ClientEarth
Prawnicy dla Ziemi

31 May 2022

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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10 Switzerland

By email: aarhus.compliance@un.org

Dear Ms Marshall

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Poland with the provisions of the Convention on access to justice in relation to forest management plans (ACCC/C/2017/154)

The Communicant would hereby like to provide the Committee with the replay to its questions on communication ACCC/C/2017/154, dated 4 May 2022. The Communicant hopes that this additional information will facilitate the Committee's preparation for a hearing on this case.

Questions to the communicants:

1. Please provide the text of the act of 25 March 2016 approving the annex to the forest management plan of the Białowieża forest and the annex itself, in Polish, together with an English translation of the relevant parts, including any text on how the act approving the annex could be appealed.

The text of the act of 25 March 2016 approving the annex to the forest management plan of the Białowieża forest, in Polish, is provided in **Annex 1**, together with an English translation in **Annex 2**.

The annex itself, in Polish, together with an English translation is provided in **Annex 3** and **Annex 4** respectively.

Considering the Committee's request for a text "on how the act approving the annex could be appealed", we would like to provide an explanation of the last paragraph of the act of 25 March 2016 which contains legal instructions on appealing procedure of that act, namely: '*Any party not satisfied with the decision may, pursuant to Article 127 § 3 of the Code of Administrative Proceedings, appeal to the issuing authority for judicial review within 14 days from receiving the decision'*.

Despite these legal instructions, for the reasons stated below, the procedure under Article 127 (3) of the Code of Administrative Proceedings could already in 2016 not be triggered due to the nature of the act approving the annex to the forest management plan which is considered to be an internal act (and not an administrative act).

As the Communicant already explained in the Communication, in the case of forest management plans for forests owned by the state treasury, the approval of the plan is made by the minister responsible for the environment.

At the time when the act at stake was adopted (i.e., in 2016), the practice was that the act by which the minister approves a forest management plan was called a decision and information about a possible appeal procedure was included (as in the annex to the Forest Management Plan for the Białowieża Forest District, included in Annex 1). However, the administrative courts had at that time already established that forest management plans are not administrative decisions. Therefore, the appeal procedure indicated in the provided information was in fact not available.

For example, in its judgment of June 14, 2012, case no. IV SA/Wa 495/12[1], the Warsaw Regional Administrative heard a complaint against the decision of the Minister of the Environment regarding the approval of the forest management plan and found that '*despite the fact that the activities in this regard were given the form of an administrative decision (this term was used in the document and the document had the elements indicated in Art. 107 § 1 and 3 of the Code of Administrative Procedure, which are necessary for the administrative decision), however, it cannot be considered that a defective definition of this form would result in it being an administrative decision within the meaning of the Code of Administrative Procedure*.'

There was therefore a clear inconsistency in the fact that it was not possible to appeal against the Forest Management Plans and, at the same time, in the approval act itself, there was an instruction on the possibility of appealing against it.

This is due to the fact that there were different interpretations of what, under administrative law, the act of approving an annex to the forest management plan by the minister was. As mentioned above, for many years the Minister for the Environment approved forest management plans in the form of a decision - i.e., giving them the name of the decision and meeting other formal conditions required by law (such as an instruction about possible appeal - which in this case was that Article

[1] It is a decision of the court of first instance, which as a result of an appeal was examined by the Supreme Administrative Court and which judgment was translated in Attachment no 1 to the Communication to the Aarhus Convention Compliance Committee (November 2017).

127 was simply quoted - as in the present case). It was only in 2014, when the Supreme Administrative Court ruled (case no. II OSK 2477/12) that this interpretation is wrong and this approval is an internal act, beyond the jurisdiction of administrative courts.

Nevertheless, the practice of approving FMP by the Minister in the form of a "decision" continued, even until the 2016 annex at issue. It was only a long-term campaign of non-governmental organizations, as well as a case before the court on the initiative of the Ombudsman (judgement ref. number II OSK 2336/17 on 19th October 2017 mentioned on page 11 of the Communication), which led to, first of all, greater public awareness in this subject, but also in the fact that now the FMPs are approved without giving them the name ‘decision’ and without attaching instructions on the possibility of appeal. As an example, the Communicant provides a document issued by the Minister of Environment on 30 December 2020 approving the forest management plan prepared for the Lipinki Forest District, in **Annex 5** with a translation in English in **Annex 6.** This document approves the forest management plan but it is not named a ‘decision’ and there is no instructions on how to challenge it. Thus, the problem of not being able to appeal FMPs continues (i.e. no access to justice) but at least the acts approving the FMPs do not longer claim the opposite.

2. Please provide the text in Polish of the following judgments, along with an English translation of the relevant parts:
(a) Judgment no. IV SA/Wa 2787/16 of the District Administrative Court dated 14 September 2017;
There is a typing mistake as it is a judgment dated 14 March 2017.
(b) Judgment no. II OSK 2336/17 of the Supreme Administrative Court dated 19 October 2017;
(c) Judgment no. II OSK 649/20 of the Supreme Administrative Court dated 18 March 2020.

The texts in Polish and the translations of relevant parts of the above judgments are included in the following annexes, respectively:

(a) Judgment no. IV SA/Wa 2787/16 - **Annex 7**,
(b) Translation of the judgment no. IV SA/Wa 2787/16 - **Annex 8**,
(c) Judgment no. II OSK 2336/17 - **Annex 9**,
(d) Translation of the judgment no. II OSK 2336/17 - **Annex 10**,
(e) Judgment no. II OSK 649/20 - **Annex 11**,
(f) Translation of the judgment no. II OSK 649/20 - **Annex 12**.

3. At page 2 of your update of 18 February 2022, you state that a proposed amendment to the Forest Act is pending in the High Chamber of the Polish Parliament.

(a) Please provide an update on the legislative process to adopt the draft amendment. Please also provide the text, in Polish, of the draft legislative amendment as it currently stands together with an English translation thereof.

The daft legislative amendment was proposed by the Senat (the upper Chamber of the Parliament) [2] and on 3 March 2022 was discussed at the Senat's Extraordinary Committee on Climate Change, Committee on the Environment and the Committee on Legislation[3]. Information on the legislative process in the Senat is available at: https://www.senat.gov.pl/prace/proces-legislacyjny-w-senacie/inicjatywy-ustawodawcze/inicjatywa,196.html

On 24 March 2022, at its 39th session, the Senat adopted a resolution to submit to the Sejm (the lower Chamber of the Parliament) a draft legislative amendment of the Law on Forests. The draft amendment, together with an English translation thereof, is provided in **Annex 13**.

The daft is currently pending before the Sejm. However, there is no public information when it would be discussed. The draft has also no official file number yet.

The Communicant would like to draw the Committee's attention to the negative opinion issued by the Minister of the Climate and Environment in relation to this proposal[4] and the opinions expressed at the meeting of at the Senat's Extraordinary Committee on Climate Change, Committee on the Environment and the Committee on Legislation.[5] The Communicant provides the official transcript of this meeting in Polish (**Annex 14**) as well as a translation of the statement of the State Secretary at the Ministry of the Climate and Environment in English (**Annex 15**). The Communicant would like to particularly draw the Committee's attention to the State Secretary's statement that: "Poland, of course, is in dispute with the European Commission. We are arguing about whether the Aarhus Convention obliges environmental organisations to allow environmental organisations to challenge forest management plans or so-called simplified forest management plans. Poland, however, takes the view that the Aarhus Convention does not impose such an obligation on Poland or on any other country, since the right to a court is granted only in relation to projects and not forest management plans. This is not a project, but a plan."[6] The State Secretary also stated that 'the government is completely opposed to this project [i.e. the legislative proposal]'.[7]

(b) Please confirm whether, if enacted if its current form, the proposed amendment would fully address the communicants' allegations that the Party concerned fails to provide for access to justice under article 9 (3) of the Convention for environmental NGOs and

[2] https://www.senat.gov.pl/prace/druki/record,11973.html
[3] The report from this meeting is available at: https://www.senat.gov.pl/prace/druki/record,12033.html
[4] The negative opinion can be accessed under the following link, in Polish: https://www.senat.gov.pl/download/gfx/senat/pl/senatinicjatywypliki/1625/4/619_mkis.pdf . The Communicant stands ready to provide an English translation of the document, if requested.
[5] The transcript of the meeting can be accessed here, in Polish: https://www.senat.gov.pl/prace/komisje-senackie/przebieg,9572,1.html . We provide a pdf of this page in Annex 14 and an English translation of the relevant part in Annex 15.
[6] Annex 15, p. 1. The quote in Polish reads: 'Polska oczywiście jest w sporze z Komisją Europejską. Spieramy się o to, czy konwencja z Aarhus zobowiązuje do umożliwienia organizacjom ekologicznym zaskarżenia do sądu planów urządzenia lasu czy też tzw. uproszczonych planów urządzenia lasu. Polska jednak stoi na stanowisku, że konwencja z Aarhus nie nakłada na Polskę ani na żaden inny kraj takiego obowiązku, ponieważ prawo do sądu przysługuje tylko w stosunku do przedsięwzięć, a nie planów urządzenia lasu. To nie jest przedsięwzięcie, lecz właśnie plan' – see Annex 14, p. 5.
[7] Annex 15, p. 3. The quote in Polish reads: 'Rząd jest całkowicie przeciwny temu projektowi' – see Annex 14, p. 7.

individuals to challenge forest management plans that contravene national law relating to the environment.

The draft law at stake introduces the right to challenge the approval of a forest management plan through judicial and administrative proceedings by confirming that the general rules on legal standing stipulated in Article 50 (1) of the Law on the Proceedings before the Administrative Courts (hereinafter LPAC) would apply. Article 50 (1) LPAC provides that '*Anyone who has a legal interest, a prosecutor, the Polish Ombudsman, the Polish Ombudsman for Children and social organizations within their statutory activity, may bring a challenge in matters concerning other person's legal interests, if they have previously participated in the administrative proceedings'.*

The draft law provides also that an environmental organization referred to in Article 3 (1) (10)[8] of the Act of 3 October 2008 on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment (so called – EIA law), referring to its statutory objectives, is also entitled to lodge a complaint if it has been carrying out statutory activities in the field of environmental protection or nature conservation for a minimum of twelve months prior to the date on which the complaint was lodged.

If adopted, this amendment would give the members of the public concerned, including the ENGOs, the right to challenge the forest management plan in line with Article 9 (3) of the Convention.

4. At page 11 of the communication, you state that on 22 September 2016, the Polish Ombudsman filed a complaint to the District Administrative Court in Warsaw against the "decision" of the Minister of the Environment approving the annex to the Białowieża FMP and that two of the communicants, ClientEarth and Pracownia na rzecz Wszystkich Istot supported the complaint and participated in the proceedings before both the District Administrative Court and the Supreme Administrative Court. Please specify the legislative provisions on the basis of which the communicants participated in the court proceedings. Unless these are already before the Committee, please also provide the texts of the relevant legislative provisions in Polish, together with an English translation thereof.

The Communicant join the court proceedings before the Warsaw Regional Administrative Court pursuant to Article 33 § 2 LPAC.

> *Art 33 § 2 Udział w charakterze uczestnika może zgłosić również osoba, która nie brała udziału w postępowaniu administracyjnym, jeżeli wynik tego postępowania dotyczy jej interesu prawnego, a także organizacja społeczna, o której mowa w art. 25 § 4, w sprawach innych osób, jeżeli sprawa dotyczy zakresu jej statutowej działalności. Postanowienie sąd wydaje na posiedzeniu niejawnym. Na postanowienie o odmowie dopuszczenia do udziału w sprawie przysługuje zażalenie.*

[8] 'Environmental organization - means a social organization whose statutory purpose is environmental protection'

> *Article 33 § 2. A request to join a proceeding as a participant may also be submitted by a person that has not participated in administrative proceedings if the outcome of the proceeding concerns his or her legal interest as well as by a social organisation, as referred to in art. 25 § 4, in cases concerning other persons if the case relates to the scope of its statutory activities. The order shall be made by the court in camera. An order refusing the request to participate in the case shall be subject to an interlocutory appeal.*

A person or social organisation – who requested to join a proceeding as a participant under Article 33 § 2 LPAC – once accepted by the court, joins the proceeding as a participant, **having the same rights as a party** to the proceeding. It is regulated by Article 12 LPAC, which reads as follows:

> *Art. 12 Ilekroć w niniejszej ustawie jest mowa o stronie, rozumie się przez to również uczestnika postępowania.*
>
> *Article 12* ***Wherever this Act refers to a party, it shall also mean a participant in the proceedings****.*

5. At page 11 of the communication, you claim that the Ombudsman, ClientEarth and Pracownia na rzecz Wszystkich Istot, each filed "separate cassation appeals" before the Supreme Administrative Court against the judgment of the District Administrative Court no. IV SA/Wa 2787/16 dated 14 September 2017. Please specify the legislative provisions on the basis of which the communicants filed these appeals. Unless these are already before the Committee, please also provide the texts of the relevant legislative provisions in Polish, together with an English translation thereof.

The communicants filed the cassation appeals based on the Art. 173 § 1 and § 2 LPAC.

> *Art. 173 § 1 Od wydanego przez wojewódzki sąd administracyjny wyroku lub postanowienia kończącego postępowanie w sprawie, z wyłączeniem przypadków, o których mowa w art. 58 § 1 pkt 2-4, art. 161 § 1 oraz art. 220 § 3, przysługuje skarga kasacyjna do Naczelnego Sądu Administracyjnego.*
> *§ 2. Skargę kasacyjną może wnieść strona, prokurator, Rzecznik Praw Obywatelskich, Rzecznik Małych i Średnich Przedsiębiorców lub Rzecznik Praw Dziecka po doręczeniu im odpisu orzeczenia z uzasadnieniem.*
>
> *Article 173. § 1. A judgment or an order concluding the proceedings in the case rendered by a voivodship administrative court, exclusive of cases referred to in art. 58 § 1 subparagraphs 2–4, art. 161 § 1 and art. 220 § 3, shall be subject to a cassation appeal to the Supreme Administrative Court.*
> § 2. *A cassation appeal* ***may be lodged by a party****, a public prosecutor, an Ombudsman, an Ombudsman for Small and Medium-Sized Enterprises or an Ombudsman for Children after they have been served with a copy of the reasoned judgment.*

Since a participant holds the rights of a party to the proceedings due to above-mentioned Article 12 LPAC, a participant is entitled to lodge a cassation appeal under Article 173 § 1 and § 2 LPAC in conjunction with Article 12 LPAC.

Thus, the Communicants as the participants of the proceedings before the Warsaw Regional Administrative Court, lodged the cassation appeal against the judgment of the court of first instance to the Supreme Administrative Court.

6. At page 8 of the communication, you state that each administrative decision contains legal instructions on the appeal procedure for that specific decision and that "typically" an unsuccessful motion to revise the decision under article 127 (3) of the Code of Administrative Procedure enables filing a complaint to the District Administrative Court which then may be appealed before the Supreme Administrative Court.

(a) Please clarify which "regulations regarding appeals against decisions" article 127 (3) of the Code of Administrative Procedure refers to (see annex 4 to the communication).

Article 127 of the Code of Administrative Procedure (CAP) regulates the right to appeal administrative decisions. As a rule, administrative decisions issued in the first instance may be appealed to the public administration authority of higher level (Art. 127(2) CAP). Art. 127(3) CAP regulates cases where there is no public administration authority of higher level. This occurs when decisions are issued on first instance by a minister or a self-government appeal board. In such cases, instead of a typical appeal to an authority of higher level, a party is entitled to file a motion to the same administrative body who issued the decision at first instance (that is, to the minister or to the self-government appeal board) to revise its decision and reconsider the matter. The motion to revise the decision is simply a different type of an appeal, that is applicable when there is no public authority of higher level and the only possibility to provide two-instance administrative procedure is to ask the administrative body who issued the decision to reconsider the matter. Accordingly, a motion to revise the decision is considered a regular type of appeal and the regular rules that govern the appeal procedure applies accordingly. This is clarified by the phrase: "the regulations regarding appeals against decisions shall apply in such a case").

These "regulations" are contained in [other provisions of the CAP]. They regulate matters such as the right to file an appeal, the formal requirements, the effects of filing an appeal on the enforceability of the decision of the first instance and the standard of review. These regulations can be summarised as follows.

The right to file an appeal is entitled to a party of the proceedings of the first instance. The party may also waive her/his right of appeal against the decision issued by the public administration authority. Subsequently, upon serving the public administration authority with a statement on waiving the right of appeal by the last of the parties to the proceedings, the decision becomes legally binding.

An appeal (including a motion to revise a decision) requires no detailed reasons to be stated. It is sufficient if it is evident from the appeal that the party is dissatisfied with the decision issued. Specific provisions may impose other requirements concerning the contents of the appeal. The appeal shall be submitted to the competent appellate authority via the authority which issued the

decision within 14 days of the day the decision has been served upon a party, and if the decision has been communicated orally - of the day the decision has been communicated to the party

Before the deadline for filing the motion to revise the decision, the decision is not enforceable. Filing the motion to revise the decision has a suspensive effect. The filing of an appeal within the time limit shall cause suspension of the execution of the decision, except when the decision is given the order of immediate enforceability or is immediately enforceable under the law.

The provisions regulating the appeal proceedings before the body of second instance regarding the standard of review (the scope of reconsideration and determination of the case) are directly applicable to the motions to revise the decision. Therefore, the case is subject to a new substantive control. Moreover, according to Article 136 § 1 CAP upon demand of a party or ex officio, the appellate authority may conduct additional proceedings in order to supplement evidence or materials in the matter or order the authority which issued the decision to conduct such proceedings. Pursuant to Article 131 in conjunction with Article 127 § 3 CAP, the authority examining the application is obliged to notify all parties that an appeal has been filed.

In regular appeal proceedings (when an appeal is filled to an administrative body of higher level via an administrative body of the first instance) the authority of the first instance that issued the challenged decision may find that the appeal fully deserve to be upheld and by way of self-control, it may issue a new decision, in which it will overrule or change the appealed decision. However, it is not a case with the motions to revise the decision, since there is no public authority of higher instance, so the whole appeal procedure is simply a trigger for an administrative body that issued a challenged decision to reconsider the matter by way of self-control.

The party may also withdraw the appeal until the decision is issued. The appellate body may not issue its decision contrary to the prohibition of *reformationis in peius*.

(b) Please clarify whether, in the case of a forest management plan, article 127 (3) enables a claimant to submit a motion under article 127 (3) and, if that motion is unsuccessful, to appeal the unsuccessful motion to the District Administrative Court and Supreme Administrative Court.

The decision of the Minister of Environment to approve a forest management plan or its annex **is not an administrative decision** or any other act or activity within the meaning of Art. 3 par. 4 (4) LPAC. This was confirmed by the Supreme Administrative Court in its judgment of 12 March 2014 (case no. II OSK 2477/12) holding that the approval of a FMP by the Minister of the Environment is not an administrative decision, but rather an 'internal act'. This was further confirmed by the Supreme Administrative Court in its judgment of 19 October 2017 (case no. II OSK 2336/17), mentioned on page 11 of the Communication, the English translation of which is provided by the Communicant in **Annex 10**.

Moreover, it is not an action ending administrative proceedings, let alone administrative proceedings requiring public participation. As a result, natural and legal persons cannot participate in the procedure for approval of such a document and its annex. Even if these documents concern legal interest of any natural or legal persons (including environmental organisations), there are simply no proceedings in which they could be a party.

For the same reasons, social organisations cannot, pursuant to Article 31 of CAP and Article 44 of the Act of 3 October 2008 on the EIA law, request to be allowed to participate in the procedure for approval of a forest management plan or its annex. They also cannot challenge the action approving these documents.

Thus, the motion under Article 127 (3) CAP could not be submitted because of the nature of this act.

There is no legal procedure in which NGOs could ask for a revision of the act in terms of its compliance with national environmental law.

(c) Does an appeal to the District Administrative Court against an unsuccessful motion under article 127 (3) enable the claimant to challenge the substance of the administrative decision or only the unsuccessful motion for internal review itself?

As a preliminary point of clarification in relation to this question, the Communicant is not challenging the procedure under article 127(3) CAP. Rather, the Communicant only refers to article 127(3) CAP to explain why there is no access to justice to challenge FMPs under Polish law.

To the extent that the Committee's question concerns the Communicant's statement in paragraph 19 of the Communication, the Communicant would like to clarify that this paragraph is not to be read as a claim that the scope of review by the administrative courts would be limited to assessing the legality of the reply to the complaint by the administrative authority. Rather, and as explained below, the scope of review employed by the administrative courts does cover the legality of the administrative decision itself.

To give the Committee a full picture of the legal situation, the Communicant provides a more detailed explanation of the relevant rules regulating administrative appeals under Polish law below.

In Polish legal system, complaints against decisions and other administrative acts or protracted administrative proceedings need to be filed with the regional administrative court within 30 days via the administrative authority which issued the decision or the administrative act in the last instance.

While filing a complaint does not stay enforcement of the contested administrative act, the administrative authority or the court may stay the enforcement of the act on its own initiative or at the party's request. After receiving a complaint, the administrative authority is required to send it to the regional administrative court, with a reply, within 30 days.

The regional administrative court first examines the formal and legal correctness of the complaint. If it finds formal obstacles to considering the complaint, it will reject the complaint. If the court finds no formal or legal deficiencies in the complaint, it will examine it on the merits.

The regional administrative court rules within the limits of the case but is not bound by the allegations and conclusions stated in the complaint or the legal grounds raised by the party. Consequently, the court will independently assess the correctness of the action or decision of the administration authority in the case and its compliance with the law.

After considering the complaint, the administrative court issues a ruling in which:

1. It denies the complaint and dismisses the case, or
2. If the complaint is upheld:
    - It annuls the decision or ruling in whole or part if it finds:
        - A violation of substantive law which had an impact on the outcome of the case
        - A legal violation giving cause to resume the administrative proceedings
        - A violation of procedural rules that could have had a significant impact on the outcome of the case
    - It declares the invalidity of the decision or ruling in whole or part on grounds set forth in the CAP or other law, or
    - It declares that the decision or ruling was issued in violation of the law, on grounds set forth in the CAP or other law.

The regional administrative court has the power to quash rather than reform, meaning that it can only annul an administrative act and remand the case for reconsideration to the administrative authority.

The administrative court cannot, however, amend an administrative act and issue a substantive decision (i.e., decide in place of the administrative authority). What it can do is to include in its judgment instructions for the administrative authority on how it should further proceed in the case.

The regional administrative court may annul administrative acts of the authorities of both instances (if it decides that both the first and the second decision in the case were issued incorrectly) or only of the second instance.

Where the administrative court finds that the complaint against an administrative decision was justified and it annuls the decision, the proceeding revert back to the administrative authority which issued it. Then the authority, in re-examining the case, will be bound by the interpretations provided by the court.

Starting from 1 June 2017, a party to the proceedings can also lodge a complaint under Article 127(3) CAP against an administrative decision directly to the administrative court without requesting the authority to reconsider the case (this is based on Article 52 § 3 LPAC[9]). Such a

[9] Art. 52 § 3 *Jeżeli stronie przysługuje prawo do zwrócenia się do organu, który wydał decyzję z wnioskiem o ponowne rozpatrzenie sprawy, strona może wnieść skargę na tę decyzję bez skorzystania z tego prawa. Prawo do wniesienia skargi bez zwrócenia się do organu, który wydał decyzję, z wnioskiem o ponowne rozpatrzenie sprawy nie przysługuje stronie, gdy organem, który wydał decyzję, jest minister właściwy do spraw zagranicznych w zakresie spraw uregulowanych w ustawie z dnia 12 grudnia 2013 r. o cudzoziemcach (Dz. U. z 2020 r. poz. 35, 2023, 2320 i 2369 oraz z 2021 r. poz. 159 i 1918) albo konsul.*

complaint also allows a claimant to challenge the substance of the administrative decision concerned.

Yours sincerely,

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Art. 52 § 3 of LPAC *If a party has the right to apply to the authority which issued the decision with a request for reconsideration of the case, the party may file a complaint against the decision without exercising this right. The right to lodge a complaint without turning to the authority which issued the decision with a request for reconsideration of the case shall not be exercised by a party when the authority which issued the decision is the minister in charge of foreign affairs within the scope of matters regulated by the Act of 12 December 2013 on foreigners (Journal of Laws of 2020, item 35, 2023, 2320 and 2369 and of 2021, item 159 and 1918) or a consul.*