

Compliance Committee to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters (Aarhus Convention)

**Second progress review of the implementation of decision VI/8b  
on compliance by Austria with its  
obligations under the Convention**

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## **I. Introduction**

1. At its sixth session (Budva, Montenegro, 11-13 September 2017), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision VI/8b on compliance by Austria with its obligations under the Convention (see ECE/MP.PP/2017/2/Add.1).

## **II. Summary of follow-up**

2. On 9 March 2018, the communicants of communications ACCC/C/2010/48 and ACCC/C/2011/63 submitted written statements concerning the implementation of decision VI/8b.

3. At its sixtieth meeting (Geneva, 12-15 March 2018), the Committee reviewed the implementation of decision VI/8b in open session with the participation by audio conference of representatives of the Party concerned and the communicant of communication ACCC/C/2010/48.

4. On 27 September 2018, the communicant of communication ACCC/C/2010/48 submitted comments on the first progress report by the Party concerned on decision VI/8b.

5. On 2 October 2018, the Party concerned submitted its first progress report on decision VI/8b, one day after the deadline of 1 October 2018.

6. On 5 October 2018, the secretariat forwarded the first progress report to the communicants of communications ACCC/C/2010/48 and ACCC/C/2011/63, inviting their comments by 1 November 2018.

7. On 30 October 2018, the communicant of communication ACCC/C/2011/63 provided comments on the first progress report and the communicant of communication ACCC/C/2010/48 submitted additional comments. On 1 November 2018, the communicant of communication ACCC/C/2010/48 submitted an update on legislative developments in the Party concerned.

8. On 18 December 2018, the communicant of communication ACCC/C/2010/48 submitted comments on the Aarhus-Participation Act 2018.

9. On 20 December 2018, in response to a request from the Committee, the Party concerned provided the text of the Aarhus-Participation Act 2018 as published in its official gazette, along with an official English translation. Though the Committee had requested it to do so, the Party concerned did not provide consolidated versions of the relevant provisions of the sectoral laws, as amended by the Aarhus-Participation Act 2018, or an English translation thereof.

10. After taking into account the information received, the Committee prepared its first progress review and adopted it through its electronic decision-making procedure on 22 February 2019.

11. On 25 February 2019, the secretariat sent the Committee's first progress review to the Party concerned and the communicants of communications ACCC/C/2010/48 and ACCC/C/2011/63.

12. At its sixty-third meeting (Geneva, 11-15 March 2019), the Committee reviewed the implementation of decision VI/8b in open session, with the participation by audio conference of representatives of the Party concerned and the communicant of communication ACCC/C/2010/48.

13. On 14 March 2019, the Party concerned and the communicant of communication ACCC/C/2010/48 provided a written version of the statements they had delivered during the open session on decision VI/8b held during the Committee's sixty-third meeting.

14. On 27 June 2019, the communicant of communication ACCC/C/2010/48 provided additional information.

15. On 24 July 2019, the secretariat wrote to the Party concerned to remind it of the deadline of 1 October 2019 set out in paragraph 3(e) of decision VI/8b for the Party concerned to provide its second progress report.

16. On 1 October 2019, the Party concerned submitted its second progress report on decision VI/8b, on time.

17. On 2 October 2019, the secretariat forwarded the second progress report to the communicants of communications ACCC/C/2010/48 and ACCC/C/2011/63, inviting their comments thereon.

18. On 28 October 2019, the communicant of communication ACCC/C/2010/48 provided its comments on the second progress report of the Party concerned.

19. On 30 October 2019, the communicant of communication ACCC/C/2011/63 provided its comments on the second progress report of the Party concerned.

20. After taking into account the information received, the Committee prepared its second progress review and adopted it through its electronic decision-making procedure on 1 March 2020. The Committee thereafter requested the secretariat to forward the second progress review to the Party concerned and the communicants of communications ACCC/C/2010/48 and ACCC/C/2011/63.

### **III. Considerations and evaluation by the Committee**

21. In order to fulfil the requirements of paragraph 3 of decision VI/8b, the Party concerned would need to provide the Committee with evidence that:

(a) As a matter of urgency, it had taken the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that criteria for non-governmental organisation (NGO) standing to challenge acts or omissions by private persons or public authorities that contravene national law relating to the environment under article 9(3) of the Convention are revised and specifically laid down in sectorial environmental laws, in addition to any existing criteria for NGO standing in the environmental impact assessment, integrated pollution prevention and control, waste management or environmental liability laws;

(b) When addressing subparagraph (a) above, it ensured that, members of the public, including NGOs, have access to adequate and effective administrative or judicial procedures and remedies in order to challenge acts and omissions of private persons and public authorities that contravene national laws, including administrative penal laws and criminal laws, relating to the environment;

(c) It provided the Committee as soon as possible and no later than 1 October 2018 with a detailed plan of action on how it will implement the above recommendations;

(d) It developed a capacity-building programme and provided training on the implementation of the Convention for judges, prosecutors and lawyers.

22. In its first progress review, the Committee found that the Party concerned had not yet met the requirements of paragraph 3(a), (b), (c) and (d) of decision VI/8b, and expressed its concern at the slow progress by the Party concerned to address the recommendations set out in those paragraphs, in particular given the time that had passed since the findings and recommendations of the Committee on communications ACCC/C/2010/48 and ACCC/C/2011/63 were endorsed by the fifth session of the Meeting of the Parties (Maastricht, the Netherlands, 30 June-2 July 2014).<sup>1</sup>

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<sup>1</sup> Committee's first progress review, 22 February 2019, para. 50.

## Scope of Committee's review

### *The federal Location Development Act*

23. In its comments on the second progress report by the Party concerned, the communicant of communication ACCC/C/2011/63 reports on legislative developments regarding the federal Location Development Act (*Standortentwicklungsgesetz – StEntG*).<sup>2</sup> The Committee recalls that in its first progress review on decision VI/8b, it had explained that the communicants of communications ACCC/C/2010/48 and ACCC/C/2011/63 had not demonstrated how their allegations that the then-proposed Location Development Act failed to comply with articles 6 and 9(2) and (4) of the Convention were within the scope of decision VI/8b. The Committee determined that it would therefore not examine those allegations further in the context of its review of decision VI/8b. The Committee reiterates its determination, while confirming that this would not preclude the possibility of it examining these issues if the legislation as adopted is put before it in a future communication.<sup>3</sup>

### *Alleged shortcomings in public participation concerning proposed legislative amendments*

24. The communicant of communication ACCC/C/2010/48 reports that the province of Burgenland published a draft legislative amendment relevant to the implementation of decision VI/8b on its website in July 2019 but allegedly failed to inform stakeholders of this development.<sup>4</sup> The communicant reports that, due to this lack of notice and the short timeframe provided for making comments on the draft legislation, it missed the opportunity to submit comments. It also reports that the province indicated that it would not accept comments made after the deadline had passed.<sup>5</sup>

25. The Committee considers that the communicant of communication ACCC/C/2010/48 has not shown how these allegations, which would seem to concern compliance with article 8 rather than article 9(3), are within the scope of decision VI/8b. Accordingly, the Committee will not consider these allegations further in the context of its review of decision VI/8b, although this would not preclude the possibility of it examining such allegations if put before it in a future communication.

## **Paragraph 3(a) of decision VI/8b**

26. In its second progress report the Party concerned provides an account of the latest legislative developments at the federal and provincial level.<sup>6</sup>

### *The federal level*

#### The Aarhus-Participation Act 2018

27. In its second progress report, the Party concerned confirms that the Aarhus-Participation Act 2018 was published in the Federal Law Gazette on 22 November 2018 and entered into force on 23 November 2018.<sup>7</sup> The Party concerned states that this legislation amends the corresponding environmental laws at the federal level: the Waste Management Act (*Abfallwirtschaftsgesetz 2000*), the Water Act 1959 (*Wasserrechtsgesetz 1959*) and the Air Pollution Control Act (*Immissionsschutzgesetz-Luft*).<sup>8</sup> On air quality, the Party concerned adds that provisions on access to justice were part of a recast National Air Emissions Act 2018 (*Emissionsgesetz-Luft 2018*).<sup>9</sup> The Party concerned states that the

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<sup>2</sup> Comments on the Party's second progress report from the communicant of communication ACCC/C/2011/63, 30 October 2019, p. 2.

<sup>3</sup> Committee's first progress review, 22 February 2019, paras. 14-15.

<sup>4</sup> Comments on the Party's second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 5.

<sup>5</sup> Comments on the Party's second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 5.

<sup>6</sup> Party's second progress report, 1 October 2019, pp. 1-3.

<sup>7</sup> Party's second progress report, 1 October 2019, p. 1.

<sup>8</sup> Party's second progress report, 1 October 2019, p. 1.

<sup>9</sup> Party's second progress report, 1 October 2019, pp. 1-2.

Aarhus-Participation Act 2018 covers “the most predominant and comprehensive” areas of environmental law that are in federal competence.<sup>10</sup>

28. In reply to the Committee’s invitation at the open session on decision VI/8b at the sixty-third meeting to provide details in its second progress report of other legislation at the federal level which would be relevant to the implementation of article 9(3), for example legislation on chemicals and mining, the Party concerned in its second progress report provides some general information on its chemicals legislation. It does not however explain how members of the public may have access to administrative or judicial procedures to challenge contraventions of its legislation on chemicals or mining.<sup>11</sup>

29. In its comments on the second progress report by the Party concerned, the communicant of communication ACCC/C/2010/48 reports that, notwithstanding the Aarhus-Participation Act 2018, there remain significant gaps in implementation of article 9(3) of the Convention. The communicant identifies four key issues in this context:

(a) Apart from the specific areas of waste, water and air quality legislation, other federal environmental legislation (including, for example, industrial and trade law, forestry, mining, animal protection, pesticides and chemicals) has not yet been adapted to meet the requirements of article 9(3);

(b) The right to appeal under section 42(3) of the Waste Management Act is limited to alleged violations of European Union environmental law;

(c) Access to justice in the context of water protection is mainly limited to projects with potentially significant adverse effects on water quality; and

(d) A failure to provide for the ability to challenge plans and programmes and a lack of legal remedies against omissions by private parties and public authorities, apart from in the case of air quality legislation.<sup>12</sup>

30. The communicant of communication ACCC/C/2011/63 “fully endorses” the comments on the second progress report of the Party concerned submitted by the communicant of communication ACCC/C/2010/48.<sup>13</sup> The communicant also reports that remedies to challenge acts or omissions of authorities concerning environment, wildlife, endangered species and the Convention on International Trade in Endangered Species of Wild Fauna and Flora remain insufficient.<sup>14</sup>

31. With respect to the scope of “national law relating to the environment” in article 9(3), the Committee recalls that, in its findings on communication ACCC/C/2011/63, it held that:

“Article 9, paragraph 3, is not limited to “environmental laws”, e.g., laws that explicitly include the term “environment” in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment.”<sup>15</sup>

32. In the light of the preceding paragraph, having examined the provisions of the Aarhus-Participation Act, the Committee is not convinced that, by providing access to justice for environmental NGOs under the Waste Management Act 2002, the Air Pollution Control Act and the Water Act 1959, in addition to any existing criteria for NGO standing in the

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<sup>10</sup> Party’s second progress report, 1 October 2019, p. 1.

<sup>11</sup> Party’s second progress report, 1 October 2019, pp. 5-6.

<sup>12</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, pp. 2-3.

<sup>13</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2011/63, 30 October 2019, p. 2.

<sup>14</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2011/63, 30 October 2019, p. 2.

<sup>15</sup> ECE/MP.PP/C.1/2014/3, para. 52.

environmental impact assessment, integrated pollution prevention and control, waste management or environmental liability laws, the Party concerned has yet taken the necessary legislative or other measures to ensure NGO standing to challenge contraventions of all its sectoral environmental laws.

33. In its first progress review, the Committee already indicated that, in light of the broad scope of article 9(3) of the Convention, it was clear that amending the law to provide for access to justice only in the sectoral areas of waste, water and air quality would not be sufficient to meet the requirements of paragraphs 3(a) and (b) of decision VI/8b.<sup>16</sup> The Committee accordingly invited the Party concerned, as a matter of urgency, to arrange for a review of the relevant body of national law to identify the outstanding areas of law “relating to the environment” that require adaptation in order to comply with the requirements of paragraph 3(a) and (b) of decision VI/8b.<sup>17</sup>

34. The Committee also invited the Party concerned to provide with its second progress report a complete list of the areas of law identified as requiring to be adapted in this context, together with details of the proposed legislative measures considered necessary to address any implementation gaps and the indicative time frame for the relevant legislative processes.<sup>18</sup>

35. The Committee therefore expresses its serious disappointment that in its second progress report the Party concerned provides no indication that it has as yet carried out, or even taken steps to commence, a review to identify the outstanding areas of its law “relating to the environment” that will yet require amendment in order to comply with paragraph 3(a) of decision VI/8b.

36. The Committee accordingly reiterates its invitation to the Party concerned to undertake such a review as a matter of urgency, and to provide with its final progress report a complete list of the areas of law identified as requiring to be adapted in this context, together with details of the proposed legislative measures considered necessary to address any implementation gaps and the indicative time frame for the relevant legislative processes.

37. The Committee furthermore invites the Party concerned, in its final progress report, to respond to the following questions, and to provide the text of the relevant legislative provisions together with an English translation thereof:

(a) Is access to justice for environmental NGOs under the Waste Management Act limited to alleged violations of European Union environmental law?

(i) If not, what legislative provision(s) grant environmental NGOs the right to appeal alleged violations outside the scope of European Union environmental law?

(ii) If so, what legislative measures have to date been taken, or are proposed, in order to provide environmental NGOs with access to justice to challenge alleged violations outside the scope of European Union environmental law?

(b) Is access to justice for environmental NGOs in the area of water protection limited to projects with potentially significant adverse effects on water quality?

(i) If not, what legislative provision(s) grant environmental NGOs access to justice regarding water protection outside the scope of projects with potentially significant effects on water quality?

(ii) If so, what legislative measures have to date been taken, or are proposed, in order to provide environmental NGOs with access to justice to challenge alleged violations outside the scope of projects with potentially significant effects on water quality?

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<sup>16</sup> Committee’s first progress review, 22 February 2019, para 31.

<sup>17</sup> Committee’s first progress review, 22 February 2019, para. 32.

<sup>18</sup> Committee’s first progress review, 22 February 2019, para. 32.

(c) Is the right for environmental NGOs to challenge omissions by private parties and public authorities which contravene national environmental law limited to challenges under the Air Pollution Control Act?

(i) If not, what other legislative provision(s) grant environmental NGOs access to justice to challenge omissions by private parties and public authorities which contravene national environmental law?

(ii) If so, what legislative measures have to date been taken, or are proposed, in order to provide environmental NGOs with access to justice to challenge omissions by private parties and public authorities which contravene national environmental law apart from the Air Pollution Control Act?

(d) Is the right for environmental NGOs to challenge plans and programmes which contravene national environmental law limited to plans and programmes regarding air quality?

(i) If not, what other legislative provision(s) grant environmental NGOs access to justice to challenge plans and programmes which contravene national environmental law other than plans and programmes regarding air quality?

(ii) If so, what legislative measures have to date been taken, or are proposed, in order to provide environmental NGOs with access to justice to challenge plans and programmes which contravene national environmental law other than plans and programmes regarding air quality?

38. The Committee makes clear that the satisfactory fulfilment of paragraphs 36 and 37 above will be essential preconditions for the Committee to be in a position to assess whether the Party concerned has met the requirements of paragraph 3(a) of decision VI/8b with respect to the federal level.

#### Standing criteria for environmental non-governmental organisations

39. In its first progress review on decision VI/8b, the Committee observed that the provisions inserting access to justice rights in the sectors of water, waste and air each refer to “environmental organisations recognised pursuant to section 19 of the Environmental Assessment Act 2000.”<sup>19</sup> The Committee accordingly concluded that, to the extent that section 19 of the Environmental Assessment Act (EIA Act) determines the standing criteria of NGOs to challenge acts and omissions within the meaning of article 9(3) of the Convention, the amendments to section 19 of the EIA Act fall squarely within the ambit of the Committee’s review of decision VI/8b.<sup>20</sup>

40. In its first progress review, the Committee indicated that in order to assess the implications for NGO standing of the amendment to section 19 of the EIA Act, it required further information from the Party concerned. Specifically, it invited the Party concerned to provide: the text of the amended provision; the rationale for the amendment inserting new membership criteria; the basis on which the specific membership quotas were selected; and the likely implications of the amendment in practice.<sup>21</sup> In particular, the Committee invited the Party concerned to explain how the amendment fits with the recommendations in paragraph 3(a) of decision VI/8b. It also sought clarification on what sort of evidence the Party concerned would consider necessary for NGOs to demonstrate that membership quotas are met.<sup>22</sup>

41. In its second progress report, the Party concerned states that the amendment to the EIA Act was adopted by its Parliament in late autumn 2018 and entered into force at the beginning of December 2018.<sup>23</sup> The proposed amendments concerning additional

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<sup>19</sup> Committee’s first progress review, 22 February 2019, para. 18.

<sup>20</sup> Committee’s first progress review, 22 February 2019, para. 18.

<sup>21</sup> Committee’s first progress review, 22 February 2019, para. 36.

<sup>22</sup> Committee’s first progress review, 22 February 2019, para. 36.

<sup>23</sup> Party’s second progress report, 1 October 2019, p. 4.

requirements for the recognition of NGOs were introduced in the final phase of the parliamentary deliberations.<sup>24</sup> The Party concerned submitted an English translation of section 19 of the EIA Act with its second progress report.

42. Article 19(6) of the EIA Act, as amended, provides that:

“An environmental organisation is an association or a foundation:

1. Whose primary objective is the protection of the environment according to the association’s statutes or the foundation’s charter,
2. That is non-profit oriented under the terms of Articles 35 and 36 Bundesabgabenordnung (Federal Fiscal Code), Federal Law Gazette I No 194/1961 and
3. That has been in existence and has pursued the objective identified in number 1 for at least three years before submitting the application pursuant to paragraph (7).

The association shall have at least one hundred members. A federation shall comprise at least five member associations that meet the criteria of paragraph 6 numbers 1 to 3 and that, together, reach the minimum number required for five recognised environmental organisations. The authority shall be provided with credible evidence of the number.”<sup>25</sup>

43. Article 19(7) of the EIA Act provides that:

“[...] the Federal Minister of Agriculture and Forestry, Environment and Water Management shall decide upon request by administrative order whether an environmental organisation meets the criteria of paragraph (6) and in which Federal Provinces the environmental organisation is entitled to exercise the rights related to *locus standi*.”<sup>26</sup>

44. Article 19(8) of the EIA Act stipulates, inter alia, that:

“The Federal Minister for Sustainability and Tourism shall publish a list of the environmental organisations recognised by administrative order pursuant to paragraph (7) on the internet site of the Federal Ministry for Sustainability and Tourism. This list shall specify the Federal Provinces in which the environmental organisations are entitled to exercise rights related to *locus standi*.”<sup>27</sup>

45. Article 19(9) of the EIA Act provides that:

“An environmental organisation recognised pursuant to paragraph (7) shall forthwith inform the Federal Minister for Sustainability and Tourism if any of the criteria defined in paragraph (6) is no longer met. If the Federal Minister for Sustainability and Tourism gets to know that a recognised environmental organisation no longer meets any of the criteria of paragraph (6), this shall be determined by way of administrative order in agreement with the Federal Minister for Digital and Economic Affairs. The list pursuant to paragraph (8) shall be amended accordingly. Upon request by the Federal Minister for Sustainability and Tourism, but at any rate every three years from admission, the environmental organisation shall submit suitable documents proving that the criteria defined in paragraph (6) are still met. Such review shall also be carried out at the request of an EIA authority.”<sup>28</sup>

46. Article 46(28)(5) includes a transitional provision which provides that:

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<sup>24</sup> Party’s second progress report, 1 October 2019, p. 4.

<sup>25</sup> Party’s second progress report, 1 October 2019, annex 2, p. 3.

<sup>26</sup> Party’s second progress report, 1 October 2019, annex 2, p. 3.

<sup>27</sup> Party’s second progress report, 1 October 2019, annex 2, p. 3.

<sup>28</sup> Party’s second progress report, 1 October 2019, annex 2, p. 3.

“Pursuant to Article 19(9) environmental organisations which, at the time of the entry into force of this Federal Act, have been recognised for more than three years shall submit the documents by 1 December 2019 at the latest.”<sup>29</sup>

47. As regards the rationale for adding additional criteria to article 19 to obtain recognition and, as a result, standing, the Party concerned explains in its second progress report that the political parties in the Parliament that proposed this particular amendment considered that “environmental organisations are granted considerable rights on access to justice with regard to the Aarhus Participation Act and therefore only active environmental organisations with a certain number of members should have legal standing.”<sup>30</sup>

48. With respect to the basis on which the specific membership quotas were selected, the Party concerned refers to the judgment of the Court of Justice of the European Union in Case C-263/08 *Djurgården*,<sup>31</sup> in which the Court determined that a minimum requirement of 2,000 members was not compatible with European Union law.<sup>32</sup> The Party concerned reports that legislators therefore considered that requiring an association to have a minimum of 100 members was feasible.<sup>33</sup> The Party concerned also reports that a federation of at least five associations will obtain recognition if, taken together, the five associations comprise the required minimum total membership of 500 members.<sup>34</sup>

49. The communicant of communication ACCC/C/2010/48 submits that the amendment of article 19 of the EIA Act is not in line with the Convention, as it determines the minimum requirement of 100 members to be an absolute prerequisite, not allowing for any other proof, such as support from the public or professional expertise.<sup>35</sup>

50. Regarding the likely effects of the new criteria, the Party concerned reports that, according to article 46(28)(5) of the EIA Act, as amended (see para. 46 above), environmental organisations which were already recognised by 1 December 2018 for a period of more than three years are required to submit documents for renewal of their recognition by 1 December 2019 at the latest.<sup>36</sup> The Party concerned reports that the procedures have commenced on the recognition of existing environmental organisations.<sup>37</sup> Specifically, the Party concerned reports that the Ministry for Sustainability and Tourism has already received several applications for review of the recognition of existing environmental organisations.<sup>38</sup> It reports that, as of 1 October 2019, the date of its second progress report, no application for renewal of recognition had been refused.<sup>39</sup> The Party concerned reports that the ministry does not envisage any obstacles with the renewals of recognition of environmental organisations so far and it does not anticipate any concerns or problems with regard to the further recognition of existing environmental organisations.<sup>40</sup>

51. In reply to the Committee’s invitation to provide further information concerning the evidence the Party concerned would consider necessary for NGOs to demonstrate that membership quotas are met, the Party concerned states that the recognition process does not require an organisation to provide a list of members.<sup>41</sup> Rather the number of members “has to be made credible”, for example by certification of a notary or an independent auditor.<sup>42</sup>

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<sup>29</sup> Party’s second progress report, 1 October 2019, annex 2, p. 4.

<sup>30</sup> Party’s second progress report, 1 October 2019, p. 4.

<sup>31</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* EU:C:2009:631.

<sup>32</sup> Party’s second progress report, 1 October 2019, p. 4.

<sup>33</sup> Party’s second progress report, 1 October 2019, p. 4.

<sup>34</sup> Party’s second progress report, 1 October 2019, p. 4.

<sup>35</sup> Statement of the communicant of communication ACCC/C/2010/48, 14 March 2019, p. 1.

<sup>36</sup> Party’s second progress report, 1 October 2019, p. 5.

<sup>37</sup> Party’s second progress report, 1 October 2019, p. 5.

<sup>38</sup> Party’s second progress report, 1 October 2019, p. 5.

<sup>39</sup> Party’s second progress report, 1 October 2019, p. 5.

<sup>40</sup> Party’s second progress report, 1 October 2019, p. 5.

<sup>41</sup> Party’s second progress report, 1 October 2019, p. 5.

<sup>42</sup> Party’s second progress report, 1 October 2019, p. 5.

52. In its comments on the second progress report by the Party concerned, the communicant of communication ACCC/C/2010/48 submits that, in practice, the amendments to the EIA Act concerning the new recognition requirements place “a significant burden” on environmental NGOs.<sup>43</sup> The communicant claims specifically that for many NGOs the collection and proof and creation of relevant documentation is resource intensive and can involve up to 10 work days.<sup>44</sup> It alleges further that, because the ministry does not accept affidavits by executive boards of associations, notarial certifications or confirmations by statutory auditors are necessary, thereby creating additional costs for associations. The communicant submits that at least five of the 57 environmental organisations that are currently recognized are considering not applying for further recognition with the result that they will lose their right to participation and access to justice.<sup>45</sup> The communicant states, however, that the amendment does not affect foundations as they legally do not have members.<sup>46</sup>

53. As noted above, the communicant of communication ACCC/C/2011/63 “fully endorses” the comments on the second progress report of the Party concerned submitted by the communicant of communication ACCC/C/2010/48.<sup>47</sup> The communicant also alleges that that due to the minimum requirement of 100 members for NGOs, small organisations in smaller, especially rural communities will “cease to exist.”<sup>48</sup> It claims that section 19 of the EIA Act grants access to justice only to two types of environmental organisations, namely associations and federations, but not foundations, since they do not have members.<sup>49</sup> The communicant states that after 1 January 2020 it “most probably will no longer be an “environmental organisation” under the law of the Party concerned.<sup>50</sup>

54. In its first progress review, the Committee, while not coming to any conclusion on the matter at this stage, indicated that the amendment to section 19 of the EIA Act “may be a step in the wrong direction in terms of compliance with article 9(3).”<sup>51</sup> Based on the information before it, the Committee remains concerned that the amendment may indeed be a step in the wrong direction. In the absence of more information from the Party concerned regarding the amendment and its impacts, the Committee will not undertake an assessment of the amendment in the context of its second progress review. The Committee, however, invites the Party concerned, together with its final progress report due on 1 October 2020, to provide the following further information:

(a) To clarify whether section 19 of the EIA Act grants foundations standing to challenge contraventions of environmental law within the scope of the Aarhus-Participation Act 2018 and if so, the requirements a foundation must meet in order to have such standing.

(b) To explain the reasons for selecting one hundred members as the minimum number of members for an association (section 19(6) of the EIA Act).

(c) To explain why, in order to challenge a contravention of national law relating to the environment, it is considered necessary that an association must have existed for a certain period of time (section 19(6) of the EIA Act).

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<sup>43</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 6.

<sup>44</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 6.

<sup>45</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 6.

<sup>46</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 6, fn. 9.

<sup>47</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2011/63, 30 October 2019, p. 2.

<sup>48</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2011/63, 30 October 2019, p. 3.

<sup>49</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2011/63, 30 October 2019.

<sup>50</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2011/63, 30 October 2019, p. 3.

<sup>51</sup> Committee’s first progress review, 22 February 2019, para 37.

(d) To specify the number of each of the following entities that were recognized as an environmental organisation under the law of the Party concerned in 2018 *prior* to the entry into force of section 19 of the EIA Act:

- (i) Associations recognized at the federal level;
- (ii) Associations recognized at the federal level that had more than 100 members;
- (iii) Of associations recognized only at the provincial level, the number of associations recognized in each province;
- (iv) Of associations recognized only at the provincial level, the number of associations recognized in each province that had more than 100 members.
- (v) Foundations recognized at the federal level;
- (vi) For foundations recognized only at the provincial level, the number of foundations recognized in each province.

(e) To ask each environmental organisation that has applied for recognition under article 19 of the EIA Act up until the date of the final progress report, the number of work days it required to prepare its application for recognition and the costs it incurred to do so, and to submit the results of that survey together with the final progress report.

(f) To explain the rationale for requiring environmental organisations to re-apply for recognition every three years (section 19(9) of the EIA Act).

(g) To explain the rationale for granting to the Federal Minister for Sustainability and Tourism and any EIA authority the power to request an environmental organisation to re-apply for recognition at any time, when that environmental organisation already has to re-apply for recognition every three years (section 19(9) EIA Act).

#### Concluding remarks regarding the federal level

55. The Committee welcomes the progress made by the Party concerned to grant access to justice for environmental NGOs at the federal level in the areas of waste management, water and air quality through the adoption of the Aarhus-Participation Act 2018. However, in the light of the issues identified in paragraphs 36, 37 and 54 above, the Committee considers that the Party concerned has not demonstrated that it has yet fully met the requirements of paragraphs 3(a) of decision VI/8b with respect to standing for environmental NGOs under article 9(3) at the federal level.

#### *The provincial level*

56. The Party concerned reports that several provinces have passed laws amending their corresponding legislation concerning nature protection and the protection of species, as well as their laws on hunting and fishing. The legislative amendments reported by the Party concerned are summarized below:

(a) The province of Lower Austria has passed the *Landesgesetz, mit dem das NÖ Naturschutzgesetz 2000 und das NÖ Jagdgesetz 1974 geändert werden* which covers the areas of nature protection and hunting. It entered into force on 22 March 2019.<sup>52</sup>

(b) The province of Upper Austria has passed the *Landesgesetz, mit dem das Oö. Natur- und Landschaftsschutzgesetz 2001, das Oö. Nationalparkgesetz und das Oö. Umwelthaftungsgesetz geändert werden* which covers the areas of nature and landscape protection and national parks and which entered into force on 1 August 2019. Draft legislative proposals amending the fishing and hunting law (*Oö. Fischereigesetz 2019* and amendment to the *Oö. Jagdgesetz*) were expected to be adopted by the provincial parliament by the end of 2019.<sup>53</sup>

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<sup>52</sup> Party's second progress report, 1 October 2019, p. 2.

<sup>53</sup> Party's second progress report, 1 October 2019, p. 2.

(c) The province of Vorarlberg has passed the *Gesetz über Beteiligung im Naturschutz, Jagd- und Fischereirecht (Aarhus-Beteiligungsgesetz) – Sammelnovelle* which covers the areas of nature protection, hunting and fishing and which entered into force on 4 September 2019.<sup>54</sup>

(d) Regarding the province of Styria, the law amending the *Gesetz über Einrichtungen zum Schutz der Umwelt*, which refers to the areas of nature protection, hunting and fishing, was adopted by the provincial parliament on 17 September 2019.<sup>55</sup>

(e) As regards the province of Burgenland, the *Entwurf eines Gesetzes über die Anpassung der Burgenländischen Rechtsordnung an die Aarhus-Konvention (Burgenländisches Aarhus Beteiligungsgesetz)*, which adapts the relevant provincial law to the Convention, was expected to be adopted by the provincial parliament in October 2019.<sup>56</sup>

(f) For the province of Carinthia, the *Entwurf eines Gesetzes, mit dem das Kärntner Fischereigesetz, das Kärntner Gentechnik-Vorsorgegesetz, das Kärntner IPPC-Anlagengesetz, das Kärntner Jagdgesetz 2000, das Kärntner Landes-Pflanzenschutzmittelgesetz und das Kärntner Naturschutzgesetz 2002 geändert werden (Kärntner Aarhus- und Umwelthaftungs Anpassungsgesetz)*, which covers the area of nature protection and hunting and adapts the relevant provincial law to the Aarhus Convention, was to be adopted by the provincial parliament in autumn 2019.<sup>57</sup>

(g) With regard to the province of Salzburg, the *Entwurf eines Gesetzes, mit dem das Salzburger Naturschutzgesetz 1999, das Salzburger Nationalparkgesetz 2014, das Jagdgesetz 1993 und das Fischereigesetz 2002 geändert werden (Sbg. Aarhus-Beteiligungsgesetz 2019)*, which covers the areas of nature protection, national parks, hunting and fishing, was sent out for public consultation until September 2019. It was expected that the provincial parliament would adopt the law in November 2019.<sup>58</sup>

(h) The province of Tyrol sent out for public consultation the *Entwurf eines Gesetzes, mit dem das Tiroler Naturschutzgesetz 2005, das Tiroler Jagdgesetz 2004 und das Tiroler Fischereigesetz 2002 geändert werden (Tiroler Aarhus-Beteiligungsgesetz 2019)*, which covers the areas of nature protection, hunting and fishing, with the deadline for public comments closing at the beginning of September 2019.<sup>59</sup>

57. The Party concerned reports in summary that it was envisaged that “almost all” provinces will have finalized the implementation of their legislation by the end of 2019.<sup>60</sup>

58. While welcoming the fact that many provinces have published or already adopted measures to implement decision VI/8b, the communicant of communication ACCC/C/2010/48 submits that the amendments at the provincial level each suffer from various shortcomings.<sup>61</sup> Rather than commenting on the situation in each province individually, the communicant of communication ACCC/C/2010/48 provides a summary of the alleged shortcomings at the provincial level. These include allegations that:

(a) All the provincial legislative amendments are restricted to nature protection legislation implementing European Union law;

(b) There is no possibility to challenge omissions in the area of nature protection, for example, a failure to conduct a screening procedure, or to challenge plans and programmes relating to the environment;

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<sup>54</sup> Party’s second progress report, 1 October 2019, p. 2.

<sup>55</sup> Party’s second progress report, 1 October 2019, p. 2.

<sup>56</sup> Party’s second progress report, 1 October 2019, p. 3.

<sup>57</sup> Party’s second progress report, 1 October 2019, p. 3.

<sup>58</sup> Party’s second progress report, 1 October 2019, p. 3.

<sup>59</sup> Party’s second progress report, 1 October 2019, p. 3.

<sup>60</sup> Party’s second progress report, 1 October 2019, p. 3.

<sup>61</sup> Comments on the Party’s second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 3.

(c) Some provinces have preclusion requirements whereby members of the public are excluded from legal remedies if they have not participated in the decision-making procedure;

(d) Most provinces restrict the possibility to appeal permits affecting protected species to species protected by European Union law;

(e) Some provinces exclude injunctive relief for members of the public; and

(f) Most provinces restrict the retroactive effect of the new rights to appeal so that only decisions issued less than one year or 1.5 years maximum prior to the legislative amendments may be subject to appeal.<sup>62</sup>

59. The communicant of communication ACCC/C/2010/48 further reports that, as of the date of its comments, the province of Vienna had not published any draft legislation to implement article 9(3) of the Convention.<sup>63</sup>

60. At a more general level, the communicant of communication ACCC/C/2010/48 states that, notwithstanding the fact that the federal ministry and the provinces sought to find common ground, the legislative developments to date have resulted in several differences across the various jurisdictions, including, for example different time limits, limits to overall access to justice, and different platforms for notifications.<sup>64</sup> The communicant submits that these differences lead to practical problems in seeking access to justice.<sup>65</sup>

61. The Committee welcomes the information provided by the Party concerned in its second progress report regarding the measures taken at the provincial level. From the information provided it appears that there has been significant progress at the provincial level since the first progress report by the Party concerned was submitted and the Committee welcomes and encourages these initiatives.

62. However, it is clear from the information provided that the legislative measures required to implement article 9(3) at the provincial level are not yet complete. In particular, the Party concerned reports that, as at 1 October 2019, the legislative process was ongoing in the provinces of Upper Austria, Burgenland, Carinthia, Salzburg and Tyrol.<sup>66</sup> As regards the province of Styria, the Party concerned reports that amending legislation was adopted on 17 September 2019, but does not state whether it has yet entered into force.<sup>67</sup> Furthermore, the communicant of communication ACCC/C/2010/48 indicates that the province of Vienna had, at the date of its comments on the second progress report of the Party concerned, not yet published a draft amendment to implement decision VI/8b.

63. The Committee also takes note of the shortcomings alleged by the communicant of communication ACCC/C/2010/48 regarding the legislative measures adopted at the provincial level. Since, notwithstanding the Committee's invitation to the Party concerned to provide the text of all legislative amendments together with its second progress report, the Party concerned has not done so, the Committee is not in a position in the context of its second progress review to examine the extent to which the legislative amendments meet the requirements of paragraph 3(a) and (b) of decision VI/8b.

64. In the meantime, however, with respect to the alleged shortcomings raised by the communicant of communication ACCC/C/2010/48 in paragraph 58 above, the Committee makes the following observations:

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<sup>62</sup> Comments on the Party's second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, pp. 3-4.

<sup>63</sup> Comments on the Party's second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 5.

<sup>64</sup> Comments on the Party's second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 5.

<sup>65</sup> Comments on the Party's second progress report from the communicant of communication ACCC/C/2010/48, 28 October 2019, p. 5.

<sup>66</sup> Party's second progress report, 1 October 2019, pp. 2-3.

<sup>67</sup> Party's second progress report, 1 October 2019, p. 2.

(a) With respect to paragraph 58(a) and (d) above, as the Committee has held previously, article 9(3) concerns contraventions of any law relating to the environment.<sup>68</sup> Thus, restricting access to justice to the right to challenge contraventions of environmental legislation implementing European Union law, while not providing for those rights with respect to other environmental legislation, would be insufficient to meet the requirements of paragraph 3(a) of decision VI/8b;

(b) Regarding paragraph 58(b) above, it is clear from the express wording of article 9(3), as well as from paragraph 3(a) and (b) of decision VI/8b, that access to justice must be provided with respect to omissions within the scope of article 9(3);

(c) Concerning paragraph 58(c) above, the Committee has previously observed that the Convention does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure, and introducing such a general requirement for standing would not be in line with the Convention.<sup>69</sup>

#### Concluding remarks concerning the provincial level

65. The Committee welcomes the progress made by the Party concerned with respect to the legislative measures taken at the provincial level to provide access to justice for environmental NGOs under article 9(3). However, having not been provided with the text of the legislative measures already adopted nor of those proposed for adoption, the Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of paragraph 3(a) of decision VI/8b with respect to standing for environmental NGOs under article 9(3) at the provincial level.

#### **Paragraph 3(b) of decision VI/8b**

66. In its findings on communication ACCC/C/2011/63, the Committee examined the possibility for environmental NGOs to challenge contraventions of the following legislative provisions:

“(a) Section 7 of the Wildlife Trade Act (*Artenhandelsgesetz*), which penalizes, among others, the import and export of wild species without the necessary licence;

(b) Sections 9 and 10 of the Vienna Nature Conservation Act (*Naturschutzgesetz*), which penalize several severe offences to habitats and species, such as being present in protected habitats without permission or collecting protected plants;

(c) Sections XIV to XVI of the Nature Conservation and Landscape Care Act of one of the Austrian provinces (*Burgenland Naturschutz- und Landschaftspflegegesetz*), which penalize acts that may jeopardize habitats and species, such as significantly removing waters and altering moorlands and wetlands environments and the surrounding area;

(d) The Animal Protection Act (*Tierschutzgesetz*), penalizing, for instance, acts that inflict pain, injury or other suffering to animals.”<sup>70</sup>

67. In those findings, the Committee found that:

“because members of the public, including environmental NGOs, have in certain cases no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature

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<sup>68</sup> ECE/MP.PP/C.1/2014/3, para. 52.

<sup>69</sup> ACCC/C/2012/76 (Bulgaria) (ECE.MP.PP/C.1/2016/3, para. 68).

<sup>70</sup> ECE/MP.PP/C.1/2014/3, para. 22.

conservation and animal protection, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention”.<sup>71</sup>

68. In order to meet the requirements of paragraph 3(b) of decision VI/8b, the Party concerned will need to provide the Committee with evidence that when addressing paragraph 3(a) of decision VI/8b, it has ensured that members of the public, including NGOs, have access to adequate and effective administrative or judicial procedures and remedies in order to challenge acts and omissions of private persons and public authorities that contravene national laws, including administrative penal laws and criminal laws, relating to the environment.

69. In its second progress report, the Party concerned reports on recent legislative developments “with regard to paragraphs 3(a), (b) and (e) of decision VI/8b”. However, the Party concerned does not in fact indicate which, if any, of the legislative amendments referred to in its second progress report address the recommendation in paragraph 3(b) of decision VI/8b. The Committee expresses its disappointment at the failure by the Party concerned to provide such essential information in its second progress report, as it makes the Committee’s task of reviewing the progress made by the Party concerned to address paragraph 3(b) extremely difficult. The Committee thus invites the Party concerned in its final progress report to explain which legislative provisions are now in place to grant environmental NGOs standing to challenge contraventions of each of the laws listed in paragraph 22 of the Committee’s findings on communication ACCC/C/2011/63 (see para. 66 above). The Committee also invites the Party concerned to provide, together with its final progress report, the text of each legislative measure, together with an English translation thereof, that grants environmental NGOs standing to challenge contravention of those laws.

70. In the light of the above, the Committee expresses its concern that, despite the various legislative measures reported upon by the Party concerned in its second progress report, it provides no information on which, if any, of these measures address the recommendation in paragraph 3(b) of decision VI/8b. Accordingly, the Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of paragraph 3(b) of decision VI/8b.

### **Paragraph 3(c) of decision VI/8b**

71. In respect of paragraph 3(c) of decision VI/8b, in its first progress report, the Party concerned acknowledged the requirement to provide the Committee with a detailed plan of action on how it will implement paragraphs 3(a) and (b) of decision VI/8b.<sup>72</sup> However, its first progress report provided only a general update on progress as of 2 October 2018. It did not provide a detailed plan of action for the Committee to consider. Accordingly, in its first progress review, the Committee invited the Party concerned, by 1 October 2019, to provide:

“a detailed plan of action on how it will implement paragraphs 3(a) and (b) of decision VI/8b. Such a plan should include for both paragraph 3(a) and (b) of decision VI/8b: the specific actions proposed to be taken by Austria at both the federal and provincial level; the procedural steps associated with these actions; and the anticipated timeframe to complete these actions”.<sup>73</sup>

72. Notwithstanding the Committee’s clear guidance, the second progress review submitted by the Party concerned once again provides only a general update on legislative developments at the federal and provincial level as at 1 October 2019 regarding paragraphs 3(a) and (b) of decision VI/8b. It does not provide a detailed plan of action for the Committee to consider. This is notwithstanding the Committee’s first progress review having identified specific areas where further action would be required from the Party concerned.

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<sup>71</sup> ECE/MP.PP/C.1/2014/3, para. 63.

<sup>72</sup> Party’s first progress report, 2 October 2018, p.1.

<sup>73</sup> Committee’s first progress review, 22 February 2019, para. 43.

73. For example, as pointed out in paragraph 32 above, in its first progress review, the Committee had already made clear that “amending the law to provide for access to justice only in the sectoral areas of waste, water and air quality is not sufficient to meet the requirements of paragraphs 3(a) and (b) of decision VI/8b”.<sup>74</sup> The Committee thus called on the Party concerned, to “as a matter of urgency, arrange for a review of the relevant body of national law (at both the federal and provincial level) to identify the outstanding areas of law “relating to the environment” that require adaptation in order to comply with the requirements of paragraph 3(a) and (b) of decision VI/8b”. The Committee indicated that “a complete list of the areas of law identified as requiring to be adapted in this context, together with details of the proposed legislative measure(s) considered necessary to address any implementation gaps and the indicative time frame for the relevant legislative process(es) should be provided to the Committee with Austria’s second progress report due on 1 October 2019.”<sup>75</sup>

74. However, as the Committee observes in paragraph 35 above, the second progress report by the Party concerned contains no indication that it has either undertaken such a review nor that it is planning to do so. Nor does it indicate any proposed legislative measures to address any implementation gaps and the indicative time frame for the relevant legislative processes. The Committee considers that each of these actions should have formed part of the detailed plan of action to be provided by the Party concerned in accordance with paragraph 3(c) of decision VI/8b.

75. Accordingly, since the Party concerned has not to date provided the Committee with a detailed plan of action on how it will fully implement the recommendations set out in paragraph 3(a) and (b) of decision VI/8b, the Committee considers that the Party concerned has not yet fulfilled the requirements of paragraph 3(c) of decision VI/8b.

#### **Paragraph 3(d) of decision VI/8b**

76. With regard to paragraph 3(d) of decision VI/8b, in its first progress report the Party concerned had informed the Committee that the Austrian Academy for Administrative Courts (*Österreichische Akademie der Verwaltungsgerichtsbarkeit*) of the Johannes Kepler University of Linz was to organize a special seminar in December 2018 on the Aarhus Convention and its three pillars.<sup>76</sup> The Party concerned had also provided details of a capacity-building project “KOMM-Recht Reloaded”, led by the environmental NGO Umweltdachverband.<sup>77</sup> The project is focused on legal questions in relation to requirements governing access to justice under the Convention and European Union environmental law, including the jurisprudence of the Court of Justice of the European Union. The Party concerned reports that a core element of this project, which at the time of its first progress report was expected to be finalized by the end of October 2018, is an analysis of the findings of the Committee on article 9(3) of the Convention, with a focus on standing for environmental NGOs.<sup>78</sup> The Party concerned also informed the Committee that, in order to gain a better understanding of the Convention’s compliance mechanism, the study would provide a translation in German of the relevant findings of the Committee. It was reported that the guidance document and studies prepared in the context of the “KOMM-Recht Reloaded” project would be used as training material in the special seminar on the Convention organised by the Austrian Academy for Administrative Courts in December 2018.<sup>79</sup>

77. The Committee expresses its disappointment that the second progress report submitted by the Party concerned on 1 October 2019 does not provide any update or further details on the seminar organised by the Austrian Academy for Administrative Courts in

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<sup>74</sup> Committee’s first progress review, 22 February 2019, para. 31.

<sup>75</sup> Committee’s first progress review, 22 February 2019, para. 32.

<sup>76</sup> Party’s first progress report, 2 October 2018, p. 2.

<sup>77</sup> Party’s first progress report, 2 October 2018, p. 2.

<sup>78</sup> Party’s first progress report, 2 October 2018, p. 2.

<sup>79</sup> Party’s first progress report, 2 October 2018, p. 2.

December 2018 or on the “KOMM-Recht Reloaded” project. The seminar and the “KOMM-Recht Reloaded” project are referred to only in passing in the second progress report.<sup>80</sup>

78. In its second progress report the Party concerned states that the Federal Ministry for Sustainability and Tourism is sharing information and experience on the implementation of the Convention with other relevant ministries and provinces on a regular basis.<sup>81</sup> The Committee welcomes this initiative. However, the Party concerned has not provided the Committee with any further details which might enable the Committee to assess whether the initiative might assist in fulfilling the requirements of paragraph 3(d) of decision VI/8b.

79. As regards capacity building or training for judges, the Party concerned reports that due to the principle of the separation of powers under its Constitution, the administration (executive) has no means to impose capacity building or training for judges.<sup>82</sup> Its second progress report states that on 29 January 2019 the Environment Directorate-General at the European Commission organised an ad hoc meeting of national judges in Brussels on article 267 of the Treaty on the Functioning of the European Union (TFEU) in relation to access to justice in environmental matters and that the Party concerned attended this meeting.<sup>83</sup> A summary report of this meeting, prepared by the Environment Directorate-General at the European Commission, is provided as an annex to the second progress report.<sup>84</sup>

80. The Committee recalls that paragraph 3(d) of decision VI/8b requires the Party concerned to “develop a capacity building programme to provide training on the implementation of the Convention for judges, prosecutors and lawyers”. With respect to the assertion by the Party concerned that, due to the separation of powers, its administration (executive) has no means to impose capacity building or training on judges, the Committee points out that there is nothing in the principle of the separation of powers that would prevent the administration (executive) of the Party concerned from undertaking any or all of the following:

(a) To disseminate decision VI/8b and the Committee’s findings on communication ACCC/C/2010/48 and ACCC/C/2011/63 to the Advisory Board on Further Education (*Fortbildungsbeirat*);

(b) The Federal Ministry of Justice to provide funding to the Advisory Board on Further Education to organize a capacity building programme to train the judiciary and public prosecutors on access to justice under the Convention;

(c) The Federal Ministry of Justice to develop a capacity building programme on access to justice under the Convention and to *invite* members of the judiciary and public prosecutors to participate.

81. In this context, the Committee reminds the Party concerned that in accordance with article 27 of the Vienna Convention on the Law of Treaties, a Party may not invoke provisions of its internal law as justification for its failure to fulfil international law obligations.

82. To date, the Party concerned has provided the Committee with very limited information on the seminar held in December 2018 and on the specific capacity building project “KOMM-Recht Reloaded”. In particular, no information has been provided to enable the Committee to verify how many judges, prosecutors and lawyers attended the seminar held in December 2018. As regards the “KOMM-Recht Reloaded” project, no evidence has been provided to enable the Committee to assess whether this project delivered on the aims identified in the first progress report including, for example, the development of training materials relating to article 9(3) of the Convention.

83. Similarly, no detail has been provided to the Committee to enable it to assess the effectiveness of the initiative by the Ministry for Sustainability and Tourism to share

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<sup>80</sup> Party’s second progress report, 1 October 2019, pp. 3-4.

<sup>81</sup> Party’s second progress report, 1 October 2019, p. 4.

<sup>82</sup> Party’s second progress report, 1 October 2019, p. 4.

<sup>83</sup> Party’s second progress report, 1 October 2019, p. 4.

<sup>84</sup> Party’s second progress report, 1 October 2019, p. 4, annex 1.

information and experience on the implementation of the Convention with other relevant ministries and the provinces.

84. As regards the ad hoc meeting of national judges organised by the Environment Directorate-General at the European Commission on 29 January 2019, the summary report of the meeting states that the “aim of the meeting was to understand the perspective of national judges on the use of article 267 [TFEU] for validity references, including any factors that might operate as barriers or impediments to its use”. The Committee accordingly cannot see how the ad hoc training addresses the requirement for the Party concerned to provide training to its judges, prosecutors and lawyers on the implementation of the Convention.

85. In its first progress review, the Committee emphasized that, in order to fulfil the requirements of paragraph 3(d) of decision VI/8b, the Party concerned will need to provide information to the Committee to demonstrate that it has developed a capacity building programme, and provided training (or arranged for such training to be provided) for its judges, prosecutors and lawyers.<sup>85</sup> The Committee further indicated that the information to be provided to the Committee should include: (a) the specific content of the trainings, including the detailed programme with the titles of the presentations delivered, (b) the organizers of the trainings and the profession and relevant experience of each trainer and speaker, and (c) the number of judges, prosecutors and lawyers who have attended the trainings and in which court and town or region each judge, prosecutor and lawyer is based. The Committee expresses its disappointment that, apart from the report of the European Commission’s ad hoc meeting for national judges on article 267 TFEU, the Party concerned has not provided any information of this nature in its second progress report.

86. Furthermore, the Committee has not been provided with any information to indicate that the particular events and initiatives mentioned in the second progress report are part of a wider capacity building programme and training that the Party concerned has developed for judges, prosecutors and lawyers on the implementation of the Convention.

87. In the light of the above, while welcoming the initiatives taken to date, the Committee considers that the Party concerned has failed to provide the Committee with sufficient evidence to demonstrate that it has fulfilled the requirement in paragraph 3(d) of decision VI/8b to develop a capacity building programme to provide training for judges, prosecutors and lawyers on the implementation of the Convention.

## **IV. Conclusions**

88. The Committee welcomes the significant progress made by the Party concerned to adopt legislative measures at the federal and provincial levels to provide standing for environmental NGOs under article 9(3). However, in the light of the points identified in paragraphs 31-33, 36-37, 54 and 64-65 above, the Committee considers that the Party concerned has not demonstrated that it has yet met the requirements of paragraph 3(a) of decision VI/8b.

89. The Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of paragraph 3(b) of decision VI/8b.

90. The Committee considers that the Party concerned has not yet fulfilled paragraph 3(c) of decision VI/8b.

91. While welcoming the initiatives taken to date, the Committee considers that the Party concerned has failed to provide the Committee with sufficient evidence to demonstrate that it has fulfilled the requirements of paragraph 3(d) of decision VI/8b.

92. The Committee invites the Party concerned, together with its final progress report due on 1 October 2020:

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<sup>85</sup> Committee’s first progress review, 22 February 2019, para 48.

(a) With respect to paragraphs 3(a), (b) and (c) of decision VI/8b, to undertake, as a matter of urgency, a review of federal and provincial law to identify the outstanding areas of law “relating to the environment” that will still yet require adaptation in order to comply with the requirements of paragraph 3(a) and (b) of decision VI/8b, and then to provide the Committee with a detailed plan of action, including:

- (i) A complete list of the areas of law identified as still requiring to be adapted in this context;
- (ii) Details of the proposed legislative measures considered necessary to address these gaps; and
- (iii) The indicative time frame for the relevant legislative processes.

(b) With respect to paragraph 3(a) of decision VI/8b, to provide:

- (i) The text, together with an English translation thereof, of all legislative or other measures by then taken at either the federal or provincial levels to ensure that criteria for NGO standing to challenge acts or omissions by private persons or public authorities that contravene national law relating to the environment under article 9(3) of the Convention are revised and specifically laid down in sectorial environmental laws.
- (ii) Its replies to the Committee’s questions in paragraph 37 above, together with the text of any relevant legislative provisions and an English translation thereof.
- (iii) Its replies to the Committee’s questions in paragraph 54 above.

(c) With respect to paragraph 3(b) of decision VI/8b, to explain which legislative provisions are now in place to grant environmental NGOs standing to challenge contravention of each of the laws listed in paragraph 66 above and to provide the text, together with an English translation thereof, of each legislative measure that grants environmental NGOs standing to challenge contraventions of each of those laws.

(d) With respect to paragraph 3(d) of decision VI/8b, to provide evidence to demonstrate that it has fulfilled the requirement to develop a capacity building programme to provide training for judges, prosecutors and lawyers on the implementation of the Convention, including evidence that the training provided for judges, prosecutors and lawyers has in fact been widely attended by such persons.

93. The Committee reminds the Party concerned that all measures necessary to implement decision VI/8b must be completed by, and reported upon, by no later than 1 October 2020, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of decision VI/8b.

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