions on public participation for any administrative decision.

41. The Committee finds that, in its written and oral submissions, the Party concerned was not very clear on whether the legal framework, and in particular the provisions concerning the rights of the public to participate in the decision-making regarding the granting of forest use licences, had changed or not after 2008. The Committee acknowledges that administrative law is rather complex in many jurisdictions. It finds that the Georgian legislation related to public participation in respect of forestry is rather unclear and complicated and, in its view, this situation should be remedied. The Committee, however, refrains from examining whether this amounts to non-compliance with the requirements of article 3, paragraph 1. This is because the relevant activities in accordance with the Committee's findings relating to article 6, paragraphs 1 (a) and (b) fall outside the scope of the Convention (see below) and thus the relevant legislation relating to the activities at issue does not implement the Convention as required by article 3, paragraph 1.

Decisions on specific activities (art. 6, para. 1)

42. The main allegations of the communicant concern the failure of the Party concerned to comply with article 6, paragraphs 2 and 4. In this respect, the Committee assessed whether the forest use licences issued by auctions of 1 May 2007 and 7–8 October 2008 were administrative decisions that permit activities which are subject to subparagraphs (a) or (b) of article 6, paragraph 1.

43. Article 6, paragraph 1 (a) applies to decisions on whether to permit proposed activities listed in annex I to the Convention. Forest use and management activities are not listed in this annex to the Convention. However, paragraph 20 of the annex also includes all activities that according to domestic law require EIA with public participation. The Committee observes that the determination of whether an activity falls within the ambit of paragraph 20 of annex I to the Convention depends on three elements, namely: (i) public participation; (ii) EIA in the context of which public participation takes place; and (iii) domestic legislation providing for EIA.

44. In the context of the present case, it is clear that, until 2005, forest use projects were subject to EIA according to the 1996 Environmental Permit Law. The legal environment changed in 2005, when the Georgian Law on Licences and Permits and Resolution No. 132 came into force and the national legislature thereby tacitly abolished the 1996 environmental permit regime. Through the new laws, forest use and management were no longer subject to EIA.

45. However, the Forest Code, which is still in force and constitutes the main legal reference for public participation in forest use and management activities, warrants public participation rights of citizens and representatives of public organizations in the decision-making process for managing the State Forest Fund. Until 2005, public participation rights were further provided under the EIA procedure detailed in the 1996 Environmental Permit Law. The Party concerned during the discussion of the communication stated that while forest use is no longer subject to EIA, a number of steps precede the issuance of a licence that include elements of an EIA, although not officially requiring an EIA. These steps involve assessments and studies in order to develop the terms of a licence, including quantitative restrictions on logging and other conservation and sustainable use measures (see in particular arts. 4 and 8 of Resolution No. 132).

46. The Committee notes that even if paragraph 20 of annex I to the Convention refers to the taking place of an EIA, national legislation may provide for a process that includes all basic elements for an EIA, without naming the process by the term "EIA". Such a de facto EIA process should also fall within the ambit of annex I, paragraph 20. It is critical, however, to define the extent to which the de facto EIA process qualifies as an EIA process, even if it is not termed as such.

47. Within the jurisdiction of the Party concerned, there is presently a process termed EIA (for instance under the 2008 Law on Permits for Impact on the Environment), which encompasses public participation for the issuance of licences of an exclusive list of activities, in which forest use and management are not included; and there is also a process preceding the issuance of other licences, such as the forest use licences under Resolution No. 132 where, according to the submissions of the Party concerned, the key elements of an EIA process, including public participation (under the administrative code) are integrated (de facto EIA). In this case, however, the Committee is not convinced that the de facto EIA process for the issuance of forest use licences amounts to an EIA in the meaning of annex I, paragraph 20. In that regard, the Committee notes that Georgian legislation already provides for EIA under specific activities listed in its 2008 Law on Permits for Impact on the Environment, among which forest use activities were not included. This is an indication that the national legislature did not have the intention to subject forest use and management activities to an EIA process. Therefore, the Committee finds that licences issued by the auctions of 1 May 2007 and 7–8 October 2008 are not decisions within the scope of article 6, paragraph 1 (a), of the Convention.

48. The Committee considered whether the forest use licences at issue are decisions in the meaning of article 6, paragraph 1 (b) of the Convention. In this case, the Committee is not convinced that article 6, paragraph 1(b) is applicable.

IV. Conclusions and recommendations

A. Findings

49. As regards the alleged non-compliance with the provisions of article 6, paragraphs 2 and 4, the Committee finds that Georgia is not in a state of non-compliance, because the

decisions at issue do not fall within the ambit of article 6, paragraph 1 (see paras. 47 and 48 above).

50. While the Committee does not find that the Party concerned fails to comply with the Convention, it finds that the Georgian legislation relating to public participation in respect of forestry is rather unclear and complicated and this in the view of the Committee should be remedied (see para. 41 above).

B. Recommendation

51. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, noting the agreement of the Party concerned that the Committee take the measure referred in paragraph 37 (b) of the annex to decision I/7, and noting with appreciation the ongoing work on the national Environmental Code, recommends that the Party concerned take the necessary steps to ensure that its national legislation with regard to public participation in respect of forestry is clear.
